

This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

E. D. Smith

Calgary

N. W.

February 28th 1891

A TREATISE

ON

THE POWER AND DUTY

OF AN

ARBITRATOR,

AND THE LAW OF

SUBMISSIONS AND AWARDS;

WITH AN

APPENDIX OF FORMS, AND OF THE STATUTES RELATING TO ARBITRATION.

BY

FRANCIS RUSSELL, M.A.,

OF THE INNER TEMPLE, ESQ., BARRISTER-AT-LAW.

SEVENTH EDITION

BY

THE AUTHOR

AND

HERBERT RUSSELL, B.A.,

OF THE INNER TEMPLE, ESQ., BARRISTER-AT-LAW.

"Esto bonus miles, tutor bonus, arbiter idem
Integer."

JUV. 8 Sat. 79.

LONDON:

STEVENS AND SONS, LIMITED, 119 & 120, CHANCERY LANE,
SWEET AND MAXWELL, LIMITED, 3, CHANCERY LANE,
TORONTO: CARSWELL AND CO.,
Law Publishers and Booksellers.
1891.

LONDON:
PRINTED BY C. F. ROWORTH, GREAT NEW STREET, FETTER LANE, E.C.

PREFACE TO THE SEVENTH EDITION.

In bringing out this Edition more than usual labour has been required, by reason of the necessity of setting out under the several headings the effect of the Arbitration Act, 1889 (52 & 53 Vict. c. 49).

This Statute deals with the whole subject of Arbitration, and though, for the most part, it substantially re-enacts and simplifies the old law, each clause of the Act demanded very careful consideration.

Mr. Francis Russell, the Author of this Work, died in the month of May last, but the preparation of the whole Book for the press had been completed by my father and myself together shortly before his last illness. It is hoped, therefore, that it may merit and meet with as favourable a reception as has been accorded to the other Six Editions.

HERBERT RUSSELL.

2, Paper Buildings, Temple,
July, 1891.

EXTRACT FROM THE

PREFACE TO THE FIRST EDITION.

THE present treatise is divided into three parts.

In the second, or principal part, the author has endeavoured to set forth an exposition of the law of arbitration, so far as it concerns the arbitrator's powers and duties, and to arrange it so as to show him how he may best exercise the one and perform the other. It treats also of the privileges and liabilities of an arbitrator.

To these objects the inquiry was originally intended to have been confined; but as the arbitrator's functions vary materially with the varying terms of the submission to reference, it was found incumbent to enter into a more detailed investigation respecting the submission: and the result of that research, so far as it primarily affects other parties than the arbitrator, has been prefixed in the first or preliminary part, in the hope of assisting parties to select that mode of arbitration best suited to their particular circumstances.

The third part, respecting the effect of awards, and the modes of enforcing and setting them aside, was added from a desire to make the work in a measure complete as a treatise on awards, as well as on arbitrators. Unfortunately, this part of the subject has far exceeded the contemplated limits.

A variety of Precedents and of Forms of Proceedings relating to Arbitration has been subjoined in the Appendix of Forms.

In this Appendix, for the sake of convenient perusal and selection, a large number of clauses capable of being bene-

ficially introduced into submissions is collected together under Form I.* so with regard to awards, clauses showing the modes of awarding on a great variety of matters, are all comprised under Form LXXIII.† the first under the head of awards. There are also contained forms for proceedings as to references respecting the compensation to be paid to persons whose lands are taken under the authority of Parliament for the purposes of a Railway or other Public Undertaking.

For many forms in the Appendix the Author has to express himself indebted to the kindness of legal friends, and to the courtesy of the officers of the courts of law, and more particularly of Mr. Hill and Mr. Kemp, of the Rule Office of the Court of Queen's Bench; and he wishes especially to acknowledge his obligations to Mr. P. W. Rogers, of the Registrar's Office of the Court of Chancery, for affording him much valuable information on points of Chancery practice, and for furnishing him with various forms used in Chancery in proceedings connected with arbitrations.

Recent legislation having so widely enlarged the field of arbitration, especially by means of the Lands Clauses Consolidation Act, 1845, the Railways Clauses Consolidation Act, 1845, the Companies Clauses Consolidation Act, 1845, and the Public Health Act, it has been thought advisable to add, in a further Appendix, the arbitration clauses of those Acts, and the other principal Statutes and sections of Statutes relating to Arbitration.

* Page 717. † Now LXIII., at p. 760.

CONTENTS OF THE TREATISE.

PART THE FIRST.

The Submission.

CHAPTER I.

WHAT MATTERS MAY BE REFERRED TO THE DECISION OF AN ARBITRATOR.

PAGE

SECT. I.—MATTERS AFFECTING THE CIVIL INTERESTS OF THE PARTIES 3

1. *Civil rights of the parties* 3
 - Matters concerning personal chattels or personal wrongs 3
 - Matters concerning real property 4
 - Questions of law 4
 - Actions, suits, and judgments 4
 - Not matters illegal 5
 - Future use of property 5
 - Future differences 5

2. *Matters referred under the Arbitration Act*, 1889 . . 5

3. *Matters referred under other Statutes* 6
 - Compensation for lands taken for or injured by railways, &c. 6
 - Compensation under the Public Health Act, 1875 . . 7
 - Housing of the Working Classes Act 7
 - Adjustments under the Local Government Act, 1888 . 7
 - Disputes between masters and workmen . . . 8
 - Compensation for taking allotments 8
 - Joint Stock Companies 8
 - Matters in County Courts 8

4. *Civil proceedings at Quarter Sessions* 9
 - Matters of appeal 9

5. *Suits in Divorce Court* 10
 - Terms of separation 10

SECT. II.—MATTERS OF A CRIMINAL NATURE 11
 - Not felonies 11
 - Misdemeanors 11

PAGE
Where remedy by action criminal matters referable . 11
Indictments for conspiracy 12
assault. 12
nuisance. 13
perjury 13
non-repair of highway . . . 13
Compromise after conviction 13
Presentment before commissioners of sewers . . 13
Indictments before quarter sessions 14
Consent of court to reference of indictment . . 14

CHAPTER II.

WHO MAY REFER MATTERS TO ARBITRATION.

SECT. I.—PERSONS INTERESTED IN THE SUBJECT MATTERS . . 15
1. *Parties capable of disposing of their rights* . . . 15
2. *Femes covert* 16
3. *Husband and wife* 17
4. *Infants* 18
5. *Partners and parties with joint interests* . . . 20
6. *Corporations sole and aggregate* 21
7. *Parties interested added* 22

SECT. II.—PERSONS NOT INTERESTED IN THE SUBJECT MATTERS . 23
1. *Authorised agent* 23
2. *Attorneys and solicitors* 25
3. *Counsel* 27
4. *Executors and administrators* 29
Personal liability 29
Admission of assets by referring 30
5. *Trustees* 32
6. *Committee of a lunatic* 32
7. *Public officer* 32

SECT. III.—PERSONS EMPOWERED TO REFER BY STATUTE . . 33
1. *Trustees of bankrupts* 33
Reference: admission of assets. 33
Reference by bankrupt 33
Liability of assignees 34
2. *Savings banks and friendly and benefit building societies* . 34
Distinction between them 37

PAGE
3. *Promoters of public undertakings and railways* . . 38
Railway and joint stock companies 38
4. *The Crown* 39

CHAPTER III.

HOW MATTERS MAY BE REFERRED TO ARBITRATION.

SECT. I.—OF SUBMISSIONS IN GENERAL 40
1. *General qualities of a submission* 40
No particular form requisite 41
2. *What is a reference to arbitration* 41
Intention of parties to bind themselves 41
Who are arbitrators 42
3. *Taking collateral security to enforce the award* . . . 44
Warrant of attorney 44
Conveying lands to arbitrator on trust 44
4. *Arbitration pending cannot be pleaded* 45
Pleadable under Railway Companies Arbitration Act, 1859 46
5. *Staying proceedings contrary to reference* . . . 46
Under the Arbitration Act, 1889 46
In what cases action will be stayed 47

SECT. II.—OF SUBMISSIONS BY PAROL, AGREEMENT IN WRITING, OR DEED 52
1. *Parol submission* 52
2. *Submission by agreement in writing not under seal* . . 53
Under the Arbitration Act, 1889 53
3. *Submission by bond* 54
4. *Submission by deed* 56
5. *Disadvantage of submissions which cannot be made orders of court* 56

SECT. III.—OF SUBMISSIONS BY CONSENT WHICH HAVE THE EFFECT OF ORDERS OF COURT BY STATUTE 57
Effect of the Arbitration Act, 1889 57
Construction of the statute 9 & 10 Will. III. c. 15 . 57
Submission under Lands Clauses Act a submission by consent 60

PAGE

SECT. IV.—OF AGREEMENTS TO REFER FUTURE DISPUTES TO ARBITRATION 60

1. *Effect as a submission of an agreement to refer future disputes* 60

2. *Effect in law of an agreement to refer future disputes* . 61

Governing principle 62

3. *Effect in equity of an agreement to refer future disputes* . 64

No specific performance 64

No plea in equity 64

4. *Effect of the Arbitration Act*, 1889 66

Appointing arbitrators 66

Supplying a vacancy 66

Three arbitrators 68

SECT. V.—OF AN AGREEMENT IN THE SUBMISSION NOT TO PROCEED AT LAW OR EQUITY 68

1. *Effect in law of an agreement not to sue* 68

2. *Effect in equity of an agreement not to sue* 70

SECT. VI.—OF SUBMISSIONS MADE IN A CAUSE AT LAW . . 71

1. *Forms of submissions made in a cause* 71

2. *Submission by order of court or judge* 72

3. *Submission by order of nisi prius* 72

Taking verdict subject to reference 73

Damages in action limited by verdict 73

Referring other matters with the action 74

Reference on the "usual terms" 76

4. *Setting aside a submission made in a cause* 77

On compulsory reference 79

5. *Amending a submission made in a cause* 79

6. *Altering terms of reference without altering submission* . 82

7. *Submission in a cause a stay of proceedings* 84

8. *Submission in a cause a discharge of bail* 85

9. *Enforcing submissions made in a cause* 86

10. *Compulsory and other references under the Arbitration Act*, 1889 87

Reference for inquiry and report 87

Reference for trial 87

Time for applying for order 88

Special referee 88

In what cases ordered 89

Official referees 93

Distribution of business among 93

Fees of 93

PAGE

SECT. VII.—OF JUDICIAL AND STATUTABLE SUBMISSIONS NOT MADE IN A CAUSE AT COMMON LAW . . . 95

1. *Submission by order of equity* 95
2. *Submission by record* 96
3. *Submission by order of a county court* 97
4. *Submission by order of quarter sessions* 97
 Power as to costs 97
 Compulsory reference of appeals under Highway Act, &c. 98
5. *Submissions under the Lands and Railways Clauses Consolidation Acts* 98
 Compulsory on demand of party 98
 Appointment of arbitrators, the submission . . . 99
 of one arbitrator to act for both . . 100
 Costs of reference 101
 Under Railway Companies Arbitration Act, 1859 . 102
 Under Regulation of Railways Act, 1873 . . . 102
6. *Other submissions by statute* 103
 Under the Companies Clauses Act 103
 Public Health Act, 1875 103
 Local Government Act, 1888 104
 Lunacy Act, 1890 104
 By private Act of Parliament 105
 Tramways Act 105
 Housing of the Working Classes Act, 1890 . . 105

SECT. VIII.—OF PROCEEDINGS ON THE SUBMISSION WHEN ONE PARTY HAS PREVENTED AN AWARD BEING MADE . 106

1. *Remedy by action and attachment* 106
 Preventing award being made breach of submission . 106
 Revocation a breach of submission 106
2. *Motion for costs under the submission* 107
 Clause to give costs when award wilfully prevented . 107
 Court no power without the clause 108
 No power where award made 108

PART THE SECOND.

The Power and Duty of the Arbitrator.

CHAPTER I.

THE OFFICE OF ARBITRATOR.

PAGE

Sect. I.—Of who may be an Arbitrator 111
When interest disqualifies 112
Arbitrators by statute 114
Arbitrator deemed officer of court 115
Removable for misconduct 116

Sect. II.—Of the Moral Qualities requisite in an Arbitrator 116

Sect. III.—Of the Principles by which the Arbitrator should be guided 117
Whether bound to decide according to law 118
Taking moral questions into consideration . . . 120
When power beyond law 121

CHAPTER II.

OVER WHAT MATTERS THE SUBMISSION GIVES THE ARBITRATOR JURISDICTION.

Sect. I.—Of the effect of particular Terms to refer particular Matters 123
All matters in difference 123
All matters in the cause 125
Disputes 128

Sect. II.—Of the Subject Matters, whether Joint or Several 131

Sect. III.—Up to what Date Matters in Difference may arise 132
Cause referred, up to date of writ 132
General reference, up to date of submission . . 133
Future, contingent, and periodical claims . . . 134

CHAPTER III.

THE DURATION OF THE ARBITRATOR'S AUTHORITY.

PAGE

SECT. I.—OF THE DURATION OF THE ARBITRATOR'S AUTHORITY WHEN NOT ENLARGED OR REVOKED . . . 136

1. *When the submission prescribes no time within which the award is to be made* 136
 - Commencement of authority 136
 - Duration 137

2. *When the submission prescribes a limited time for making the award* 138
 - Limit under the Arbitration Act, 1889 138
 - Limit under the Lands Clauses Consolidation Act . 140

3. *Authority of the arbitrator determined by making the award* 141
 - Arbitrator cannot alter award when made . . . 141
 - May correct clerical error 142
 - Cannot make new award except under statute, when first award bad 142

SECT. II.—ENLARGING THE TIME FOR MAKING THE AWARD . . 143

1. *Enlargement of the time by the arbitrator* . . . 143
 - No implied power to enlarge 143
 - Enlargement must be made within original period . 143
 - How enlargement should be made 145
 - Under the Arbitration Act, 1889 145
 - Enlargement by umpire not enlarge arbitrator's time . 147
 - Enlarging time under the Lands Clauses Act . . 147

2. *Enlargement of time by consent of the parties* . . . 147
 - Enlargement by consent a new submission . . 147
 - Conduct of parties amounting to consent . . . 148

3. *Enlargement of time by the courts of law* . . . 149
 - Under the Arbitration Act, 1889 150

4. *Enlargement of time by a court of equity* . . . 151

SECT. III.—REVOKING THE ARBITRATOR'S AUTHORITY . . . 152

1. *Revocation by common law at the will of a party* . . 152
 - Submission at common law revocable until award made 152
 - Arbitration clause not revocable 153
 - Submission under Arbitration Act not revocable . . 153
 - Revocation breach of submission 154
 - Justification for revoking 155

PAGE

2. *Revocation by leave of the court* 155
Revocation when prohibited without leave of court by the Arbitration Act, 1889 156
When leave will be granted 158
County Court submission 161
Submission under the Lands, Railways, and Companies Clauses Acts 161

3. *Revocation in equity at the will of a party* . . . 161

4. *Bankruptcy no revocation* 162

5. *Revocation by marriage of a female party* . . . 163

6. *Revocation by the refusal to act or death of the arbitrator* 164
Revocation by disagreement of two arbitrators . . 164
Appointing new arbitrators by statute, on death, refusal, or incapacity 165

7. *Revocation by the death of a party* 166
Death of a single party a revocation 166
Of one of several parties 167
Clause for preventing death from revoking submission. 169
In action of tort 169
Death no revocation under the Lands, Railways, or Companies Clauses Acts 170

CHAPTER IV.

THE POWER AND DUTY OF THE ARBITRATOR BEFORE MAKING THE AWARD.

SECT. I.—OF PROCEEDINGS IN THE REFERENCE 171

1. *Serving the submission on the arbitrator* 171
Procuring and serving the order of reference . . 172

2. *Power of the arbitrator to regulate the proceedings in the reference* 172
To determine how reference to be conducted . . 172
To fix time and place of meeting 172
Discretion when reviewed 173
Ordinary course of a reference 175
Under the Lands and Railways Clauses Acts . . 176
Under Railway Companies Arbitration Act, 1859 . . 176
Power of referee 177
When to sit continuously 178

PAGE

3. *Enforcing the attendance of witnesses* 178
Provisions in Arbitration Act for compulsory attendance 179
Enforcing attendance of prisoner 180
Subpœna on a County Court reference 181
Before referee 181

4. *Parties attending the arbitrator privileged from arrest* . 181
How far privileged during adjournments . . . 182

5. *Examination of the witnesses on oath* 182
Statutory provisions empowering the arbitrator to swear them 182
False evidence, perjury 183
When evidence by affidavits admissible . . . 184

6. *Duty of the arbitrator to hear the evidence* . . . 185
Awarding without hearing evidence, bad . . . 185
Hearing one side only 185
When arbitrator may refuse to hear evidence . . 186
Discretionary to view premises 187
Closing case too hastily 188

7. *Power of the arbitrator to call for documents* . . 190
Under Lands and Railways Clauses Acts . . . 190

8. *Duty of the arbitrator to receive no evidence unless both parties are present* 191
Arbitrator should not receive private communications. 191
Referring back award for irregular examination . 193
Inquiry whether items admitted 194

9. *Waiving objection to irregular conduct of the arbitrator* . 195
Parties may waive objection by their conduct . . 195
Arbitrator's course to cure an irregularity . . 197

10. *When arbitrator empowered to proceed ex parte* . . 197
Implied power 197
Party wilfully neglecting to attend 198
Party attempting to revoke 198
Arbitrator must give notice that he means to proceed ex parte 198

11. *Duty of the arbitrator in deciding points of evidence* . 199
Arbitrator is bound by the rules of evidence . . . 199
His decision on points of evidence not open to review . 200
Refusing evidence as to a particular claim not a mere mistake of evidence. 200
To take notice of stamps on documents 202
Party retaining right of objecting to evidence . . 202

12. *Duty of the arbitrator when empowered to amend* . . 202

PAGE

13. *Power of the arbitrator to make or decline to make an award* 203
Court no power to make arbitrator award . . . 203
Unless he is officer of court 203
Proceedings in arbitration when restrained by injunction 203
14. *Closing the case* 205
Arbitrator may re-open case when closed . . . 205
Requiring matters in difference to be stated in writing 205
15. *When arbitrator about to award wrongly* . . . 206
Set right in law by the court on rule to revoke . . 206
16. *Stating a case pending the reference* 206
Case or issue under the Arbitration Act, 1889 . . 206
Under rules of court 207

SECT. II.—OF THE ARBITRATOR'S DELEGATING HIS AUTHORITY . 207

1. *Power of the arbitrator to adopt the opinion of another* . 207
Arbitrator may not delegate his power of judging . 207
Arbitrator may adopt an opinion 208
Power to call in a valuer 209
2. *Duty of the arbitrator in taking an opinion as to a matter of fact* 210
Arbitrator should examine scientific adviser as a witness 210
3. *Duty of the arbitrator in taking an opinion on a point of law* 211
Arbitrator may consult counsel as to framing his award 211
May take counsel's opinion on a case 212
4. *Power of the arbitrator to delegate a ministerial act* . 213
Taxing costs 213

SECT. III.—OF THE DUTY OF JOINT ARBITRATORS . . . 214

1. *Appointment of joint arbitrators* 214
Court cannot compel appointment 214
2. *Power of two arbitrators to appoint umpire* . . . 214
Under the Arbitration Act, 1889 214
3. *Disadvantages of reference to several arbitrators* . . 215
Arbitrators should not act as agents of parties appointing 215
Arbitrators appointing third arbitrator . . . 215
4. *Duty of all the arbitrators to act* 216
They may not delegate the decision to one of themselves 217
All the arbitrators must act together . . . 217
All should execute award together 218
Appointment of umpire, when a condition precedent to acting 219

PAGE

5. *Duty of the arbitrators when award by less than all valid* 219
All the arbitrators must have opportunity of judging . 220
Under the Lands, Railways and Companies Clauses Acts 221
Death, refusal, or incapacity of one of the two . 221
What a refusal to act 222

SECT. IV.—OF THE UMPIRE 223

1. *By whom an umpire is to be appointed* 223
Appointment under the Arbitration Act, 1889 . . 223
Appointment under the Lands, Railways and Companies Clauses Acts. 225

2. *When the arbitrators should appoint the umpire* . . 228
Under the Arbitration Act, 1889 229
Under the Lands Clauses Consolidation Act . . 230
Under the Railway Companies Arbitration Act, 1859 . 230
Under the Public Health Act 230
By quarter sessions on refusal of arbitrators . . 231

3. *How the arbitrators are to choose an umpire* . . . 231
By choice not chance 231
Unless parties consent 232
Appointing second umpire if first refuse . . . 233
Appointment must be as directed in the submission . 334
Appointment by railway commissioners . . . 234

4. *Commencement and duration of the umpire's authority* . 234
Commencement from the disagreement of the arbitrators 234
Under the Arbitration Act, 1889 234
Commencement from the expiration of the arbitrator's period 235
Commencing subject to defeazance before time out . 235
What a disagreement of the arbitrators . . . 236
Umpire's power to enlarge before disagreement . . 237
Umpire no authority when arbitrators award on part . 237
Duration of umpire's authority 238
Enlargement by the court 238
Duration of umpire's authority under the Lands Clauses Act 238
From what date the umpire's three months' commence 239
Under Public Health Act, 1875 240
Railway Companies Arbitration Act, 1859 . . . 241

5. *Power and duty of the umpire* 242
Same as of the arbitrators 242
Umpire must rehear case unless it be otherwise agreed 242
Umpire under the Lands Clauses Act 244
Joint award by arbitrators and umpire . . . 244

CHAPTER V.

THE DUTY OF THE ARBITRATOR IN FORMING HIS AWARD.

PAGE

SECT. I.—OF THE FORMAL REQUISITES OF THE AWARD . . 247

1. *Making the award* 247
The award must comply with the submission . . 247
Under the Arbitration Act, 1889 248
All arbitrators must sign together 248
2. *Publishing the award* 249
Publication to the parties 250
3. *Delivering the award* 250
4. *Stamping the award* 252
No stamp on certificate 255

SECT. II.—OF THE FORM OF THE AWARD 256

Any words expressing a decision an award . . . 256
No recitals necessary, what advisable . . . 257
False recitals not vitiate award 258
Certificate instead of award 259

SECT. III.—THE AWARD MUST BE ENTIRE 260

Separate certificates in two actions 260

SECT. IV.—THE AWARD MUST BE FINAL 261

1. *Effect of clause "ita quod fiat de præmissis"* . . 261
Intent—to have all matters decided 262
2. *Award void if a matter left undecided* 263
Amending clerical error: Arbitration Act, 1889 . . 267
3. *Effect of awarding mutual releases* 269
4. *Rule awarding de præmissis* 270
5. *Award de præmissis, general finding presumed final* . 271
6. *Award de præmissis, particular finding presumed final* . 273
7. *Whether matter presumed decided when award silent* . 274
In what cases silence a decision 276
8. *Conditional award* 277
9. *Award in the alternative* 280
10. *Award reserving or delegating judicial authority* . . 281
Arbitrator no power to reserve or delegate authority . 282
Except delegating taxing costs to the master . . 283
11. *Award reserving or delegating ministerial duty* . . . 283
Arbitrator may delegate ministerial acts . . . 283

PAGE

SECT. V.—THE AWARD MUST BE CERTAIN 286

1. *What certainty requisite* 286
2. *Certainty as to the amount awarded* 288
3. *Certainty as to costs awarded* 290
4. *Award when presumed certain* 292
5. *Certainty as to general directions* 294

SECT. VI.—THE AWARD MUST BE MUTUAL 296

SECT. VII.—THE AWARD MUST BE POSSIBLE AND CONSISTENT . 300

Finding for same party on inconsistent issues . . 301

SECT. VIII.—THE AWARD HOW AFFECTED BY A MISTAKE OF THE ARBITRATOR 303

1. *When the award is good on its face* 303
 Mistake in law and fact 306
 Amending clerical error under Arbitration Act, 1889 . 310
2. *Effect of extrinsic statements by the arbitrator showing a mistake on his part* 310
3. *Inquiry by the court of the arbitrator's grounds of award* 314
4. *When the award sets forth the grounds of decision* . . 316
 Whether court will review them 316
5. *Stating case under Arbitration Act*, 1889, *and Rules of Court* 318
 Judgment of court on special case when an interlocutory order 319
 Appeal against judgment 320
 By arbitrators under Lands Clauses Acts . . . 320
6. *Duty of the arbitrator when empowered to raise a point of law* 320
 Clause, when compulsory, when enabling . . . 320
 Arbitrator should state facts, not evidence . . . 321
 Awarding conditionally on the court's decision . . 322

SECT. IX.—THE AWARD, THOUGH BAD IN PART, WHEN GOOD FOR THE REST 325

1. *When the bad part of the award is separable* . . . 325
2. *When the bad part of the award is inseparable* . . . 331
 Award void, when bad part inseparable or affecting the rest 331

CHAPTER VI.

THE DUTY OF THE ARBITRATOR IN AWARDING ON AN ACTION REFERRED.

PAGE

SECT. I.—OF DISPOSING OF THE CAUSE WITHOUT DECIDING IT . 337
When award good though cause not decided . . . 337
Award of a nonsuit or stet processus . . . 337

SECT. II.—OF AWARDING ON THE CAUSE WHEN COSTS ABIDE THE EVENT 338
1. *The arbitrator must decide the cause when costs abide the event* 338
Award of a stet processus, bad 338
2. *What a sufficient decision before the rules for taxing costs of issues* 339
3. *Deciding cause referred before issue joined* . . . 340
4. *Awarding on the issues since the rules as to costs* . . 342
Arbitrator must award on each issue, substantially or specifically 343
Whether a general verdict a finding on each issue . 347

SECT. III.—OF AWARDING AN ENTRY OF A VERDICT . . . 350
1. *When arbitrator empowered to award a verdict* . . . 350
Power not implied, how given 351
2. *Duty of the arbitrator in awarding a verdict* . . . 352
3. *Effect of an unauthorized award of a verdict* . . . 354

SECT. IV.—OF THE DUTY OF THE ARBITRATOR IN AWARDING DAMAGES 356
Award for plaintiff must give damages . . . 356
Limit of amount of damages 358

SECT. V.—OF AWARDING JUDGMENT 362
1. *Power to direct entry or arrest of judgment* . . . 362
No implied power under old law 362
Awarding judgment on a demurrer 362
Awarding damages non obstante veredicto. . . . 363
No power to award arrest of judgment 365
2. *Power to direct judgment since the Judicature Acts* . 365
Arbitrator or referee may direct judgment . . . 365

SECT. VI.—OF AWARDING ON AN ACTION IN EQUITY . . . 366
When arbitrator only as the master 367

PAGE

SECT. VII.—DUTY OF REFEREE UNDER ARBITRATION ACT, 1889, AS TO AN ACTION 367

Reference for inquiry and report 367
Referee how to report and find 367
Referee to try 369
Appeal against referee's finding 370
Setting aside judgment 371
Remitting back to referee 372

CHAPTER VII.

THE DUTY OF THE ARBITRATOR IN AWARDING AS TO COSTS.

SECT. I.—OF THE ARBITRATOR'S POWER AND DUTY IN AWARDING COSTS 373

1. *What are costs of the cause, reference, and award* . . 373
Cost of the reference 374
award 375
2. *The power of the arbitrator over costs* 377
Implied power over costs of cause 377
Not of reference or award 377
Under the Arbitration Act, 1889 378
Costs under the Lands, Railways, and Companies Clauses Acts, and Railway Companies Arbitration Act 379
3. *Duty of the arbitrator in awarding costs* 380
When arbitrator to fix amount of costs 381
Arbitrator may apportion the costs 382
Costs as between solicitor and client, under Arbitration Act 383
Should not specify in the award amount of his own charges 385
Remuneration to be determined by the court 386
4. *Effect of awarding payment of the costs of the cause* . 387
Same costs payable as on a verdict 387

SECT. II.—OF THE POWER AND DUTY OF THE ARBITRATOR WHEN COSTS ABIDE THE EVENT 389

1. *Power of the arbitrator when costs abide the event* . . 389
Arbitrator no power over the costs 389

PAGE

2. *What the event when the costs of the cause only abide the event* 390
Event is the event of the award as to the cause . . 390
Arbitrator must decide the cause separately . . . 391
With separate damages 391
3. *What the event when the costs of cause and reference abide the event* 392
Event to be construed distributively 392
Formerly no costs, award finding part for each . . 393
Costs of causes abiding event of each cause . . . 395
4. *Effect of the award when costs abide the event* . . 397
Award same effect as a verdict 397
Reference before or after verdict 399
Costs on County Court scale 400
Costs of claim and counterclaim 403
5. *Supporting award defective in finding as to costs* . . 404

SECT. III.—OF THE DUTY OF THE ARBITRATOR WHEN EMPOWERED TO CERTIFY FOR COSTS 404
Power to certify should be given to arbitrator . . 404
Certifying cause fit to be tried before a judge . . 405
for costs of special jury 406
action brought to try a right . . . 407
Arbitrator must certify in the award. 407

CHAPTER VIII.

WHAT DIRECTIONS MAY BE GIVEN IN THE AWARD.

SECT. I.—OF DIRECTIONS UNDER THE GENERAL POWERS OF THE ARBITRATOR 410
1. *What kind of satisfaction may be directed*. . . . 410
Whether arbitrator may award other than money . 411
When special directions valid 412
Ordering indentures to be cancelled 414
Acceptance of goods with a deduction . . . 414
Directing securities to be given up 414
Arbitrator may not direct unlawful act . . . 415
2. *Directions as to payment of money* 415
Arbitrator should direct payment 415
Fixing time, place, and mode of payment . . . 415
Setting off cross claims 417
Directing payment by an executor 417
Directing payment to wife only 419

PAGE

3. *Directions as to payment of interest* 420
4. *Directions in cases of partnership* 421
Awarding dissolution of partnership 421
Awarding on the debts and credits of a firm . . 421
Appointing a receiver 422
Settling terms of dissolution of partnership . . 424
Awarding right to sue in partner's name . . 424
Awarding in restraint of trade 424
5. *Directions as to giving an indemnity* 424
Arbitrator may award an indemnity when necessary . 424
When settling terms of dissolution of partnership or purchase of property 426
6. *Directions as to executing releases* 427
Arbitrator may award releases 427
7. *Directions as to executing conveyances* 428
Arbitrator must specify nature of conveyance . . 428
Need not draw conveyance 428
Directions as to costs of preparing it 429

SECT. II.—OF DIRECTIONS UNDER A POWER TO AWARD WHAT SHALL BE DONE 430
1. *Whether clause to say what shall be done compulsory* . 430
2. *Directions as to what to be done held valid* . . . 432
No objections open on the merits 433
Instances of valid directions 433
3. *Directions as to what shall be done held void* . . 437
Awarding a verdict without power 437
Instances of directions void for uncertainty . . 438
Duty of arbitrator in awarding on scientific matters . 439

SECT. III.—OF DIRECTIONS AS TO ALLOTTING LANDS . . . 440
1. *Directions under Inclosure Acts* 440
2. *Directions in making partitions of lands* 442
Powers of commissioners of partition 442
Arbitrator making partition must award conveyances . 443

SECT. IV.—OF DIRECTIONS AFFECTING STRANGERS TO THE SUBMISSION 443
1. *Directing a payment to be made to a stranger* . . . 443
Void unless for party's benefit 444
Whether benefit need appear on the award . . . 445
2. *Directing a stranger to do an act* 446
Void unless stranger bound to comply 446
When stranger merely ministerial 448
Party submitting on behalf of a stranger . . 448
3. *Directions affecting a stranger's property* 449
Excess of authority and void 449
Good if conditional on stranger's consent . . . 450

CHAPTER IX.

THE AWARD UNDER THE LANDS CLAUSES CONSOLIDATION ACT, 1845.

PAGE

1. *Proceedings and award under the Lands Clauses Consolidation Act* 452
Notice to treat 452
Arbitrators cannot go beyond claim, but should award according to it 453
Arbitrator not to try title, but to assume it . . 453
Promoters may contest existence of damage . . . 455
Under Public Health Act, amount of compensation may be settled before liability 456
Test whether land is injuriously affected . . . 458
Damage to amenities 458
Annoyance 459
Obstruction to access to premises 459
Interference with lights 460
Abstraction of water 461
Vibration, noise, and smoke 461
When land taken as well as injured, larger elements of compensation 462
Cutting off springs 462
Goodwill, trade profits 463
Depreciation of house from loss of water frontage . . 463
Compensation for necessary and probable damage . 464
No second inquiry if unforeseen damage arises . . 465
Damage from severance 466
Arbitrator may not direct payment 468
Arbitrator not to consider excuse for non-payment . 469
Arbitrator may state a special case 470
Duty of arbitrator as to costs of reference . . . 471
Costs under the Public Health Act, 1875 . . . 471
Offer of compensation by promoters 472
Costs may be taxed by the master 474
No costs where solicitor uncertificated . . . 474
Recitals in award 474
Delivery of award to promoters 475
Compelling promoters to take up award . . . 475
Enforcing award 476
Suing for costs before taxation 477
Setting award aside 477

2. *Award under Agricultural Holdings Act*, 1883 . . 478

CHAPTER X.

THE AWARD REFERRED BACK TO THE ARBITRATOR.

PAGE

Sect. I.—How Awards are referred Back 479

Clause in submission to refer back 479
Power under Arbitration Act, 1889 480
On reference for trial or for report 480
Applies to references by consent or compulsory . . 480
On what motions an award will be referred back . 481
For what causes 482
Award good on face not sent back for mistake of arbitrator 483
Unless admitted by arbitrator 483
Amending clerical error 485
Limit of time for application 485
Notice of motion 486
Court may refer back more than once 487

Sect. II.—Duty of the Arbitrator when Award referred Back 488
Arbitrator's powers revived by reference back . . 488
Power over costs of second reference 488
Limit of time for making second award: Arbitration Act, 1889 489
Duty of arbitrator as to hearing evidence . . . 489
Award sent back for special purpose 489
Mode of framing second award 491

CHAPTER XI.

THE PERSONAL INTERESTS OF THE ARBITRATOR.

Sect. I.—Of the Arbitrator's Right to Remuneration . . 492

Whether arbitrator can sue for his fees 493
Whether remedy for fees by attachment or rule of court 493
Retaining award till fees paid 494
Fees on award under the Lands Clauses Act . . . 495
Remuneration of arbitrator or referee under the Arbitration Act, 1889 495

PAGE

SECT. II.—OF THE LIABILITY OF THE ARBITRATOR AT LAW . . 495

1. *Liability in respect of fees* 495

Reviewing arbitrator's charges by the court . . . 496

Whether liable to action for withholding award . . 496

No attachment against arbitrator refusing to refund excessive fee 496

Action for money had and received lies for the excess paid 496

2. *Liability for misconduct or in respect of the award* . . 497

May be removed under Arbitration Act, 1889 . . 497

No action against arbitrator for want of skill or care . 497

Whether action lies against arbitrator for corrupt award 497

Mandamus to arbitrators to appoint umpire under statute 498

Misconduct a misdemeanour under the Lands and Railways Clauses Acts, &c. 498

Award directing a trespass, whether action lies against arbitrator 498

3. *Liability of the arbitrator when a stakeholder* . . 499

Holding chattel to abide event of award . . . 499

Bankruptcy of party depositing it 499

To whom arbitrator should deliver the chattel . . 500

Party awarded against cannot maintain action . . 501

SECT. III.—OF THE LIABILITY OF THE ARBITRATOR IN EQUITY . 501

Arbitrator made defendant to bill to set aside award might demur 501

Unless charged with gross misconduct 502

Corrupt arbitrator condemned in costs 503

Serving notice of motion to set aside award on arbitrator 504

SECT. IV.—OF TESTIMONY BY THE ARBITRATOR . . . 504

1. *The arbitrator called as witness* 504

Whether compellable to state grounds of award . . 505

May prove proceedings and admissions made by the parties 507

2. *Voluntary statements by the arbitrator* 509

Whether arbitrator should state to a party the grounds of his award 509

Affidavits by the arbitrator 509

3. *When the arbitrator is a barrister* 510

Not usually make an affidavit 510

Refusing explanation to a party 511

Inquiry of the arbitrator by the court 512

PART THE THIRD.

The Consequences of the Award.

CHAPTER I.

EFFECT OF THE AWARD.

PAGE

1. *The award a final judgment in law and equity* . . 514
 Effect on claim 514
 in equity 515
 Under Public Health Act, 1875 516
2. *Effect of a colourable award* 517
3. *Effect of an award on matters in difference not brought forward* 517
4. *Effect of an award on some special matters* . . . 519
5. *Effect of an award to transfer property* 520
 Real property 520
 Personal property 522
 Under Inclosure Acts 523
6. *Effect of an award on the parties and strangers* . . . 524
7. *Effect of an award on a party bankrupt* 526
8. *Effect of an award on the solicitor's lien for costs* . . 527
9. *Effect of altering an award* 528
 Correcting clerical error 529

CHAPTER II.

PERFORMANCE OF THE AWARD.

SECT. I.—WHAT A SUFFICIENT PERFORMANCE OF THE AWARD . 530
 Party bound to take notice of award 530
 Award must be substantially performed . . . 531
 As far as is lawful and possible 531

SECT. II.—PERFORMANCE OF AN AWARD DIRECTING THE EXECUTION OF A DEED 534
 Whether request to execute necessary 534
 Who to prepare and tender conveyance for execution . 534
 What sufficient authority to agent to demand . . 536

CHAPTER III.

THE AWARD AS A GROUND OF ACTION OR DEFENCE AT LAW.

PAGE

SECT. I.—HOW TO ENFORCE AN AWARD BY ACTION . . . 539
1. *An award a ground of action* 539
When action only remedy 540
2. *Enforcing award by action* 540
Statement of claim 540
Old forms of actions 541
3. *Points of practice in actions to enforce awards* . . 542
Interest recoverable on sum advanced 542

SECT. II.—HOW TO STATE AN AWARD IN PLEADING . . . 543
Averments in pleadings stating an award 543

SECT. III.—THE EFFECT OF AN AWARD PLEADED AS A DEFENCE . 546
Rule as to pleading performance 546

SECT. IV.—HOW TO ANSWER IN PLEADING AN AWARD PLEADED . 549
1. *Traversing the submission* 549
2. *Old plea of no award made* 549
3. *Misconduct or mistake of arbitrator, whether pleadable* . 550
4. *Pleading performance of the award* 550
5. *Other pleadings to defeat the award* 550
Statute of Limitations 550
Revocation of submission 551
Foreign attachment 551
Demurrer to pleading stating bad award . . . 552

SECT. V.—EFFECT OF AN AWARD IN EVIDENCE 553
1. *Proof of the submission and award* 553
Proof of execution of submission by all parties requisite. 553
When rule of court evidence of submission . . . 553
2. *Valid award conclusive as evidence* 555
Not evidence on indictment of party 555
Award under Lands Clauses Act 556
3. *Effect of an award as evidence as to strangers* . . . 556
No evidence of right or reputation against strangers . 556
Not evidence for the Crown against the party . . 557
Award acted on evidence affecting strangers . . 558
4. *Impeaching by evidence award put in evidence* . . . 559
Evidence admissible to show award not final . . 559
Evidence of misconduct or mistake of arbitrator . . 560

CHAPTER IV.

THE AWARD AS A GROUND IN OLD TIMES OF PROCEEDINGS OR DEFENCE IN EQUITY.

PAGE

SECT. I.—ENFORCING AN AWARD BY ACTION IN EQUITY . . 562

1. *When specific performance decreed* 562

Performance of award enforced as of contract . . 563

Award under Lands Clauses Act 564

Part performance 564

2. *When award invalid or inequitable* 567

Directions invalid in law not enforceable . . . 567

Awards affecting infants 568

Affecting married women or strangers . . . 568

SECT. II.—PLEADING AN AWARD IN BAR TO AN ACTION IN EQUITY 570

Old plea of award to bill to set it aside . . . 570

Denying corruption charged 572

SECT. III.—ENFORCING AN AWARD BY SUMMARY PROCEEDINGS IN EQUITY 574

1. *Whether the award must have been made an order of court before enforcement* 574

Not necessary in reference by order of court . . 574

Formerly necessary when reference out of court . . 574

2. *Motion to enforce award* 575

Enforcing award on motion under old statute . . 575

Old practice 576

Enforcing on motion award under order of equity in a suit 577

Enforcing payment under statute of Victoria . . 579

Under the Arbitration and Judicature Acts . . 579

CHAPTER V.

MAKING THE SUBMISSION A RULE OF COURT.

SECT. I.—MAKING THE SUBMISSION A RULE OF COURT . . 581

Rarely necessary now 581

Submission in an action 581

Submission out of court under the Arbitration Act . 581

Making submissions under statutes orders of court . 583

SECT. II.—MAKING A SUBMISSION UNDER THE LANDS CLAUSES CONSOLIDATION ACT A RULE OF COURT. . . 584

Practice 584

Appointment of umpire need not be made rule . . 585

CHAPTER VI.

ENFORCING THE AWARD BY ATTACHMENT.

PAGE

SECT. I.—IN WHAT CASES AN ATTACHMENT WILL BE GRANTED . 586

1. *When submission is or has effect of an order of court* . . 586
 Not if cause abates by death of party . . . 588
2. *For whom and for what an attachment will be granted* . 589
 Not to recover interest on sum awarded . . . 589
3. *Who not liable to be attached* 590
4. *On what awards attachment refused* 591
 Doubtful on compulsory reference 591
 Discretionary to grant attachment 592
 No attachment, validity of award doubtful . . . 593
5. *No proceeding by attachment and action at the same time* 594

SECT. II.—STEPS NECESSARY TO BRING THE PARTY INTO CONTEMPT 595

1. *Demanding performance of the award* 595
 Demand by agent, what sufficient authority . . 596
2. *Service of the rule, award, and other documents* . . 599

SECT. III.—THE COURSE OF THE MOTION FOR AN ATTACHMENT . 602

1. *Affidavits on the motion for an attachment* . . . 602
2. *The motion for an attachment* 606
 Practice under the Arbitration and Judicature Acts . 606
3. *What may be shown for cause against the motion* . . 609
4. *Granting or refusing the motion* 613
5. *Proceedings on the attachment* 614

CHAPTER VII.

ENFORCING THE AWARD BY PROCEEDINGS UNDER THE STATUTES.

SECT. I.—RULE TO PAY THE AMOUNT AWARDED . . . 618
 Construction of the statute 1 & 2 Vict. c. 110, s. 18 . 619
 Discretionary to grant rule 620
 Award under compulsory reference 622
 Award under Arbitration Act, 1889 622

PAGE
SECT. II.—PRACTICE AS TO OBTAINING THE RULE 623
1. *Practice under the statute of Victoria* 623
Since the Arbitration Act, 1889 624
Notice of motion 624
2. *Execution under the Arbitration and Judicature Acts* . . 630
3. *Enforcing award under the Railway Companies Arbitration Act*, 1859 631
Agricultural Holdings Act, 1883 631
Allotments and Cottage Gardens, &c. Act, 1887 . . 631

CHAPTER VIII.

ENFORCING THE AWARD BY PROCEEDINGS IN THE ACTION REFERRED.

SECT. I.—ENTERING THE VERDICT PURSUANT TO THE AWARD . 632
Practice as to entering the verdict 633
SECT. II.—TAXING THE COSTS OF THE CAUSE 635
Taxing costs of the reference 636
Scale of costs 640
SECT. III.—SIGNING JUDGMENT PURSUANT TO THE AWARD . . 645
Effect of the Judicature Acts 645
On compulsory reference under Common Law Procedure Act 647
Moving for judgment on indictment referred . . . 649
Award on appeal to Quarter Sessions entered as judgment of court 649
SECT. IV.—ISSUING EXECUTION FOR THE AMOUNT AWARDED . . 650
Execution against a public company by mandamus . 651
Execution against a local board 651

CHAPTER IX.

SETTING ASIDE AN AWARD ON MOTION.

SECT. I.—THE JURISDICTION OF THE COURTS TO SET AN AWARD ASIDE ON MOTION 652
Only when submission is or has effect of order of court 652
Under the Arbitration Act, 1889 653
County Court award 654

PAGE

SECT. II.—WITHIN WHAT PERIOD THE MOTION TO SET ASIDE AN AWARD MUST BE MADE 654

1. *Time for moving to set aside* 654
 - Limit under the Arbitration Act, 1889 654
 - Court may enlarge time for setting aside . . . 657
 - Notice of motion is complaint in the court . . . 659
2. *When award in a cause at common law* 660
 - Limit of time same as on other references . . . 660
 - Time for moving to enter verdict pursuant to point raised in award 660
3. *When further time allowed* 661
4. *When award under the Lands Clauses Acts* . . . 663
 - Same limit of time 663

SECT. III.—FOR WHAT CAUSES AN AWARD MAY BE SET ASIDE ON MOTION 664

1. *Where the conduct of the arbitrator corrupt or irregular* . 664
 - Misconduct under Arbitration Act, 1889 . . . 664
 - All equitable grounds 664
 - Compulsory references 664
 - Legal misconduct, what is 664
2. *When the award a mistaken decision in law or fact* . 667
 - Not set aside for erroneous judgment of arbitrator . . 667
 - Whether for a mere mistake 667
3. *When the award is a nullity* 668
 - Set aside if anything could be done on it . . . 668
4. *When the award is not final* 668
5. *When the award is uncertain* 671
6. *When the arbitrator has exceeded his authority* . . . 671
7. *Where party or witness in fault or new matter discovered* 672
8. *When the award has been improperly procured* . . . 675
 - What are "corruption and undue means" . . . 675

SECT. IV.—MOVING TO SET ASIDE AN AWARD 676

1. *Making the motion to set aside the award* . . . 676
 - Motion on notice stating grounds 677
 - Affidavits 677
 - Who may move to set the award aside 678
 - Whether pleadings before the court 681
2. *Stating the grounds of motion* 682

SECT. V.—OPPOSING THE MOTION TO SET ASIDE AN AWARD . 685

1. *Practice on opposing the motion* 685
2. *What may be shown for cause against the motion* . . 686

PAGE
SECT. VI.—DECISION ON MOTION TO SET ASIDE AN AWARD . . 688
1. *Result of the motion to set aside the award* . . . 688
Award not set aside unless clearly void . . . 689
When part only set aside 689
2. *Costs of the motion to set aside the award* 690
3. *Appeals* 691
Appeal from refusal to set aside 691
None from decision of Q. B. D. after compulsory reference 692

CHAPTER X.

SETTING ASIDE THE JUDGMENT ENTERED UP PURSUANT TO AN AWARD.

Motion not limited to time for setting aside award . 693
Only for defects on face of the award . . . 694
Or for irregularity in entering judgment . . . 695
Practice under new rules 695

CHAPTER XI.

IMPEACHING AN AWARD IN EQUITY.

SECT. I.—IN WHAT CASES CHANCERY HAS JURISDICTION TO SET ASIDE AN AWARD 697
1. *Jurisdiction of Chancery to set aside awards* . . 697
Same grounds as at common law 699
Equitable proceedings under Arbitration Act, 1889 . 700
SECT. II.—WHAT THE MODES OF PROCEEDING TO SET ASIDE AN AWARD IN EQUITY 701
1. *Proceeding by bill to set aside an award* 701
2. *Proceeding by motion to set aside an award* . . . 703
Appeal from refusal to set aside an award . . . 704
3. *Filing exceptions to an award in a suit* 704

CHAPTER XII.

EFFECT OF THE FAILURE OF THE REFERENCE.

PAGE

SECT. I.—THE REFERENCE FAILING, PROCEEDING IN THE CAUSE REFERRED 706

Action may generally proceed 706
Effect of a juror having been withdrawn . . . 707
Court compelling defendant to refer again . . 708
Reference failing, action in equity proceeds . . . 709
On abortive reference by Quarter Sessions appeal may be heard 710
When no award under Lands Clauses Act jury to settle compensation 710

SECT. II.—ENFORCING IN EQUITY A CONTRACT DEPENDENT ON AN ABORTIVE REFERENCE 710

When submission essence of the contract, and no part performance, action not lie 710
Specific performance, if submission not of essence or part performance 712

CONTENTS OF THE APPENDIX OF FORMS.

SUBMISSIONS.

PAGE

I. Submission by agreement 717

1. Commencement 717
2. Recital of differences, subject referred 717
3. Appointment of arbitrator 717
4. Formal requisites of award 717
5. Death of party no revocation 717
6. Duration—power to enlarge 717
7. Power over costs 718
8. Parties and witnesses to be sworn 718
9. Power to proceed ex parte 718
10. Power to call for documents 718
11. Parties to forward, not prevent award 718
12. to abide by award 718
13. not to bring action 718
14. Power to refer back award 718
15. Conclusion 719

CLAUSES IN SUBMISSIONS.

16. Recital, special differences; matters referred 719
17. action pending; matters referred 719
18. action in Chancery dismissed; matters referred . 719
19. partnership; matters referred 719
20. Appointment of two arbitrators and an umpire . . . 720
21. of an umpire from time to time . . . 720
22. after difference arisen 720
23. of two arbitrators who are to appoint a third . 720
24. Formal requisites of award 720
25. Duration—powers to enlarge 721
26. Umpire to have further time than arbitrator 721
27. Death of party not to affect reference 721
28. Costs of reference to abide event 721
29. Costs of cause to abide event—of reference in discretion—power to certify 721

CLAUSES IN SUBMISSIONS (*continued*). PAGE

30. Costs as between solicitor and client 722
31. Evidence taken by one arbitrator may be acted on by both or umpire 722
32. Umpire not to rehear case unless requested 722
33. Dispensing with regular evidence 722
34. Power to arbitrator to proceed ex parte 722
35. to state a case 723
36. to make preliminary award raising point of law. . 723
37. to direct entry of verdict 723
38. to award entry of judgment—by default . . . 723
39. to order action to be discontinued 723
40. Relieving arbitrator from finding on the issues . . . 723
41. Power to employ an accountant 723
42. to order what shall be done 724
43. to order drains to be made 724
44. to order removal of obstruction 724
45. to cause plans and maps to be made 724
46. Costs of maps and plans 724
47. Principle on which to calculate value of land . . . 724
48. Party preventing arbitrator to pay costs 725
49. Making admissions 725
50. Power to court to refer back—to same or different arbitrator 725
51. for appointing new arbitrators 725
52. Liquidated damages for refusing to appoint new arbitrator . 725
53. Penalty for breach of submission 726
54. Parties to pay arbitrator's charges 726

II. Agreement of reference. (Concise form). 726
III. by executor as to liability of testator, and as to assets 726
IV. by executor as to testator's liability, not as to assets 727
V. Arbitration clause in a deed of partnership 727
VI. Submission by bond 728
VII. Arbitration bond referring all differences between six partners 729
VIII. Submission by deed 730
IX. Judge's order of reference 731
X. Order of reference to master 732
XI. Summons for reference under s. 13 of the Arbitration Act, 1889 733
XII. under s. 14 of the Arbitration Act, 1889 733
XIII. Notice of motion to refer accounts under s. 14 of the Arbitration Act, 1889 733
XIV. Order of reference under s. 13 734
XV. as to a nuisance 734
XVI. under s. 14 735
XVII. later form 735

PAGE

XVIII. Submission by order of Nisi Prius on the usual terms . 736

Power to direct entry of judgment 736
Death of party no revocation 736
Power to enlarge time 736
Power to certify 736
To receive evidence 736
Costs of cause to abide event—of reference and award in discretion 736
General finding sufficient 737
Parties to obey award 737
Parties not to sue 737
Proceeding ex parte 737
Party preventing award to pay costs 737
Court power to refer back or appoint new arbitrator . . 737
Power to appoint new arbitrator 737

XIX. Further clause where matters in difference also referred. 737
XX. Order of reference, a juror withdrawn 738
XXI. to state a special case 738
XXII. of indictment 739
XXIII. Submission by rule of court 739
XXIV. Demand of arbitration as to compensation for lands taken under the Lands Clauses Act . . 740
XXV. Do. for lands, &c., injured in making a railway, &c. 741
XXVI. Appointment of arbitrator under the Lands Clauses Consolidation Act 742
XXVII. of arbitrator by a railway company . . 743
XXVIII. of single arbitrator to act for both parties, promoters refusing to appoint an arbitrator 744
XXIX. of arbitrator by party dissatisfied with surveyor's valuation of the lands taken . 745
XXX. of umpire by arbitrators indorsed on submission 745
XXXI. of umpire by arbitrators 746
XXXII. Judge's order appointing umpire under the Arbitration Act, 1889 746
XXXIII. Appointment of umpire by arbitrators under the Lands Clauses Act 746
XXXIV. of umpire by justices or the Board of Trade 747
XXXV. by two arbitrators of a third arbitrator to act with them 748
XXXVI. Notice to the company of appointment of arbitrator by the claimants 748
XXXVII. Order of reference from a Court of Quarter Sessions . . 750

PROCEEDINGS DURING THE REFERENCE.

		PAGE
XXXVIII.	Appointment for a meeting in the reference	752
XXXIX.	for two meetings	752
XL.	peremptory	752
XLI.	for meeting before official referee	753
XLII.	before special referee	753
XLIII.	with notice arbitrator will proceed ex parte	753
XLIV.	Oath to be administered by the arbitrator	754
XLV.	Another form	754
XLVI.	Affirmation	754
XLVII.	Another form	754
XLVIII.	Another form	754
XLIX.	Demand by arbitrator of production of documents	755
L.	Request by arbitrator of written specification of matters in difference	755
LI.	Notice by arbitrators to umpire of disagreement	755
LII.	Enlargement of time by the arbitrator	756
LIII.	by the parties	756
LIV.	Order for enlargement of time by consent	757
LV.	of Chancery Division for enlargement of time by consent	757
LVI.	Summons for enlargement of time by a judge	758
LVII.	Judge's order for enlargement of time	758
LVIII.	Leave to revoke, summons for	758
LIX.	Judge's order for	758
LX.	Revocation of the submission by a party	759
LXI.	Notice of, to the arbitrator	759
LXII.	Notice to the parties that the award is made	759

AWARDS.

LXIII.	Award on a reference by order of Nisi Prius on the usual terms	760
	Recital of part of order of Nisi Prius	760
	of enlargement of time	760
	Award of and concerning the premises	761
	as to the issues in the cause	761
	giving damages in the cause	761
	direction to pay	761
	verdict to stand for plaintiff for reduced damages	761
	as to other matters in difference	761
	as to costs	761

CLAUSES IN AWARDS.

		PAGE
1.	Commencement of award reciting submission by agreement or deed	762
2.	reciting submission by bond	762
3.	reciting other submission by bond.	763
4.	on a submission by deeds poll	763
5.	on a submission by judge's order	763
6.	reciting order of Nisi Prius	763
7.	on a submission by rule of court	763
8.	Recitals in award by umpire	763
9.	Award, plaintiff good cause of action on part of claim.	764
10.	defendant to pay sum in full of all demands in the action	764
11.	on the various issues	764
12.	for plaintiff on all the issues	764
13.	for plaintiff on some issues, and for defendant on others	764
14.	of damages in a cause	764
15.	of balance to defendant	765
16.	for defendant	765
17.	of a stet processus	765
18.	of verdict for plaintiff, with certificate for speedy execution.	765
19.	of a nonsuit, or verdict for defendant.	765
20.	on the pleadings	765
21.	of entry of judgment	766
22.	of judgment by default	766
23.	action in Chancery Division to be dismissed	766
24.	in action to recover land	766
25.	on costs of cause	766
26.	each party to bear his own costs of cause	766
27.	defendant to pay costs of reference and award	767
28.	each to bear his own costs of the reference, and pay half costs of award	767
29.	each to pay half costs of reference and award	767
30.	Certificate cause fit to be tried before a judge	767
31.	cause fit to be tried by a special jury	767
32.	action brought to try a right	767
33.	Award of mutual releases	767
34.	sums, &c., awarded to be in full satisfaction	767
35.	against executor	768
36.	on partnership accounts	768
37.	of dissolution of partnership, on terms	769
38.	between partners	770
39.	of assignment of leasehold and release	771
40.	to deliver up deeds	771
41.	of conveyance of fee	771
42.	to remove hatches as far as defendant can	771
43.	to prostrate embankment	771
44.	to erect a bridge on stranger's land, if consent had	771
LXIV.	Certificate of arbitrator finding for plaintiff	772

		PAGE
LXV.	Award on indictment directing prostration of nuisance.	772
LXVI.	by umpire of compensation under the Lands Clauses Consolidation Act	774
LXVII.	amended on reference back	778
LXVIII.	confirmed on reference back	778
LXIX.	Report of referee under s. 13 of the Arbitration Act, 1889	779
LXX.	under s. 14 of the Arbitration Act, 1889	780

PROCEEDINGS ON THE AWARD.

LXXI.	Affidavit of execution of bond of submission . .	781
LXXII.	of execution of an award	781
LXXIII.	verifying copy of award on motion to set aside award	782
LXXIV.	of enlargement of time of publication of award.	782
LXXV.	Order making agreement of reference an order of court	783
LXXVI.	Order making order of reference by Quarter Sessions a rule of Court	783
LXXVII.	Order making submission under the Lands Clauses Consolidation Act a rule of the Queen's Bench Division	783
LXXVIII.	Order making submission under the Lands Clauses Consolidation Act an order of Chancery Division	784
LXXIX.	making an award an order of Chancery Division by consent	784
LXXX.	making award order of Chancery Division on affidavit of notice of motion	785
LXXXI.	Affidavit of service of submission, &c., and award, and of demand of sum and costs awarded . .	785
LXXXII.	Power of attorney to demand money and costs awarded	786
LXXXIII.	Judge's order for payment of sum awarded . . .	787
LXXXIV.	Judgment after trial by a referee	787
LXXXV.	after trial of questions of account by a referee	787
LXXXVI.	Notice of motion for adoption and enforcement of report of referee.	788
LXXXVII.	to set aside award	788
LXXXVIII.	Order to set aside award	789
LXXXIX.	Order remitting award to arbitrator	789
XC.	Notice of motion to refer back report to the referee .	789
XCI.	Statement of claim in action on an award . . .	790

CONTENTS OF THE APPENDIX OF STATUTES.

For full List of Statutes, see p. 793.

PAGE

Arbitration 795
Railways 809
Lands Clauses Consolidation 817
Joint Stock Companies 821
Quarter Sessions 822
Explosives 824
Public Health 825
Benefit Building Societies 827
Agricultural Holdings 827
Allotments and Cottage Gardens Compensation 830
Allotments 832
Housing of the Working Classes 833
Coal Mines 839
County Courts 840

INDEX 843

TABLE OF CASES

CITED IN THE TREATISE.

A.

Abbott *v.* Aslett, 544.
Abrahat *v.* Brandon, 327, 427.
Abud *v.* Riches, 614.
Ackary, In re, 181.
Adam *v.* Rowe, 344.
Adams *v.* Adams, 228, 258, 428.
— *v.* Bankhart, 20, 21, 25, 507.
— *v.* Broughton, 500.
— *v.* Great North of Scotland Rail. Co., 305, 667.
— *v.* Statham, 449.
— *v.* Yeoman, 89.
Adcock *v.* West, 679.
— *v.* Wood, 131, 446, 549.
Addison *v.* Gray, 270, 283, 290, 330, 382, 545.
— *v.* Spittle, 259, 330.
Agar *v.* Macklew, 64.
Ahrbecker *v.* Frost, 379.
Ainsley *v.* Goff, 121.
Aitcheson *v.* Cargey, 325, 330.
Aitken's Arbitration, 181, 421, 422, 426, 480.
Alder *v.* Park, 83, 159.
— *v.* Savill, 73, 82, 315, 451.
Aldington *v.* Chesshyre, 582.
Aldridge *v.* Harper, 75, 86.
Alexander *v.* Campbell, 64.
Alford *v.* Lea, 537.
Alivon *v.* Furnival, 114.
Allardes *v.* Campbell, 58, 698.
Allen *v.* Francis, 182.
— *v.* Greenslade, 309.
— *v.* Harris, 546.
— *v.* Lowe, 118, 126, 348, 362, 363, 364, 365, 670, 682.
— *v.* Milner, 3, 515, 546, 547.
— *v.* Morrison, 253.
— *v.* Papworth, 16.
Allenby *v.* Proudlock, 5, 59, 75, 77, 86, 388, 642, 660, 661, 683.
Alsop *v.* Senior, 21, 444.
Ambler *v.* Tebbutt, 95.
Ames *v.* Milward, 301, 316, 671.
Anderson *v.* Coxeter, 59, 660, 675.
— *v.* Darcy, 200, 307.
— *v.* Fuller, 318, 635, 661.
— *v.* Wallace, 194, 209, 210, 211, 284.
Andrews *v.* Eaton, 151.
— *v.* Palmer, 163, 526, 695.
Angell *v.* Felgate, 90.
Anglesey, Marquis of *v.* Chafey, 542.
Anglo-Austrian Bank, In re, 60.
Angus *v.* Redford, 118, 125, 205, 258, 350, 351, 362, 365, 381, 407, 430, 450, 498.
— *v.* Smythies, 199.
Annan *v.* Job, 358.
Anning *v.* Hartley, 193, 219, 249, 481, 482.
Anon. Andr. 299..595, 609.
— 3 Atk. 644..306, 502, 503, 505.
— 2 Barnard. 163..59.
— Barnes, 58..582.
— 1 Bulst. 184..245.
— 1 Chitt. 38..381.
— 2 Chitt. 44..185, 307.
— 2 Chitt. 45..147.
— 1 Cromp. Pract. 265, 3rd ed., 17, 591, 611.
— 1 D. & R. 529..601.
— 1 Dowl. 5..269, 542.
— Dyer, 242, a..97, 269.
— Freem. 378..228.
— Jenk. 129..141, 223, 285.
— 1 Keb. 92..287, 415, 449.
— Latch. 14..136.
— 1 Leon. 316..444, 445.
— 3 Leon. 53..29.
— March, 18..447.
— 1 Mod. 24..84.
— 6 Mod. 16..27.
— 12 Mod. 8..327, 427.
— 12 Mod. 257..587, 600, 601.
— 12 Mod. 525..587.
— 12 Mod. 560..423.
— F. Moore, 3 pl. 8..533.
— F. Moore, 3 pl. 9..550.
— F. Moore, 3 pl. 11..448.

Anon. 2 Ld. Raym. 553..544.
— 2 Ld. Raym. 989..251, 544.
— T. Raym. 152..591.
— 1 Salk. 71..575, 587.
— 1 Salk. 73..594.
— 1 Smith, 358..677.
— 1 Smith, 426..395.
— 3 Smith, 118..607.
— 1 Vent. 87..550.
— 2 Vern. 100..116, 235.
— v. Mills, 52, 53, 59, 582, 588, 698.
— v. Palmer, 298.
Ansell v. Evans, 53, 59, 582, 588.
— v. Thomas, 626.
Antram v. Chace, 21, 43, 137, 526, 553.
Apsley v. Crosley, 86, 525.
Arbuckle v. Price, 180, 190.
Archer v. Hale, 72, 86.
— v. Owen, 317.
Armitage v. Coates, 342, 549.
— v. Walker, 38, 418, 421.
Armitt v. Breame, 287, 295.
Armstrong v. Marshall, 111, 118, 200.
— v. Stratton, 542.
Arnold v. Mayor of Poole, 323.
— v. Pole, 131.
Arthur v. Marshall, 625.
Ashton v. Poynter, 304, 308.
Ashworth v. Heathcote, 52, 82, 126, 132.
Astley v. Joy, 405.
Aston v. George, 86, 107, 152, 154, 582.
Atcheson v. Everitt, 606.
Athelston v. Moon, 131.
Atkinson v. Abraham, 192, 193.
— v. Jones, 126, 132.
Atkyns v. Baldwin, 414.
Attorney-General v. Chomley, 21.
— v. Clements, 21, 22, 429, 524.
— v. Davison, 199, 202.
— v. Elliston, 545.
— v. Fea, 22.
— v. Hewitt, 22, 580.
— v. Jackson, 117, 700.
Aubert v. Maze, 5, 119, 329.
Auriol v. Smith, 58, 325, 563, 576, 655, 698.
Autothreptic, &c. Co., In re, 374, 640.
Avelett v. Goddard, 346.
Ayland v. Nicholls, 297.
Ayre and Calder Navigation Case, 311.

B.

Babbage v. Coulburn, 62.
Backhouse v. Taylor, 24, 232, 233.
Bacon v. Cresswell, 78, 707.
— v. Dubarry, 21, 27, 297, 449, 548.
Badger, In re, 119, 120, 420.
Badley v. Loveday, 594.
Badman v. Pugh, 583.
Baggalay v. Borthwick, 664.
Baguley v. Markwick, 206, 304, 318, 483, 664.
Baigent v. Baigent, 608.
Bailey v. Cheesely, 59.
— v. Curling, 296, 594, 597.
— v. Lechmere, 555.
Baillie v. Edinburgh Oil Gas Light Co., 29, 125, 278, 411.
Baily v. Taylor, 546.
Bainbrigge v. Houlton, 602, 677.
Baker's Case, 526, 611, 616.
Baker, In re, 32.
— v. Cotterill, 257, 344, 592, 621.
— v. Hunter, 257, 258, 259, 489.
— v. Metropolitan Rail. Co., 563.
— v. Rye, 86.
— v. Stephens, 137.
— v. Townshend, 3, 12, 14, 123, 378.
Baldway v. Ouston, 106.
Balls v. Metropolitan Board of Works, 472.
Balmain v. Lickford, 401.
Banfill v. Leigh, 24, 541.
Banks v. Banks, 184, 665.
Bannatyne v. Leader, 33.
Bannister v. MacDonald, 371, 695.
Barber v. Giles, 235.
— v. Nottingham Canal Co., 455.
Barden v. Keverberg, 16.
Bargrave v. Atkins, 291, 330, 334.
Barker v. Lees, 154.
— v. North Staffordshire Rail. Co., 475.
— v. Tibson, 326.
Barnard v. King, 228, 235.
— v. Moss, 402.
Barnardiston v. Fowler, 135, 416, 533.
Barnes v. Braithwaite, 497.
— v. Greenwel, 274.
— v. Hayward, 375, 386, 497.
Barnet v. Metropolitan Board of Work, 523.
Barney v. Fairchild, 335, 447.
Barrett v. Fletcher, 545.
— v. Parry, 147, 385.
— v. Rosenthal, 92.
— v. Wilson, 317.
Barry v. Grogan, 4, 515.
— v. Rush, 30, 427.
Bartle v. Musgrave, 383, 641, 688.
Barton v. Ransom, 317, 604, 681.
Barwick, In re, 608.
Baspole's Case, 262, 271, 274.
Baspoole v. Freeman, 298.
Bass v. Maitland, 600.
Bateman v. Boynton, 442.
— v. Countess of Ross, 10, 17.
Bates v. Cooke, 229.
— v. Townley, 383, 493, 541, 544, 555.
Bath, Mayor of v. Pinch, 502, 596, 600.
— and Wells, Bishop of v. Hippesley, 19, 568.

Batterbury *v.* Vyse, 503.
Bayley *v.* Adams, 572, 573.
— *v.* Wilkinson, 104, 130.
Beahorn *v.* Wolfe, 421.
Beale *v.* Beale, 289, 291.
Bean *v.* Newbury, 18, 131, 262.
Beard *v.* Webb, 16.
Bearup *v.* Peacock, 341.
Beaufort, Duke of *v.* Neeld, 524.
— *v.* Swansea Harbour Trustees, 277, 469.
— *v.* Welch, 302, 691.
Beck *v.* Jackson, 217.
— *v.* Sargent, 229, 245.
Beckett *v.* Midland Rail. Co., 455, 458, 460, 549, 551.
— *v.* Taylor, 447.
Beckingham *v.* Hunter, 414.
Beckwith *v.* Warley, 328.
Bedam *v.* Clarkson, 295, 444.
Bedborough *v.* Army and Navy Hotel Co., 371.
Beddow *v.* Beddow, 112, 204.
Bedell *v.* Moor, 334.
Bedford, Duke of *v.* Dawson, 460.
Bedington *v.* Southall, 188.
Bedwell *v.* Wood, 378, 407.
Beeley *v.* Wingfield, 13.
Beeston *v.* White, 612, 648.
Belchier *v.* Reynolds, 566.
Bell *v.* Benson, 377.
— *v.* Postlethwaite, 81, 378.
— *v.* Twentyman, 531.
Benedick *v.* Thatcher, 57.
Benett *v.* Coster, 356.
Bennett *v.* Skardon, 661.
— *v.* Watson, 148, 149, 583, 593, 652.
Benson *v.* Heathorn, 65.
Benton *v.* Ellis Lever, 639.
Benwell *v.* Hinxman, 147.
Berney *v.* Read, 553.
Berry *v.* Penring, 265.
— *v.* Perry, 124, 220, 300.
— *v.* Wade, 18, 569.
Bevan *v.* Bevan, 602.
Bexley *v.* West Kent M. S. Bd., 43, 319.
Bhear *v.* Harradine, 58, 59, 264, 643.
Biddell *v.* Dowse, 19, 27, 299, 544.
Bidder *v.* North Staffordshire Rail. Co., 320, 468, 476.
Biddulph *v.* Chamberlain, 637.
Bigg *v.* Corporation of London, 460.
Biggs *v.* Hansell, 182.
Bigland *v.* Skelton, 385.
Bignall *v.* Gale, 193, 197, 199, 205, 644, 685, 686, 696.
Bignold *v.* Springfield, 162, 704.
Bird *v.* Bird, 445.
— *v.* Cooper, 124, 268, 514.
— *v.* Penrice, 490.
Birdsall *v.* Bradley, 578.
Birks *v.* Trippet, 262, 269, 270, 275, 545.
Birmingham and Staffordshire Gas Co. *v.* Ratcliffe, 90.
— Corporation *v.* Allen, 368.
Bishop *v.* Bishop, 57, 564, 567, 570.
— *v.* Webster, 565.
Bishop of Bath and Wells *v.* Hippesley, 19, 568.
Bissex *v.* Bissex, 544.
Blackett *v.* Bates, 564, 567.
Blagrave *v.* Bristol Waterworks Co., 466.
Blair *v.* Jones, 644.
Blake *v.* Appleyard, 403.
Blake's Case, 13, 547.
Blakey *v.* Latham, 417.
Blanchard *v.* Sun Fire Office, 242, 666.
Blanshard *v.* Lilly, 11, 75, 337.
Blennerhasset *v.* Day, 116, 119.
Bligh *v.* Cottal, 583.
Bliss *v.* Falkner, 623.
Block *v.* Palgrave, 251.
Blundell *v.* Brettargh, 57, 154, 168, 169, 248, 254, 510, 712, 713.
Blunt *v.* Cooke, 82.
Blythe *v.* Lafone, 49.
Bodington *v.* Harris, 25.
Bonner *v.* Charlton, 74, 87, 358, 540.
— *v.* Liddell, 332.
Boodle *v.* Davies, 5, 118, 326, 393, 435, 671, 683, 684, 685, 689.
Booth *v.* Garnett, 416.
Borrowdale *v.* Hitchener, 118, 633, 634, 645, 650, 660.
Borton *v.* Mesham, 583.
Boss *v.* Helsham, 42, 68, 224.
Bottomley *v.* Amber, 187.
— *v.* Buckley, 582, 604, 662.
Bourgoin *v.* Montreal, &c. Rail. Co., 467.
Bourke *v.* Lloyd, 342, 343, 346, 350.
Bouttilier *v.* Thick, 304.
Bowen *v.* Bowen, 592, 621.
— *v.* Williams, 150, 238, 686.
Bower, In re, 601.
— *v.* Taylor, 167.
Bowes *v.* Fernie, 262, 264, 270, 331.
Bowker *v.* Evans, 169.
Bowyer *v.* Blorksidge, 19.
— *v.* Garland, 541.
Boyd *v.* Emmerson, 20, 255.
Boyes *v.* Black, 384, 427, 428.
— *v.* Hewetson, 600.
Bracher *v.* Cotton, 377.
Bradbee *v.* Christ's Hospital, 316, 320, 323, 365, 683.
Bradby *v.* Southampton Local Board, 469.
Braddick *v.* Thompson, 69, 80, 185, 550, 552.
Bradford *v.* Bryan, 262, 264, 271.
Bradlaugh *v.* Du Rhin, 200.

Bradley *v.* London and North Western Rail. Co., 100, 745.
— *v.* Phelps, 108, 350, 392, 481.
— *v.* Tunstow, 377, 388.
Bradsey *v.* Clyston, 251, 447, 544.
Bradshaw *v.* East and West India Docks and Birmingham Junction Rail. Co., 99, 176, 230, 240, 306, 453, 468, 475, 476, 477, 585, 672, 686.
Brand *v.* Hammersmith, &c. Rail. Co., 462, 463.
Brander *v.* Penleaze, 601.
Brandon *v.* Brandon, 596.
— *v.* London, Chatham and Dover Rail. Co., 453, 454.
— *v.* Smith, 515.
Braunstein *v.* Accidental Death Insurance Co., 63.
Brazier *v.* Bryant, 375, 385, 495, 496, 550, 609.
— *v.* Jones, 553.
Brazilian, &c. Co. and Western Telegraph Co., In re, 228.
Brearey *v.* Kemp, 528, 622, 627.
Brett *v.* Beales, 558.
Bretton *v.* Prat, 326, 444.
Brickhead *v.* Archbishop of York, 545.
Brierly Hill Local Board *v.* Pearsall, 456.
Bright *v.* Durnell, 46, 157, 228.
Bristow *v.* Binns, 168.
British Empire Shipping Co. *v.* Somes, 96, 567.
Britt *v.* Pashley, 69, 126, 364.
Broadbent *v.* Imperial Gas Co., 432, 454, 458, 515, 570.
Broadhurst *v.* Darlington, 306, 383.
Brocas *v.* Savage, 131.
Brodie *v.* Saillard, 369.
Brogden *v.* Llynvi Valley Rail. Co., 468.
Broggref *v.* Hawke, 405.
Bromley, In re, 580.
Brook *v.* Delcomyn, 194, 242.
— *v.* Fearns, 648.
Brooke *v.* Mitchell, 141, 250, 496, 544, 656, 657.
Brooks *v.* Parsons, 342, 346, 347, 485, 694.
Brophy *v.* Holmes, 200, 266, 505, 518, 673.
Browes *v.* Bruce, 55.
Brown *v.* Brown, 96, 304, 307, 667, 698.
— *v.* Croydon Canal Co., 133, 134, 258, 271, 272, 304, 314.
— *v.* Dalton, 333.
— *v.* Girard, 78, 91.
— *v.* Goodman, 541.
— *v.* Hellaby, 302, 309, 664, 675.
— *v.* Nelson, 314, 374.
— *v.* Probert, 685.
Brown *v.* Somerset and Dorset Rail. Co., 356.
— *v.* Tanner, 155, 542.
— *v.* Vawser, 251, 254, 517.
— *v.* Watson, 327, 416, 426.
Browne *v.* Collyer, 150, 151, 681.
— *v.* Emmerson, 89.
— *v.* Marsden, 381, 383, 388.
— *v.* Meverell, 264, 449.
Browning *v.* Sabine, 608.
Brunsden *v.* Staines L. Bd., 62:
Buccleuch, Duke of *v.* Metropolitan Board of Works, 325, 331, 462, 463, 506, 540, 551, 581.
Buckle *v.* Roach, 25.
Burchall *v.* Ballamy, 708.
Burdett *v.* Harris, 228.
Burdon, In re, 151, 685.
Burgess *v.* Northwick Local Board, 456.
Burley *v.* Stephens, 145, 148, 150, 709.
Burnard *v.* Wainwright, 483.
Burnell *v.* Minot, 20.
Burrard *v.* Calisher, 363.
Burroughes *v.* Clarke, 493, 494, 589.
Burt, In re, 655.
Burton *v.* Ellington, 573.
— *v.* Knight, 116, 117.
— *v.* Mendizabel, 625.
— *v.* Petrie, 69.
— *v.* Wigley, 424, 426.
Bury *v.* Dunn, 118, 407, 481, 484.
Busfield *v.* Busfield, 274, 444, 544.
Bush *v.* Trowbridge Waterworks Co., 461, 468.
Bustros *v.* Lenders, 52.
Butcher *v.* Cole, 572, 573.
Butler *v.* Grubb, 398.
— *v.* Masters, 589, 590, 605, 609, 611, 628.
Byles *v.* The Ipswich Dock Commissioners, 466, 469.
Byrne *v.* Brown, 23, 372.
— *v.* Fitzhugh, 654.

C.

Cable *v.* Rogers, 124, 427.
Caddell *v.* Smart, 384, 528.
Caila *v.* Elgood, 118, 613, 614.
Calcraft *v.* Roebuck, 215.
Caledonian Rail. Co. *v.* Greenock and Wemyss Bay Co., 65, 105, 812.
— *v.* Lockhart, 141, 148, 149, 166, 168, 183, 187, 208, 210, 325, 465, 466, 469, 689.
— *v.* Ogilvy, 459.
Callaghan *v.* Dolwin, 35.
Callard *v.* Patcrson, 647, 695.
Calvert *v.* Redfearn, 601.

Cameron *v.* Charing Cross Rail. Co., 460.
Campbell *v.* Twemlow, 200.
Candler *v.* Fuller, 325, 331, 377, 385, 533, 534.
Capel *v.* Great Western Rail. Co., 474.
Cardigan, Earl *v.* Henderson, 599, 613.
Cardinall *v.* Cardinall, 370.
Cargey *v.* Aitcheson, 273, 283, 290, 293, 382, 552, 593, 687.
Carlisle, In re, 47.
Carmichael *v.* Houchen, 679, 682.
Carpenter *v.* Joynes, 134, 377.
— *v.* Thornton, 72, 73, 86, 89, 540.
Carr *v.* Metropolitan Board of Works, 470.
— *v.* Smith, 42, 253.
Carrol *v.* Blencow, 16.
Carter *v.* Burial Board of Tonge, 582.
— *v.* Carter, 97, 131, 567.
— *v.* Mansbridge, 59.
Cartwright *v.* Blackworth, 354, 608.
Casamajor *v.* Strode, 441.
Casborne *v.* Barsham, 34.
Cassell, In re, 231, 666.
Caswell *v.* Grocutt, 481, 484, 486.
Cater *v.* Startut, 285.
Catmur *v.* Knatchbull, 590.
Cator *v.* Croydon Canal Co., 523.
Cavendish *v.* ——, 19, 57, 299, 568.
Cayhill *v.* Fitzgerald, 23, 27, 281, 297, 449.
Cayme *v.* Watts, 360.
Chace *v.* Westmore, 303, 304.
Chamberlain, In re, 613.
— *v.* West End of London and Crystal Palace Rail. Co., 458, 459, 465.
Champion *v.* Wenham, 699.
Chanler *v.* Driver, 600, 607.
Chapman *v.* Lansdown, 643.
— *v.* Van Toll, 89.
Charles, Ex parte, 612.
Charleton *v.* Spencer, 129.
Charnley *v.* Winstanley, 106, 155, 163, 164, 542, 551.
Chatfield *v.* Sedgwick, 403.
Chealyn *v.* Dalby, 165, 709, 712.
Chesterfield Corporation *v.* Brampton Local Board, 292.
Chichester *v.* MacIntire, 117.
Chicot *v.* Lequesne, 117, 502, 504, 550, 698.
Child *v.* Horden, 531, 544.
Chilton *v.* Ellis, 597.
Ching *v.* Ching, 4, 304, 306.
Chittenden *v.* Walker, 395.
Chownes *v.* Browne, 70.
Christie *v.* Hamlet, 259, 593, 681.
— *v.* Noble, 153.
— *v.* Northern Counties, &c., Building Society, 36.
Christ's Hospital, Brecknock *v.* Martin, 655.
Chuck *v.* Cremer, 307, 698, 699.
Church *v.* Roper, 565.
Churcher *v.* Stringer, 542, 589, 650.
Clapcott *v.* Davy, 278, 546, 548.
Clapham *v.* Higham, 107, 668.
Clarbrough *v.* Toothill, 180.
Clarence Rail. Co. *v.* Great North of England Rail. Co., 7.
Clark *v.* Corporation of Bath, 579.
— *v.* Sonnenschein, 371.
Clarke *v.* Baker, 588.
— *v.* Crofts, 145, 169.
— *v.* Elwick, 582, 594.
— *v.* Owen, 348, 389, 691.
— *v.* Stocken, 116, 151, 158.
Cleesby *v.* Peese, 510.
Clegg *v.* Clegg, 47.
— *v.* Dearden, 517.
Clemenhere *v.* Tresilian, 587.
Cleworth *v.* Pickford, 62.
Clout *v.* Metropolitan District Rail. Co., 113.
Clow *v.* Harper, 90.
Cock *v.* Gent, 355, 669, 686, 689.
Cockburn *v.* Newton, 133, 266, 326, 389.
Cocks *v.* Macclesfield, 248, 251.
Cockson *v.* Ogle, 262, 284, 295.
Cole *v.* Firth, 403.
College *v.* Horn, 27.
Collet *v.* Podwell, 280.
Collier *v.* Hicks, 174.
Collins *v.* Blantern, 13.
— *v.* Collins, 42, 224.
— *v.* Locke, 63.
— *v.* Paddington Vestry, 319.
— *v.* Powell, 517.
— *v.* South Staffordshire Rail. Co., 99, 101.
Colwel *v.* Child, 27, 300.
Commins *v.* Heard, 515, 547.
Compagnie du Senegal *v.* Woods, 49.
Cooke *v.* Catchpole, 50.
— *v.* Cooke, 45, 58.
— *v.* Newcastle and Gateshead Water Co., 369, 370.
— *v.* Whorwood, 334, 416, 446, 541.
Cookson *v.* Monkhouse, 592.
Coombs, In re, 385, 493, 494, 497.
Cooper *v.* ——, 667.
— *v.* Hirst, 298.
— *v.* Johnson, 167, 169.
— *v.* Langdon, 5, 126, 302, 347, 357, 670, 687.
— *v.* Pegg, 353, 390, 400.
— *v.* Shepherd, 500.
— *v.* Shuttleworth, 44, 63, 107, 160.
Coote *v.* Pooley, 448.
Cooth *v.* Jackson, 203, 709, 710, 713.
Cope *v.* Cope, 51.
Coppard, Ex parte, 411, 422.

Coppell *v.* Smith, 551, 612.
Coppin *v.* Hurnard, 229, 235, 236.
Corbett *v.* Poolnitz, 16.
Corneforth *v.* Geer, 307.
Corpe *v.* Glyn, 32, 525, 591.
Cottam *v.* Partridge, 709.
Coulson *v.* Graham, 69, 615.
Courtauld *v.* Legh, 206.
Couvela *v.* Volkart, 118.
Cowel *v.* Waller, 229, 235.
Cowell *v.* Amman Aberdare Colliery Co., 400.
— *v.* Betteley, 384, 528.
Cox *v.* King, 441.
Craike, In re, 596, 598.
Cramp *v.* Symons, 304.
Crampton *v.* Ridley, 493.
Craven *v.* Craven, 119, 185, 271, 275, 544.
Crawshaw *v.* York and North Midland Rail. Co., 349, 392, 395.
Crawshay *v.* Collins, 164, 165, 203, 216, 703, 705, 709, 710.
Cremer *v.* Churt, 583. *See* Cromer *v.* Churt.
Cresly *v.* Carrington, 705.
Creswick *v.* Harrison, 277, 613, 620.
Crisp *v.* Bunbury, 34.
Croft *v.* London and North Western Rail. Co., 461, 465.
Crofton *v.* Connor, 705.
Crofts *v.* Harris, 278, 546.
Cromer *v.* Churt, 633, 640, 646, 653.
Croom *v.* Gore, 189, 640.
Crosbie *v.* Holmes, 390, 391, 670, 681, 682.
Croskey *v.* The European and American Steam Shipping Co., 91.
Cross *v.* Cross, 481, 484, 486.
— *v.* Metcalfe, 83.
— *v.* Mitchell, 79.
Crossley *v.* Clay, 116, 192.
Croydon Corporation *v.* Croydon, &c. Tramway Co., 105.
Cruickshank *v.* The Floating Swimming Bath Co., 115, 118.
Crump *v.* Adney, 431, 561.
Cudliff *v.* Walters, 228, 236, 237.
Cudlip *v.* Smedley, 575.
Cuerton, Ex parte, 479.
Cummins *v.* Birkett, 90, 91, 115, 203.
Curtis *v.* Barclay, 24.
— *v.* Bligh, 53, 73, 86, 180.
— *v.* Potts, 137, 552.
Cuthill *v.* Kingdon, 37.

D.

Dakins *v.* Wagner, 139, 144.
Dale *v.* Mottram, 444, 445, 447.
Dallas *v.* Glyn, 614.
Dalling *v.* Matchett, 220, 597, 666.
Dane *v.* Viscountess Kirkwall, 32.
Danes *v.* Monsay, 236.
Daniell *v.* Beadle, 607.
Daniels *v.* Wealds, 607.
Darbey *v.* Whitaker, 64, 203, 563.
Darbyshire *v.* Cannon, 587, 607.
Dare *v.* Chase, 235.
Dare Valley Rail. Co., In re, 101, 152, 480.
Darlington Wagon, &c. Co. *v.* Harding, 88, 156, 305, 370.
Darnley, Earl *v.* London, Chatham, and Dover Rail. Co., 195, 711.
Daubuz *v.* Rickman, 344, 385.
Daunt *v.* Lazard, 48.
Dauvillier *v.* Myers, 181.
Davenport *v.* Vickery, 483.
Davey *v.* Railway Passengers' Assurance Co., 582.
Davies *v.* Chatham, &c., Building Society, 37.
— *v.* Pratt, 257, 480, 481, 491, 593, 610, 626, 627, 628.
— *v.* Price, 44, 197.
— *v.* Ridge, 32.
— *v.* South Staffordshire Rail. Co., 176.
Davila *v.* Almanza, 106.
Davis *v.* Galmoye, 606.
— *v.* Getty, 58, 582, 698.
— *v.* Page, 16, 19.
— *v.* Potter, 614, 629.
— *v.* Rea, 574.
— *v.* Starr, 47, 51.
— *v.* Vass, 600, 604.
Davison *v.* Gauntlett, 146.
Dawdy, In re, 42.
Dawes *v.* Fountain, 370.
Dawney *v.* Vesey, 295, 537.
Dawson *v.* Fitzgerald, 62, 63.
— *v.* Garrett, 340.
— *v.* Sadler, 58, 59, 653, 698, 703.
— *v.* York and North Midland Rail. Co., 102.
Day *v.* Bonnin, 274, 514.
— *v.* Mearns, 402.
— *v.* Smith, 541.
Deacon *v.* Dolby, 368.
Deere *v.* Kirkhouse, 374, 401.
Deerly *v.* Duchess of Mazarine, 16.
De Gaillon *v.* L'Aigle, 16.
Delagoa Bay Rail. Co. *v.* Tancred, 692, 704.
Delver *v.* Barnes, 119, 120, 121, 307.
Dennett *v.* Pass, 598.
Denton *v.* Strong, 144, 150.
De Rosaz *v.* Anglo-Italian Bank, 227.
Deutsche Springstoff, &c. *v.* Briscoe, 49, 61, 153.
Dewar *v.* Swabey, 407.
Dibben *v.* Marquis of Anglesey, 343.
Dicas *v.* Jay, 46, 68, 84, 339, 517.
— *v.* Warne, 601.
Dick *v.* Milligan, 118, 367, 703, 705.
Dickenson *v.* Allsop, 593, 621.

Dickins *v.* Jarvis, 340, 593, 604, 643.
Dickman *v.* Hutherd, 592.
Dierden, In re, 582.
Dighton *v.* Whiting, 546.
Dilley *v.* Polhill, 544.
Dimsdale *v.* Robertson, 65, 70, 144, 152.
Dinham *v.* Bradford, 713.
Dinn *v.* Blake, 309, 311.
Dobson *v.* Groves, 13, 193, 197, 211, 316, 510, 512, 665.
Dod *v.* Herbert, 234, 254, 517.
— *v.* Herring, 34.
Doddington *v.* Bailward, 14, 237, 451, 532, 589, 600, 611.
— *v.* Hudson, 188, 198, 532, 596.
Doe *v.* Amey, 604, 620, 625.
— *d.* Banks *v.* Holmes, 485.
— *d.* Beaufort, Duke of *v.* Neeld, 524.
— *d.* Body *v.* Cox, 326, 362, 671, 693.
— *d.* Bowman *v.* Lewis, 345.
— *d.* Carlisle, Lord *v.* Bailiff, &c. of Morpeth, 78.
— *d.* Chawner *v.* Boulter, 559.
— *d.* Clarke *v.* Stilwell, 429, 535, 598, 602, 603, 616.
— *d.* Fisher *v.* Saunders, 172, 709.
— *d.* Greville *v.* Roper, 44, 555.
— *d.* Harris *v.* Saunder, 6, 524.
— *d.* Haxby *v.* Preston, 511, 680.
— *d.* Hickman *v.* Hickman, 600.
— *d.* Lloyd *v.* Evans, 507.
— *d.* Madkins *v.* Horner, 270, 345, 354, 361, 555, 649, 694.
— *d.* Mayes *v.* Cannell, 485.
— *d.* Moody *v.* Squire, 543, 623, 630.
— *d.* Morris *v.* Rosser, 4, 44, 522, 555.
— *d.* Morrison *v.* Glover, 37.
— *d.* Nicholson *v.* Middleton, 165.
— *d.* Oxenden *v.* Cropper, 300, 314, 354.
— *d.* Pain *v.* Grundy, 590.
— *d.* Roberts *v.* Mostyn, 141.
— *d.* Simpson *v.* Emmerson, 127, 305.
— *d.* Smith *v.* Webber, 556.
— *d.* Starling *v.* Hillen, 345, 347.
— *d.* Steer *v.* Bradley, 601, 626.
— *d.* Suffield, Lord *v.* Preston, 254.
— *d.* Swinton *v.* Sinclair, 528.
— *d.* Turnbull *v.* Brown, 154, 610, 668.
— *d.* Williams *v.* Howell, 596, 598.
— *d.* — *v.* Richardson, 327, 340, 427.
Dole *v.* Dawson, 259.
Domett *v.* Hellyer, 528.
Donegal, Marquis *v.* Verner, 62.
Donlan *v.* Brett, 354, 355, 592.
Dossett *v.* Gingell, 496, 497.
Doulton *v.* Metropolitan Board of Works, 474.
Downes *v.* Cooper, 4, 559.
Dowse *v.* Coxe, 19, 25, 95, 142, 169, 261, 262, 418, 540, 541, 545.
Doyley *v.* Burton, 427, 533, 544.
— *v.* Pitslow, 229.
Drage *v.* Ibberson, 11.
Dresser *v.* Johns, 613.
— *v.* Stansfield, 125, 347, 544, 549, 560.
Drew *v.* Drew, 112, 160, 194, 196.
— *v.* Josolyne, 639.
— *v.* Leburn, 160, 191, 195.
— *v.* Woolcock, 597, 625.
Driver *v.* Hood, 542, 545.
Drury *v.* Lyne, 157.
Dryden *v.* Robinson, 571.
Dubois *v.* Hole, 16.
— *v.* Medlycott, 609, 655.
Duckworth *v.* Harrison, 343, 350.
Dudgeon *v.* Martin, 514.
Dudley *v.* Mallery, 444, 447.
— *v.* Nettlefold, 381.
Dunavan *v.* Mascall, 236.
Dunhill *v.* Ford, 394.
Dunkirk Colliery *v.* Lever, 92.
Dunn *v.* Murray, 517.
— *v.* Warlters, 276, 684.
— *v.* West, 528, 622.
Duport *v.* Wildgoose, 294.
Durham County Permanent Building Society, In re, 114.
Duxberay *v.* Isherwood, 95.
Dyer *v.* Dawson, 550, 560, 561.
Dyke *v.* Cannell, 371.

E.

Eads *v.* Williams, 187, 210, 219, 566.
Eagle *v.* Charing Cross Rail. Co., 460.
Eardley *v.* Otley, 673.
— *v.* Steer, 217, 256, 341, 342, 351, 395, 666.
Earl Berkley's Will, In re, 474.
Earle *v.* Stocker, 112, 116, 187, 205, 665.
East and West India Docks *v.* Kirk, 160, 206.
East and West India Docks, &c. Rail. Co. *v.* Gattke, 457.
East London Union *v.* Metropolitan Rail. Co., 540.
Eastern Counties Rail. Co. *v.* Robertson, 200, 201.
Eastern Counties Rail. Co. *v.* Eastern Union Rail. Co., 207.
Eastern Union Rail. Co. *v.* Eastern Counties Rail. Co., 415, 437.
Eastham *v.* Tyler, 173.
Eccles *v.* Blackburn, 374, 636.
Edgecombe *v.* Rodd, 13.
Edgell *v.* Dallimore, 415, 592.
Edmunds *v.* Cox, 167.
Edmundson *v.* Hartley, 572, 573.

Edwards, Ex parte, 163, 526.
— v. Aberayron Mutual Ship Insurance Society, 63.
— v. Edwards, 91, 640, 641.
— v. The Great Western Rail. Co., 374, 637.
Elborough v. Gates, 544.
Elleman v. Williams, 392, 641.
Elletson v. Cummins, 124.
Elliott v. Cheval, 229, 298.
— v. Royal Exchange Ass. Co., 63.
— v. South Devon Rail. Co., 113, 704.
Ellis v. Arnison, 523.
— v. Desilva, 342, 393.
— v. Giles, 601.
— v. Hopper, 43, 114.
— v. Saltau, 505.
Ellison v. Ackroyd, 245, 375.
Elsom v. Rolfe, 263, 549.
Elvin v. Drummond, 41.
Elworthy v. Bird, 13, 27.
Emery v. Emery, 285.
— v. Wase, 18, 116, 208, 210, 332, 416, 568.
Emet v. Ogden, 662.
Emmerson v. Simpson, 305.
Emmet v. Heyes, 379.
England v. Davison, 330, 343, 346, 347, 404, 690.
European and American Steam Shipping Co. v. Croskey, 160, 232.
Evans v. Caddish, 224.
— v. Cogan, 17, 19, 22, 568, 569.
— v. Davies, 707, 708, 709.
— v. Harris, 572.
— and Howell, In re, 658.
— v. Lancashire and Yorkshire Rail. Co., 140, 141.
— v. Pratt, 304.
— v. Prosser, 626.
— v. Rees, 556, 557.
— v. Senor, 80.
— v. Thomson, 54, 59, 148, 582.
Everard v. Paterson, 248, 544.
Everest v. Ritchie, 355.
Evershed v. Evershed, 712.
Ewes v. Blackwall, 566.
Eynde v. Gould, 608.
Eyre v. Good, 564.

F.

Fairfield v. Wright, 80.
Fallowes v. Taylor, 13.
Farrar v. Cooper, 205, 453.
Farrer v. Bates, 548.
— v. Billing, 523.
Farringdon v. Chute, 570.
Faviell v. Eastern Counties Rail. Co., 26, 159, 200, 306, 629.
Fearon v. Flinn, 383, 481.
Fennell, In re, 608.
Fenton v. Dimes, 267.
Ferguson v. Norman, 321.
Fernley v. Branson, 386, 497.
Ferrer v. Oven, 539, 541, 553.
Ferrers, Earl v. Stafford and Uttoxeter Rail. Co., 473.
Fetherstone v. Cooper, 86, 172, 191, 192, 193, 211, 215, 249, 582, 698.
Figes v. Adams, 384, 528.
Filmer v. Delber, 25.
Finch v. Great Western Rail. Co., 442.
Finlayson v. M'Leod, 384, 405.
Firth v. Howlett, 243.
— v. Midland Rail. Co., 711.
— v. Robinson, 326, 377.
Fisher v. Pimbley, 131, 425, 546, 549, 552.
Fitzgerald v. Graves, 375, 385.
Fitzharding v. Gloucester and Berkley Canal Co., 472.
Fitzwilliam, Lord v. Dawes, 60.
Flag Lane Chapel v. Mayor of Sunderland, 243.
Fleming v. Self, 37.
Flynn v. Robertson, 309.
Fontainmoreau v. Encontre, 84.
Ford v. Gartside, 705.
— v. Jones, 231, 232.
Foreland v. Hornigold, 545.
— v. Marygold, 544, 545.
Forest, In re, 574.
Forshaw v. De Wette, 376, 379.
Forster v. Brunetti, 587.
Fortescue, Ex parte, 598.
Forwood v. Watney, 48, 158.
Foster v. Hanson, 401.
Fowle v. Steinkeller, 650.
Fowler v. Monmouthshire Rail., &c. Co., 474.
Fox v. Rail. Pass. Ass. Co., 47.
— v. Smith, 291, 382.
France v. White, 323.
Franks v. Duchesse de Pienne, 16.
Frankum v. Earl of Falmouth, 356.
Fraser v. Ehrensperger, 153.
Fraunce's Case, 544.
Fream v. Sargent, 399.
Freame v. Pinneger, 655.
Freeman v. Bernard, 251, 287, 295, 415, 530, 541, 544, 546.
— v. Drew, 537.
— v. Jeffries, 42.
— v. Sheen, 537, 538.
Fryer v. Shaw, 188.
— v. Sturt, 374.
Fuller v. Fenwick, 122, 304, 305, 308, 316, 482, 483.
Furlong v. Thornigold, 325, 334, 545.
Furnival v. Bogle, 27, 28.
Furser v. Prowd, 279, 533, 550.
Fyall v. Varier, 236.

G.

Gable *v.* Moss, 531, 544.
Gaby *v.* Wilts Canal Co., 316.
Gaffney *v.* Killen, 150, 159, 163.
Galatti *v.* Wakefield, 378, 379.
Gallop *v.* Central Queensland Meat Co., 660.
Galloway *v.* Keyworth, 495, 638, 640.
Garland *v.* Goulden, 608.
— *v.* Noble, 131.
Garret *v.* Weeden, 251.
Gartside *v.* Gartside, 572, 673.
Gascoyne *v.* Edwards, 546.
Gatcliffe *v.* Dunn, 248.
Gayle *v.* Betts, 545.
Geeve *v.* Gorton, 406, 407.
Gellibrand, In re, 606.
Genne *v.* Tinker, 541, 546, 550.
Gensham *v.* Germain, 305.
George *v.* Lousley, 257, 385, 604, 668.
Gervais *v.* Edwards, 563.
Gething *v.* Fotheringham, 583.
Gibbon *v.* Parker, 318, 483.
Gibbs *v.* Knightley, 81, 91.
Gifford *v.* Bury Town Council, 53, 103, 230, 575.
— *v.* Gifford, 600, 607.
Gill *v.* Russell, 19.
Gillett *v.* Thornton, 51.
Gillon and Mersey Navigation Co., In re, 273, 386, 411.
Ginder *v.* Curtis, 189.
Gisborne *v.* Hart, 339, 343, 549, 552, 554.
Gladwin *v.* Chilcote, 108, 188, 198, 199, 665.
Glamorganshire Banking Co., In re, 181.
Glasbrook *v.* Owen, 370.
Glasgow, &c. Rail. Co. *v.* London & North-Western Rail. Co., 674.
Glasgow Union Rail. Co. *v.* Hunter, 458, 459, 460, 463.
Glaysher, Ex parte, 61, 582.
Glover *v.* Barrie, 283, 412.
— *v.* North Staffordshire Rail. Co., 458.
Goddard *v.* Mansfield, 282, 426.
— *v.* Smith, 691.
Godfrey *v.* Bercher, 573.
— *v.* Godfrey, 4.
— *v.* Wade, 18, 707.
Goldstone *v.* Osborn, 63.
Golightly *v.* Jellicoe, 507, 519.
Good *v.* Wilks, 144.
Goodal *v.* Lowndes, 13.
Goodall *v.* Ray, 374, 376, 691.
Goodman *v.* Sayers, 116, 213, 220, 304, 688, 698, 699.
Goodred *v.* Seale, 89.
Goodson *v.* Brooke, 24.
— *v.* Forbes, 54, 253.
Goodwin *v.* Budden, 90.
Goodyear *v.* Simpson, 42, 253.
Gordon *v.* Mitchell, 313, 510.
Gore *v.* Baker, 349, 392, 485.
Gould *v.* Staffordshire Potteries Waterworks Co., 260, 473, 476, 622.
Gourlay *v.* Duke of Somerset, 65, 712.
Goutard *v.* Carr, 393.
Govett *v.* Richmond, 23, 569.
Gower's Walk Schools *v.* London, Tilbury and Southend Rail. Co., 460.
Grafham *v.* Turnbull, 308, 699.
Graham *v.* Darcey, 592, 621.
— *v.* Glover, 43, 180.
Granger *v.* Dacre, 544.
Grant *v.* Hawding, 612.
Gravatt *v.* Attwood, 694, 695.
Graves *v.* Taylor, 368.
Gray *v.* Gray, 288, 337, 444, 533, 534.
— *v.* Gwennap, 275, 276.
— *v.* Leaf, 684, 685.
— *v.* North-Eastern Rail. Co., 472.
— *v.* Wicker, 417.
— *v.* Wilson, 209.
Grazebrook *v.* Davis, 185, 550.
Great Britain Mutual Life Assurance Society, In re, 318.
Great North Western Rail. Co. *v.* Clarence Rail. Co., 143.
Great Western Rail. Co. *v.* Midland Rail. Co., 103.
Great Western Rail. Co. *v.* Waterford Rail. Co., 39, 103, 812.
Greathead *v.* Morley, 523.
Green *v.* Balfour, 127, 414.
— *v.* Pole, 84, 152, 154.
— *v.* Prosser, 601.
— *v.* Taylor, 106.
— *v.* Waring, 411, 421.
Greenhill *v.* Church, 57, 697, 701.
Greenway *v.* Carrington, 542.
Greenwood *v.* Brownhill, 310.
— *v.* Dyer, 600.
— *v.* Misdale, 152.
— and Titterington, In re, 26, 231, 233.
Gregory *v.* Howard, 507.
— *v.* Mighell, 713.
Greig *v.* Talbot, 54, 55, 59, 541.
Grenfell *v.* Edgcome, 126, 302, 357, 364, 365, 381, 431, 432, 683.
Gribble *v.* Buchanan, 393, 394.
Griffith *v.* Williams, 26.
Griffiths *v.* Thomas, 399.
Grigby *v.* Cox, 16.
Grimes *v.* Naish, 634.
Grimstone *v.* Bell, 69, 74, 76, 80.
Grindley *v.* Barker, 165, 216.
Gripe *v.* Wilkie, 582.
Grocers' Co. *v.* Donne, 322.
Grove *v.* Cox, 377.
Grundy *v.* Wilson, 589, 633.
Guadiano *v.* Brown, 663.
Guarantee Society and Levy, In re, 178.

Guildford *v.* Mills, 591.
Gulliver *v.* Summerfield, 607.
Gumm *v.* Fowler, 320.
— *v.* Hallett, 67.
Gunton *v.* Nurse, 22, 499, 500, 501, 558.
Gurney *v.* Buller, 402.
Gwinnett *v.* Bannister, 58, 698.
Gyde *v.* Boucher, 276, 277.

H.

Habershon *v.* Troby, 119, 508.
Hack *v.* London Provident Building Society, 37.
Haddan *v.* Roupell, 61.
Hagger *v.* Baker, 200, 201, 308, 666.
Haggett *v.* Welsh, 77, 95, 153, 154, 162, 574.
Hagh *v.* Chadwick, 550.
Haigh *v.* Haigh, 172, 173, 174, 188, 195, 196, 504.
Halden *v.* Glasscock, 77, 150, 604.
Hales *v.* Stevenson, 54.
— *v.* Taylor, 593.
Halfhide *v.* Fenning, 70, 183.
Hall *v.* Alderson, 528.
— and Anderton, In re, 189, 198.
— *v.* Brand, 180.
— *v.* Ellis, 151, 157, 162, 178, 180.
— *v.* Hardy, 563, 564, 565.
— and Hinds, In re, 142, 308, 309, 497, 540, 550.
— *v.* Lawrence, 244.
— *v.* Mister, 587, 645.
— *v.* Phillips, 707.
— *v.* Rouse, 150, 707.
Hallen *v.* Smith, 405.
Hallett *v.* Hallett, 146, 148, 668, 687.
Halsey *v.* Windham, 49.
Hamilton *v.* Bankin, 24, 195, 503, 697.
— *v.* Mackie, 128.
— *v.* Merchants' Insurance Co., 92.
Hammond *v.* Waterton, 42.
Hampden *v.* Walter, 608, 677.
Hampton *v.* Boyer, 541.
Hanbury *v.* Guest, 543.
Hancock *v.* Reid, 24, 339.
Hanks *v.* Arterial Drainage Co., 517.
Hannington *v.* Beare, 85.
Hanson *v.* Boothman, 533, 611.
— *v.* Liversedge, 120, 248, 290, 516, 544.
Harcourt *v.* Ramsbottom, 162, 198, 199.
Harding, Ex parte, 527.
— *v.* Forshaw, 133, 265, 341, 342, 351, 648.
— *v.* Holmes, 549.
— *v.* Watts, 228, 229.
— *v.* Wickham, 699.
Hardress *v.* Prowd, 493.
Hardy *v.* Innes, 306.
— *v.* Ringrose, 307.
Hare *v.* Fleay, 296, 445, 598, 620, 623, 627, 640, 646.
— *v.* George, 546.
— and Milne, In re, 167, 170, 212, 510, 666.
Harland *v.* Newcastle, Mayor of, 408, 484.
Harlow *v.* Read, 259.
— *v.* Winstanley, 59.
Harper, Ex parte, 60, 101.
— *v.* Abrahams, 707, 708.
— *v.* Great Eastern Rail. Co., 101, 475, 476, 477, 663.
Harries *v.* Thomas, 74, 332, 706, 707.
Harris *v.* Curnow, 451.
— *v.* Knipe, 298, 334.
— *v.* Mitchell, 231.
— *v.* Paynter, 269.
— *v.* Reynolds, 45.
— *v.* Smith, 120.
Harrison *v.* Creswick, 270, 277, 345, 354, 549, 620, 626.
— *v.* Greenwood, 75, 693, 708.
— *v.* Grundy, 59, 582.
— *v.* Lay, 274, 317, 325, 415.
— *v.* Oliver, 594.
— *v.* Smith, 71, 75.
— *v.* Wright, 52.
Hart *v.* Draper, 77.
— *v.* Duke, 160, 206.
— *v.* Hart, 64.
Hartley *v.* Barlow, 597.
Hartnell *v.* Hill, 377, 384.
Harvey *v.* Ashley, 18, 19, 568.
— *v.* Shelton, 58, 191, 194, 213, 575, 576, 582, 660, 665, 675, 687.
Haswell *v.* Thorogood, 163, 526, 612.
Hattersley *v.* Hatton, 49.
Hatton *v.* Royle, 20.
Hawke *v.* Brear, 393.
Hawkins *v.* Benton, 22, 71, 72, 290, 351, 361, 621, 623, 624, 625, 626.
— *v.* Colclough, 270, 274, 286, 298.
— *v.* Rigby, 375, 639.
Hawksworth *v.* Brammall, 148, 263, 563.
Hawkyard *v.* Stocks, 326, 335, 355, 356, 669, 677, 678.
Hawley *v.* North Staffordshire Rail. Co., 218, 222, 244, 584.
Hayes *v.* Hayes, 55.
Hayllar *v.* Ellis, 276.
Hayman *v.* Gerrard, 545.
Hayward *v.* Metropolitan Rail. Co., 472.
— *v.* Moss, 377.
— *v.* Phillips, 59, 74, 75, 77, 351, 352, 355, 437, 660, 678, 688.

Haywards *v.* Ribbans, 645, 695.
Healey *v.* Thames Valley Rail. Co., 453, 454.
Heard *v.* Baskerville, 545, 546.
Heath *v.* Brindley, 68.
Heathcote *v.* Wing, 648.
Heatherington *v.* Robinson, 216, 593.
Heatley *v.* Thomas, 16.
Hellyer and Snook, In re, 681.
Hemans *v.* Picciolto, 63.
Heming *v.* Swinnerton, 58, 550, 560, 561, 574, 582, 673, 698, 699, 703, 705.
Hemming *v.* Parker, 189.
Hemsworth *v.* Brian, 163, 389, 394, 411, 526, 599, 611, 656, 661, 663, 678.
Henderson *v.* Williamson, 248, 544.
Henfree *v.* Bromley, 141, 250, 529.
Henley *v.* Soper, 24.
Henry *v.* Kirwan, 520, 564.
Henshaw *v.* Falk, 582.
Hetley *v.* Hetley, 198.
Hewitt *v.* Hewitt, 3, 289.
— *v.* Penny, 231.
— *v.* Portsmouth Waterworks Co., 199.
Hewlett *v.* Laycock, 172, 174, 196.
Hick, In re, 148, 191, 196, 228.
Hickes *v.* Cracknell, 549.
Hicks *v.* Richardson, 251, 493, 494, 589.
Hide *v.* Cooth, 262, 705.
— *v.* Petit, 72, 153, 162, 262, 579, 587.
Higgins *v.* Street, 603.
— *v.* Willes, 291, 595.
Higginson *v.* Broadhurst, 402.
— *v.* Nesbitt, 645.
Higham and Jessop, In re, 139, 149.
Highgate Archway Co. *v.* Nash, 390.
Highnam *v.* Hassell, 397.
Hill *v.* Ball, 304, 699.
— *v.* Hill, 164.
— *v.* Levey, 22.
— *v.* Merritt, 401.
— *v.* Slocombe, 255, 607.
— *v.* Thorn, 327, 427.
— *v.* Townsend, 648.
Hilton *v.* Hopwood, 69, 86, 597, 600.
Hinton *v.* Cray, 248, 544, 549.
— *v.* Meade, 678.
Hirsch *v.* Im Thurn, 48.
Hobbs *v.* Ferrars, 163, 610, 653, 668, 679.
Hobdell *v.* Miller, 357, 416, 640, 679.
Hobler, In re, 28.
Hobson *v.* Stewart, 125, 298, 338, 347.
Hoch *v.* Boor, 89, 92.
Hocken *v.* Grenfell, 685, 691.
Hodgkinson *v.* Fernie, 304, 306, 308, 482, 483.
Hodgson *v.* Railway Passengers' Assurance Co., 47.
Hodsden *v.* Harridge, 254, 517, 539, 541, 544, 550.
Hodsoll *v.* Wise, 183.
Hodson *v.* Drewry, 231, 232, 233.
— *v.* Patterson, 629.
— *v.* Wilde, 183.
Hogg *v.* Burgess, 177, 181, 304, 310, 482, 483, 664, 805.
Hoggins *v.* Gordon, 493.
Hohenzollern, &c. *v.* Contract Corporation, 128.
Holcroft *v.* Manby, 528, 621, 622.
Holden *v.* Newman, 315, 402.
Holder *v.* Raitt, 401.
Holdsworth *v.* Barsham, 231, 290, 292, 540.
— *v.* Wilson, 230, 231, 290, 292, 540.
Holgate *v.* Killick, 311, 664.
Holland *v.* Brooks, 609, 610.
— *v.* Judd, 348.
— *v.* Vincent, 641.
Holloway *v.* Francis, 177, 318, 664.
— and Monk, In re, 681.
Holmes *v.* Higgins, 311.
— *v.* Wilson, 501.
Holt, In re, 35.
— *v.* Berry, 587.
— *v.* Gaslight and Coke Co., 466.
— *v.* Ward, 18.
Hookpayton *v.* Bussell, 87.
Hooper *v.* Abrahams, 165.
— *v.* Balfour, 118, 414.
— *v.* Hooper, 10, 438.
— *v.* Pierce, 327, 427.
Hopcraft *v.* Fermor, 591.
— *v.* Hickman, 208, 210, 211, 284, 291, 570.
Hopkins *v.* Davies, 415, 592.
— *v.* Great Northern Rail. Co., 459, 462.
Hopley *v.* Granger, 615.
Hopper, In re, 43, 176, 214, 224, 232, 234.
— *v.* Hackett, 273, 297.
Horne *v.* Blake, 411.
Horton *v.* Benson, 13, 124, 297, 449.
— *v.* Sayer, 47, 63.
Houghton *v.* Bankart, 83, 203.
— *v.* Fallowes, 602, 613.
Houlditch *v.* Houlditch, 590.
House *v.* Launder, 549.
Howett *v.* Clements, 74, 326, 352, 356, 480, 481, 487, 490, 666.
Hoyle *v.* Jennings, 148.
Huckle *v.* Wilson, 36.
Huddersfield *v.* Jacomb, 584, 658, 660, 663.
Hughes *v.* Garnett, 145, 219.
— *v.* Layton, 38.
Hulme *v.* Tenant, 16.
Humphreys *v.* Pearce, 342, 347.
Hungate *v.* Mease, 250.
Hunt *v.* Hunt, 338, 342, 346, 669.
Hunter *v.* Bennison, 114, 284, 285.

Hunter *v.* Rice, 4, 18, 522.
Huntig *v.* Ralling, 111, 304.
Huntley, In re, 482, 490.
Hurst, In re, 127.
— *v.* Bambridge, 288.
Hutcheson *v.* Eaton, 128.
Hutchins *v.* Hutchins, 610.
Hutchinson *v.* Blackwell, 351.
— *v.* Hodgson, 580.
— *v.* Shepperton, 124, 309.
Hyde *v.* Beardsley, 400.

I.

Imeson and Horner, In re, 677, 678.
Imhof *v.* Sutton, 90.
Ingram *v.* Bernard, 551, 613.
— *v.* Milnes, 273, 326, 449, 559.
— *v.* Webb, 259.
Inman *v.* Hill, 598.
Insull *v.* Moogen, 181, 483.
Irvine *v.* Elnon, 141.
Isitt *v.* Railway Passengers' Assurance Co., 319.
Issauchaud, Ex parte, 455.
Ives *v.* Jones, 640. See Jones *v.* Ives.
— *v.* Metcalfe, 304.
Iveson *v.* Conington, 27.
Ivey *v.* Young, 405.

J.

Jackson *v.* Clarke, 331, 354, 355, 600.
— *v.* Yabsley, 340.
Jacobs *v.* Phillips, 612.
James *v.* Attwood, 183, 232.
— *v.* Crane, 168.
— *v.* James, 160, 206.
Jamieson and Binns, In re, 25, 233.
Jay *v.* Byles, 320, 321.
Jebb *v.* M'Kiernan, 41, 253.
Jeffery *v.* Guy, 546.
Jeffries *v.* Lovel, 89.
Jenkins, In re, 195, 242, 243.
— *v.* Betham, 42.
— *v.* Law, 59.
Jenkinson *v.* Allison, 544.
Jennings *v.* Vandeputt, 229.
Jephson *v.* Howkins, 321.
Jewell *v.* Christie, 277.
Johnson *v.* Altrincham, &c., Building Society, 36.
— *v.* Collie, 150, 151, 229, 238.
— *v.* Durant, 306, 505, 542, 550, 561.
— *v.* Hodgson, 6, 441, 524.
— *v.* Hopper, 63.
— *v.* Latham, 282, 438, 440, 481, 491, 627, 644.
— *v.* Ogilby, 11.
Johnson *v.* Wilson, 4, 268, 428, 443, 521, 541.
Johnstone *v.* Cheape, 112, 138, 185, 186, 327.
Jones's Case, 11.
Jones, Ex parte, 455.
— *v.* Beaumont, 89.
— *v.* Bennett, 518, 574, 699.
— *v.* Corry, 312.
— *v.* Harris, 16.
— *v.* Ives, 646.
— *v.* Jehu, 401.
— *v.* Jones, 399, 400, 574, 578.
— *v.* Powell, 19, 150, 299, 301, 363, 393, 395, 683.
— *v.* St. John's College, 61.
— *v.* Totty, 443.
— *v.* Turnbull, 528.
— *v.* Victoria Graving Dock Co., 70, 320.
— *v.* Wedgewood, 574.
— *v.* Williams, 575, 619, 620, 624, 629.
— *v.* Yates, 33.
Joplin *v.* Postlethwaite, 51, 421.
Jordan *v.* Berwick, 626.
Joseph and Webster, In re, 31, 58, 419, 576, 590.
Joy *v.* Hadley, 608.
Joyce *v.* Haines, 132, 251, 334.
Jupp *v.* Cooper, 608.
— *v.* Grayson, 304.
Juxon *v.* Thornhill, 544.

K.

Kampshire *v.* Young, 573, 698.
Kay *v.* Duchess de Pienne, 16.
Keen *v.* Batshore, 555.
Keene and Atkinson, In re, 120, 263, 313, 511, 512.
— *v.* Deeble, 73, 189, 401.
Keir *v.* Leeman, 12.
Kelcey *v.* Stupples, 392, 398.
Kellett *v.* Local Board of Health of Tranmere, 151, 241.
Kelsall *v.* Tyler, 36.
Kemp *v.* Rose, 112.
Kemshead, Ex parte, 33, 678.
Kendil *v.* Merrett, 81, 622, 640, 647.
Kendrick *v.* Davies, 330, 385, 389.
Kene *v.* Fleming, 86.
Kennard *v.* Harris, 688.
Kenrick *v.* Phillips, 175, 359, 634.
Kent *v.* Elstob, 306, 311, 316.
Kenyon *v.* Grayson, 536, 597.
Keogh *v.* Leeman, 12.
Kerr *v.* Jeston, 139, 144, 607, 610, 626.
Kettle *v.* Grove, 645.
Kilburn *v.* Kilburn, 342, 344, 346, 669.
Kill *v.* Hollister, 45.
Kimberley *v.* Dick, 112.

Kind *v.* Carter, 546.
King *v.* Bowen, 257, 258, 271, 549.
— *v.* Dundonald, Lord, 348.
— *v.* Joseph, 106, 154, 610.
— *v.* Packwood, 600.
Kinge *v.* Fines, 279.
Kingsley *v.* Young, 524.
Kingston *v.* Phelps, 553.
Kingwell *v.* Elliott, 196, 510.
Kirk *v.* Strickwood, 13.
— *v.* Unwin, 144, 448.
Kirkus *v.* Hodgson, 86, 582, 634.
Kirkwood *v.* Webster, 639, 640.
Kirwan *v.* Goodman, 11.
Kitchin *v.* Turnbull, 52.
Knight *v.* Burton, 4, 124, 271, 337, 366, 443.
— *v.* Coales, 90.
— *v.* Stone, 19.
— *v.* Tabernacle Building Society, 319.
Knock *v.* Metropolitan Rail. Co., 460.
Knott *v.* Long, 283.
Knowles *v.* Holden, 9.
Knox *v.* Symmonds, 118, 120, 139, 144, 307, 579, 705.
Kockill *v.* Witherell, 280, 416.
Kyle, In re, 199.
Kynaston *v.* Jones, 259.
— *v.* Liddell, 479.

L.

Lacon *v.* Barnard, 501.
Laing *v.* Todd, 445, 494, 589, 620, 629.
Lambard *v.* Kingsford, 545.
Lambe *v.* Jones, 612, 627.
Lambert *v.* Dublin Electric Rail. Co., 477.
— *v.* Hutchinson, 150, 151, 164.
Lancaster *v.* Hemington, 304, 317, 667.
Lane *v.* Tanner, 447.
Lang *v.* Brown, 147, 225, 238.
Langman *v.* Holmes, 597.
Langridge *v.* Campbell, 390, 644.
Larchin *v.* Ellis, 189.
Larkin *v.* Lloyd, 369.
Lascelles *v.* Butt, 93.
Latuche *v.* Pasherante, 25.
Laugher *v.* Laugher, 597, 600, 605.
Law, In re, 584, 704.
— *v.* Blackburow, 345, 355.
— *v.* Garrett, 50.
Lawrence *v.* Bristol and N. Somerset Rail. Co., 124.
— *v.* Great Northern Rail. Co., 464, 466.
— *v.* Hodgson, 148, 296, 592, 671.
Le Bret *v.* Papillon, 542.
Leach *v.* Morris, 544.
Leake *v.* Butler, 544.
Lean *v.* Schutz, 16.
Leblé *v.* Carroll, 624.
Lee *v.* Elkins, 280, 327, 334, 427, 447, 545.
— *v.* Hemingway, 42, 59.
— *v.* Lingard, 118, 543, 633, 645, 650.
— *v.* Milner, 465.
— *v.* Page, 71.
Leeds *v.* Burrows, 42, 254.
Leeming *v.* Fearnley, In re, 134, 338, 339, 391, 404.
Lees *v.* Hartley, 593.
— *v.* Laforest, 64.
Leggett *v.* Finlay, 146, 147, 148.
Leggo *v.* Young, 89, 310, 314.
Leicester Club and County Racecourse Co., In re, 36.
Leicester *v.* Grazebrook, 485.
Leicester Waterworks Co. *v.* Barrow-on-Suir Assessment Committee, 9.
Leicester Waterworks Co. *v.* Cropstone, 558.
Leigh *v.* Brooks, 92.
Leslie *v.* Richardson, 150.
Levi *v.* Duncombe, 608.
Levick *v.* Epsom and Leatherhead Rail. Co., 99, 176.
Lewin *v.* Holbrook, 169, 203, 418, 590, 678.
Lewis *v.* Eley, 582.
— *v.* Harris, 377.
— *v.* Rossiter, 134, 435, 450, 540.
— *v.* Winter, 169, 634, 647, 678.
Libtrat *v.* Field, 131.
Liddell *v.* Johnstone, 255.
Lievesley *v.* Gilmore, 540.
Linch *v.* Dacey, 3, 546.
Lindsay *v.* Direct London and Portsmouth Rail. Co. 415, 605.
— *v.* Lindsay, 281.
Lindsey *v.* Aston, 334.
Linegar *v.* Pearce, 126, 365.
Linfield *v.* Ferne, 291.
Lingood, Ex parte, 527.
— *v.* Croucher, 502, 503, 504.
— *v.* Eade, 207, 283, 286, 421, 422, 423, 499, 699.
Linnen *v.* Williamson, 536.
Linsey *v.* Ashton, 549.
Lipscomb *v.* Palmer, 575.
Lister *v.* Lister, 443.
Little *v.* Newton, 59, 77, 216, 217, 218, 250, 582, 589, 640, 666, 679, 689.
Livingston *v.* Ralli, 45, 62.
Llanelly Rail. and Dock Co. *v.* London and North Western Rail. Co., 7.
Lloyd *v.* Archbowle, 189.
— *v.* Harris, 600, 620, 623.
— *v.* Lewis, 366, 636, 645.
— *v.* Mansell, 54, 622.
— *v.* Spittle, 404.
Lock *v.* Vulliamy, 256.
Lockwood *v.* Smith, 484.
Lodge *v.* Porthouse, 597, 613.
Lomax Arbitration, 58, 653.
London *v.* Lynn, 591.

London and Blackwall Rail. Co. *v.* Cross, 205, 453.
London, Chatham and Dover Rail. Co. *v.* South Eastern Rail. Co., 47, 65, 812.
London Dock Co. *v.* St. Paul's Shadwell, 312, 319, 483, 509.
London and North Western Rail. Co. *v.* Bedford, 10.
London and North Western Rail. Co. *v.* Bradley, 461.
London and North Western Rail. Co. *v.* Quick, 472, 473, 476, 622.
London and North Western Rail. Co. *v.* Smith, 457.
London, &c., Insurance Co. *v.* British, &c., Association, 88.
Londonderry Rail. Co. *v.* Leishman, 488, 699.
Longman *v.* East, 93, 366, 367, 369, 371.
Lonsdale, Lord *v.* Littledale, 59, 69, 116, 502, 503, 504, 698, 701, 702.
v. Whinnay, 595.
Lord *v.* Copper Miners' Co., 137, 227, 498.
— *v.* Hawkins, 337, 487.
— *v.* Lee, 137, 150.
— *v.* Lord, 214, 217, 234, 593, 610.
Love *v.* Honeybourne, 31, 288, 419, 671.
Lower *v.* Lower, 282.
Lowes *v.* Kermode, 84, 548, 706.
Lowndes *v.* Lowndes, 655, 676.
Lucas *v.* Wilson, 59, 71, 75, 609.
Ludbrook *v.* Barrett, 503.
Luddington *v.* White, 4, 548.
Ludlow, Mayor of *v.* Charlton, 21, 26.
Lumley *v.* Hutton, 18, 124, 235, 536.
Lund *v.* Campbell, 393.
— *v.* Hudson, 390, 641, 670, 678, 681.
Lupart *v.* Welson, 541, 544.
Lury *v.* Pearson, 48.
Lyall *v.* Lamb, 58.
Lynch *v.* Clemence, 447.
Lyng *v.* Sutton, 660.
Lynsey *v.* Aston, 334, 449.
Lyon *v.* Johnson, 47.

M.

Macarthur *v.* Campbell, 250, 362, 496, 609, 656, 663, 694.
MacBryde, Ex parte, 215, 227.
M'Can *v.* O'Ferrall, 163.
M'Carthy *v.* Metropolitan Board of Works, 459.
Macdougall *v.* Robertson, 137, 138, 169.
Mackay, In re, 70, 423, 446, 447, 672, 679.
Mackenzie *v.* Ascot Gas Co., 151, 241.
— *v.* Sligo and Shannon Rail. Co., 626.
Mackinnon *v.* Sligo and Shannon Rail. Co., 627.
Mackintosh *v.* Blyth, 374, 380.
— *v.* Great Western Rail. Co., 503.
Mackley *v.* Chillingworth, 639.
Macqueen *v.* The Nottingham Caledonian Society, 35, 174.
M'Rae *v.* M'Lean, 488, 627.
Maffey *v.* Godwyn, 588.
Maggs *v.* Yorston, 648.
Malcolm *v.* Fullarton, 125, 419.
Malmesbury Rail. Co. *v.* Budd, 112, 203.
Maloney *v.* Stockley, 267, 302, 362, 417, 670.
Manley *v.* Bray, 609, 626.
Manners *v.* Charlesworth, 443.
Manning *v.* Eastern Counties Rail. Co., 467, 555.
Mansell *v.* Burredge, 541, 544.
Manser *v.* Heaver, 133, 205, 282, 329, 694, 696.
Marder *v.* Cox, 326, 383.
Markham *v.* Jennings, 300.
Marks *v.* Marriott, 4, 251, 427, 520, 537, 544.
Marsack *v.* Webber, 397, 540.
Marsden *v.* Overbury, 180.
Marsh, In re, 130, 201, 215, 216, 304.
— *v.* Bulteel, 153, 154, 155, 542, 551.
— *v.* Hutchinson, 16.
— *v.* Wood, 34, 155, 163, 679.
Marshall and Dresser, In re, 289, 335, 671, 687.
— *v.* Powell, 140.
— *v.* Rutton, 16.
Martin *v.* Boulanger, 525.
— *v.* Burge, 287, 660, 671.
— *v.* Daws, 542.
— *v.* Fyfe, 90.
— *v.* Leicester Waterworks Co., 100, 472.
— *v.* Thornton, 507.
Mason *v.* Haddon, 49.
— *v.* Stokes Bay Rail. Co. 475, 477, 564.
— *v.* Wallis, 145, 148, 604.
— *v.* Watkins, 11.
— *v.* Whitehouse, 597, 598.
Massey *v.* Hall, 377.
Massy *v.* Aubry, 288.
Master *v.* Hamilton, 206.
Mathew *v.* Davis, 4, 126, 363.
Mathews *v.* Munster, 28.
Matlock Gaslight Co. *v.* Peters, 390.
Matson *v.* Trower, 174, 194, 196, 242, 256, 561.
Matthew *v.* Ollerton, 113.
Maule *v.* Maule, 215, 517.
Maunder, In re, 138, 665.

Maunsell *v.* Midland Great Western of Ireland Rail. Co., 204.
May *v.* Harcourt, 150.
Mayer *v.* Farmer, 654.
Mays *v.* Cannell, 345, 355, 433, 436.
Meggison *v.* ——, 543.
Mendell *v.* Tyrrell, 595, 622, 629.
Mercier *v.* Pepperell, 685, 704.
Merydith *v.* Alleyn, 545.
Metcalf *v.* Ives, 673.
Metropolitan Rail. Co. *v.* Turnham, 115.
Mexborough, Earl of *v.* Bower, 64.
Michael *v.* Myers, 86.
Michie, Ex parte, 34.
Middleton *v.* Chambers, 237.
— *v.* Weeks, 263, 271, 659, 687.
Midland Rail. Co. *v.* Heming, 583.
Miller *v.* De Burgh, 296, 436.
— *v.* Pilling, 369.
— *v.* Robe, 5, 385, 425.
— *v.* Shuttleworth, 320.
Millington *v.* Claridge, 77.
Mills *v.* Bayley, 157.
— *v.* Bowyer's Society, 181, 308, 480, 482, 484.
Milne *v.* Gratrix, 106, 152, 154, 610.
Milnes *v.* Gery, 711.
— *v.* Robertson, 34.
Milstead *v.* Craufield, 59, 582.
Minifie *v.* Railway Pass. Assur. Society, 48.
Mirabita *v.* Imp. Ottoman Bank, 320.
Mitchell *v.* Governor of Ceylon, 157.
— *v.* Harris, 65, 229, 235, 673.
— *v.* Staveley, 268, 276, 549, 652.
Moffatt *v.* Cornelius, 49.
Mole *v.* Smith, 27.
Mondel *v.* Steele, 542.
Montgomery, Lord *v.* Buckley, 675.
Moore *v.* Bedel, 446.
— *v.* Booth, 181.
— *v.* Bowmaker, 85, 86.
— *v.* Butlin, 70, 348, 528, 660, 669, 686.
— *v.* Darley, 250, 385, 496, 657, 663.
— *v.* Great Southern and Western Rail. Co., 460.
— *v.* Watson, 378.
Mordue *v.* Palmer, 142, 384, 484, 486, 488, 529.
Morel *v.* Byrne, 77, 80.
Morgan *v.* Ainslie, 89.
— *v.* Birnie, 112.
— *v.* Bolt, 218, 232.
— *v.* Man, 545, 549.
— *v.* Mather, 116, 118, 119, 307, 316, 420, 512, 665, 671.
— *v.* Miller, 22, 78, 707.
— *v.* Morgan, 112, 189.
— *v.* Pindar, 699.
— *v.* Smith, 330, 381, 382, 386, 404, 430, 431, 670, 690.
Morgan *v.* Tarte, 83, 159.
— *v.* Thomas, 77, 344, 349.
— *v.* Williams, 108, 190.
Morley *v.* Newman, 424.
Morphett, In re, 56, 134, 138, 194, 220, 415, 418, 420, 672.
Morris *v.* Bosworth, 403.
— *v.* Creach, 4.
— *v.* Fowler, 608.
— *v.* Morris, 137, 181, 382, 480, 481, 491, 625, 806.
— *v.* Reynolds, 498, 597.
Morrison *v.* Glover, 37.
Morse, In re, 640.
— *v.* Merest, 152, 516, 713.
— *v.* Sury, 131.
Moscati *v.* Lawson, 46, 74, 84, 707.
Moseley *v.* Simpson, 176, 196, 220, 504.
Mosley *v.* Baller, 37.
Mudy *v.* Osam, 21, 446.
Mulkern *v.* Lord, 37.
Mullock *v.* Jenkins, 38.
Munday *v.* Black, 187, 483, 664.
Municipal Permanent Building Society *v.* Kent, 37.
Municipal Permanent Building Society *v.* Richards, 38.
Munro *v.* Rendall, 379.
Murray *v.* Gregory, 554.
— *v.* The Sunderland Dock Co. 89.
Musselbrook *v.* Dunkin, 200, 496, 656, 657, 663.
Mylne *v.* Dickinson, 204.
Mysore West Gold Mining Co., In re, 96, 181.

N.

Nalder *v.* Batts, 203, 352, 431, 484.
Naters *v.* Sutton, 544.
Neale *v.* Clarke, 403.
— *v.* Ledger, 232.
— *v.* Postlethwaite, 620, 625.
Nerot *v.* Wallace, 11, 33.
Nettleton *v.* Crosby, 679.
New River Company *v.* Johnson, 459.
Newall *v.* Elliot, 515.
Newbold *v.* Metropolitan Rail. Co., 101, 319, 470, 476, 540, 591, 622.
Newgate *v.* Degelder, 137, 152, 154.
Newry and Enniskillen Rail. Co. *v.* The Ulster Rail. Co., 173, 187.
Newsome *v.* Bowyer, 16.
Newton *v.* Hetherington, 61, 582.
— *v.* Taylor, 52.
— *v.* Walker, 590.
Nicholls *v.* Jones, 430, 432, 450.
Nichols *v.* Chalie, 58, 65, 69, 70, 676, 698.
— *v.* Grunnion, 297.
— *v.* Roe, 58, 70, 582, 698.

Nicholson *v.* Sykes, 391, 641.
Nickalls *v.* Warren, 22, 185, 479, 487, 489, 666.
Nickels *v.* Hancock, 280, 325, 447, 563, 564, 566.
Nobel, &c. *v.* Stewart, 49.
Noble *v.* Harris, 154.
Nokes *v.* Frazer, 405.
Nolan *v.* Copeland, 639.
Norris *v.* Daniel, 338, 339.
North British Rail. Co. *v.* Trowsdale, 660.
North Staffordshire Rail. Co. *v.* Landor, 99, 475.
North Staffordshire Rail. Co. *v.* Wood, 99.
Northumberland, Duke of *v.* Errington, 541.
Norton *v.* Mascall, 565.
Norwich *v.* Norwich, 334, 444, 446.
Nott *v.* Long, 281.
Noy *v.* Reynolds, 184.

O.

Oates *v.* Bromil, 248, 544.
O'Flannagan *v.* Geoghegan, 180.
Oglander *v.* Baston, 15.
Oglesby's Arbitration, 582.
Oldfield *v.* Price, 151.
— *v.* Wilmer, 281, 546.
Oliver *v.* Burt, 580.
— *v.* Collins, 233, 234.
— *v.* Scott, 657, 661.
Orient Steam Navigation Co. *v.* Ocean Marine Co., 639.
Ormelade *v.* Coke, 262, 297, 545.
Ormerod *v.* Tate, 527, 598.
— *v.* Todmorden Mill Co., 90, 92.
Ormes *v.* Beadel, 78.
Ormond *v.* Kynnersley, 574.
O'Rourke *v.* Railway Commissioners, 3.
Orphan Board, President, &c., of *v.* Van Reenen, 166.
Orphan Working School *v.* Henley, 49, 90.
Osborn's Case, 334.
O'Sullivan *v.* Hutchins, 162, 704.
Oswald *v.* Lord Grey, 187, 686.
O'Toole *v.* Pott, 646.
Owdy *v.* Gibbons, 55, 113.
Owen *v.* Hurd, 71, 588, 603.
— *v.* London and North Western Rail Co., 115.
— *v.* Waters, 544.
Owens *v.* Vanhomrigh, 399.
Oxenham *v.* Lemon, 519.

P.

Padley *v.* Lincoln Waterworks Co., 501, 503.
Page *v.* Meek, 45.
Palmer's Case, 614.
Palmer *v.* Hardwick, 203.
— *v.* Metropolitan Rail. Co., 149.
Pappa *v.* Rose, 497.
Parberry *v.* Newnham, 150.
Pardoe *v.* Epping Forest Conservators, 472.
Parfitt *v.* Chambre, 416.
Parker *v.* Bach, 583.
— *v.* Burgess, 600.
— *v.* Burroughs, 112, 117.
— *v.* Parker, 251.
Parkes *v.* Smith, 61, 150, 515, 547.
Parkinson *v.* Smith, 386, 596, 628.
Parr *v.* Winteringham, 43, 114.
Parrott *v.* Shellard, 702.
Parsons *v.* Parsons, 533.
Pascoe *v.* Pascoe, 413, 544, 548.
Paterson *v.* Groses, 594.
Paull *v.* Paull, 25, 26, 259, 595, 609.
Paxton *v.* Great North of England Rail. Co., 635, 661.
Payne *v.* Acton, 401.
— *v.* Bailey, 307, 708.
— *v.* Cook, 262.
— *v.* Deakle, 147.
Peacock *v.* Monk, 16.
Peake *v.* Finchley Local Board, 471.
Pearman *v.* Carter, 82.
Pearse *v.* Cameron, 73, 74, 79, 359.
— *v.* Pearse, 366.
Pearson *v.* Archbold, 390, 391, 623.
— *v.* Henry, 30, 555.
— *v.* Overell, 488.
— *v.* Ripley, 393.
Pedley *v.* Frampton, 402.
— *v.* Goddard, 58, 283, 290, 381, 609, 655, 669.
— *v.* Westmacott, 59.
Peebles *v.* Hay, 604, 625.
Pell *v.* Addison, 90.
Pellatt *v.* Mackwick, 90.
Pennell *v.* Walker, 50, 417.
Penny *v.* South Eastern Rail. Co., 458, 461.
Penrice *v.* Williams, 180.
Pepper *v.* Gorham, 188, 205, 665.
Percival, In re, 29.
Perkins *v.* Potts, 264.
Perriman *v.* Steggall, 118, 200, 304.
Perring and Keymer, In re, 220, 582, 658.
Perry *v.* Mitchell, 289, 294, 549.
— *v.* Nicholson, 254, 517, 544.
Pescod *v.* Pescod, 231, 666.
Petch *v.* Fountain, 134.
Peters *v.* Anderson, 323, 679.
Peterson *v.* Ayre, 205, 218, 219, 481, 687.
Petty *v.* Daniel, 608, 677.
Philips *v.* Bury, 43.

Phillips *v.* Evans, 308, 309, 667, 685.
— *v.* Gill, 624, 677.
— *v.* Higgins, 344, 627.
— *v.* Hopwood, 479.
— *v.* Knightley, 425, 447, 537, 545.
Phipps *v.* Ingram, 157, 186, 204, 665.
Pickering *v.* Cape Town Rail. Co., 204.
— *v.* Watson, 327, 427.
Piercy *v.* Roberts, 33.
— *v.* Young, 47, 51, 128, 153.
Pigot's Case, 529.
Pike *v.* Newman, 602, 677.
Pile *v.* Pile, 463.
Pilmore *v.* Hood, 675, 681.
Pinhorn *v.* Tuckington, 542.
Pinkerton *v.* Caslon, 360.
Pinkny *v.* Bullock, 291, 330.
Pitcher *v.* Rigby, 118, 515, 699, 702.
Pits *v.* Wardal, 446, 545, 546.
Pitt *v.* Coombs, 615.
Platt *v.* Hall, 353, 634, 681.
Plews *v.* Baker, 51.
— *v.* Middleton, 193, 217, 218, 583, 675.
Plummer *v.* Lee, 293.
Ponsford *v.* Swaine, 494, 506.
Pontifex *v.* Severn, 367.
Pool *v.* Bousfield, 11.
Poole *v.* Pipe, 565.
— *v.* Selwood, 708.
Pope *v.* Bish, 572.
— *v.* Brett, 288, 334, 335, 444.
— *v.* Lord Duncannon, 162.
Porch *v.* Hopkins, 487, 709.
Portishead Warehouse Co. *v.* Bristol, &c. Rail. Co., 319.
Portland, Countess of *v.* Prodgers, 16.
Potter *v.* Day, 525.
— *v.* Newman, 150, 307, 656, 660.
Potts *v.* Ward, 167, 668.
Powell *v.* Phillips, 59.
— *v.* Ward, 606.
Pownall *v.* King, 58, 582.
Poyner *v.* Hatton, 361, 599.
Pratt *v.* Hillman, 311, 316.
— *v.* Salt, 381, 383.
Prentice *v.* Loudon, 36.
— *v.* Reed, 73, 74, 167, 358, 359, 438.
Preston *v.* Eastwood, 255, 668.
Price *v.* Hollis, 4, 256, 306.
— *v.* Hughes, 655.
— *v.* James, 81.
— *v.* Popkin, 258, 412, 438, 672.
— *v.* Price, 304, 514.
— *v.* Williams, 510, 705.
Priddel *v.* Sutton, 415.
Pringle *v.* Gloag, 384, 528.
Prior *v.* Hembrow, 22, 95, 118, 169.
Pritchard *v.* Ovey, 711.
Proctor *v.* Williamson, 175, 209.
Prosser *v.* Goringe, 3, 21, 22, 78, 434.
Proudfoot *v.* Poile, 19, 383, 447, 674.
Proudfoot *v.* Hart, 372, 695.
Pullen *v.* Liverpool Corporation, 240.
Purslow *v.* Bailey, 411, 541, 546.
Pusey *v.* Desbouvrie, 570.
Pybus *v.* Smith, 16.
Pyne, In re, 601.

R.

Radcliffe *v.* Hall, 340.
Rainforth *v.* Hamer, 53, 290.
Randal *v.* Gurney, 181.
Randall *v.* Randall, 262, 266, 609.
Randell *v.* Thompson, 49.
Randegger *v.* Holmes, 48.
Rathven *v.* Elgin, 114.
Ravee *v.* Farmer, 507, 519, 552, 560.
Rawling *v.* Wood, 248, 593.
Rawsthorn *v.* Arnold, 660, 684.
Rawtree *v.* King, 82.
Rayner, Ex parte, 471, 474.
Read *v.* Fore, 601.
— *v.* Garnett, 645, 650.
— *v.* Victoria Station, &c. Co., 455.
Reade *v.* Dutton, 145, 219.
Rees *v.* Rees, 612, 627.
— *v.* Waters, 75, 131, 263, 326, 360, 389, 416, 669, 687.
Reeves *v.* Macgregor, 390, 395.
— *v.* White, 36.
Regent's Canal Co. *v.* Ware, 477, 564.
Reid *v.* Ashby, 400.
— *v.* Deer, 600.
— *v.* Fryatt, 143, 145.
Rennie *v.* Mills, 343, 643.
Rex aut Reg. *v.* Anon., 607.
— *v.* Bardell, 12, 14, 59, 75, 154, 155, 156, 157, 203.
— *v.* Bell, 606.
— *v.* Bingham, 97, 526, 542, 613, 674, 679.
— *v.* Biram, 473, 498.
— *v.* Blakemore, 13.
— *v.* Boyce Coombe, 470.
— *v.* Brewer, 133, 315.
— *v.* Bristol Dock Co., 457.
— *v.* Brown, 462, 467.
— *v.* Burslem Local Board of Health, 455.
— *v.* Calver, 601.
— *v.* Cambrian Rail. Co., 459, 476.
— *v.* Cheadale Savings Bank, 35.
— *v.* Coleridge, Lord, 226.
— *v.* Coombs, 13, 14.
— *v.* Cotesbatch, 13.
— *v.* Cotton, 13, 557.
— *v.* Curwen, 617.
— *v.* Davis, 526, 611, 616.

Rex aut Reg. v. Eastern Counties Rail. Co., 458, 460.
— v. Evans, 35.
— v. Fontainemoreau, 556, 557.
— v. Gore, 12, 588, 649.
— v. Grant, 35, 242, 442.
— v. Great Northern Rail. Co., 470.
— v. Great Western Rail. Co., 681.
— v. Hallett, 184.
— v. Hanks, 183.
— v. Hardey, 12, 13, 14, 59, 69, 75, 106, 157, 604.
— v. Harding, 14.
— v. Harrison, 602.
— v. Haslingfield, 554.
— v. Helston, 27.
— v. Hemsworth, 163, 595, 616.
— v. Hill, 26, 149.
— v. Hobbes, 165.
— v. Jones, 602.
— v. Kant, 13, 14.
— v. Lancaster and Preston Rail. Co., 468.
— v. Leeds and Selby Rail. Co., 465.
— v. Lindsay, 105.
— v. London and North Western Rail. Co., 454, 456, 457, 468.
— v. Maffey, 588, 589.
— v. Metropolitan Board of Works, 459, 462.
— v. Metropolitan Commissions of Sewers, 454, 455, 468.
— v. Metropolitan Rail. Co., 457.
— v. Middlesex Justices, 97, 380, 649.
— v. Middlesex, Sheriff of, 469, 602, 603.
— v. Mildenhall Savings Bank, 35.
— v. Moate, 13, 377, 388, 405.
— v. Myers, 614.
— v. Natland, 9.
— v. Nockolds, 6.
— v. Norman, 183.
— v. Northampton JJ., 9, 27.
— v. Outram, 229.
— v. Paget, 605.
— v. Pease, 461.
— v. Price, 582.
— v. Rant, 12, 14.
— v. St. Katharine's Dock Co., 269, 651.
— v. St. Luke's, Chelsea, 460.
Rex aut Reg. v. Shillibeer, 12, 59, 75, 156, 157.
— v. Shortridge, 36.
— v. Sloman, 600.
— v. South Devon Rail. Co., 475, 495.
— v. Stevens, 139, 144.
— v. Tooley, 600.
— v. Trafford, 37.
— v. Vaughan, 459.
— v. Vreones, 184.
— v. Wait, 153.
— v. Wallasey Local Board, 460.
— v. West Midland Rail. Co., 475.
— v. West Riding JJ., 97, 380, 649.
— v. Wheeler, 69, 664, 699.
— v. Whitaker, 165, 216.
— v. Witham Savings Bank, 35.
— v. York JJ., 379.
Reynal, Ex parte, 403.
Reynell v. Luscomb, 698.
Reynolds v. Askew, 658, 660, 662, 673, 677.
— v. Flower, 401.
— v. Gray, 229, 233, 234.
— v. Harris, 349, 390, 392, 393, 637, 642.
Rhodes v. Airedale Drainage Commissioners, 60, 101, 319, 455, 458, 470, 556, 560.
— v. Haigh, 167.
Rhys v. Dare Valley Rail. Co., 316, 453, 469, 507.
Riccard v. Kingdon, 660, 661, 680.
Richard v. Talbot, 178, 372.
Richards v. Basset, 555.
— v. Browne, 271.
— v. Cullern, 181.
— v. Easto, 322.
— v. Kitchen, 608.
Richardson v. Chancey, 594.
— v. Kensitt, 406.
— v. Nourse, 307.
— v. Smith, 711.
— v. South Eastern Rail. Co., 471.
— v. Worsley, 381.
Richmond v. Parkinson, 601, 607.
Rickards v. Patterson, 620, 623, 624.
Ricket v. Metropolitan Rail. Co., 460.
Ricketts, In re, 180, 181.
— v. Gurney, 181.
Rider and Fisher, In re, 266.
Riddell v. Sutton, 30, 188, 541, 550.
Ridoat v. Pye, 182, 665.
Ridout v. Pain, 307.
Rigby v. Okell, 72, 387.
Ringer v. Joyce, 189, 680.
Ringland v. Lowndes, 103, 112, 197, 231, 241, 661.

Ripley *v.* Great Northern Rail. Co., 466.
Risden *v.* Inglet, 262, 271.
Robbins *v.* Standard, 551.
Roberts *v.* Eberhardt, 387, 423, 549.
— *v.* Evans, 582.
— *v.* Marriett, 124, 427, 549.
— *v.* Newbold, 19.
Robertson *v.* Hutton, 628.
— *v.* Sterne, 400.
Robinson *v.* Davies, 160, 206.
— *v.* Davis, 606.
— *v.* Henderson, 385.
— *v.* Robinson, 177.
Robison *v.* Calwood, 251, 544.
Robson *v.* ——, 30, 590.
— *v.* Lees, 89, 181.
— and Railston, In re, 124, 268, 518.
Rock *v.* Slade, 32.
Rodham *v.* Stroher, 545.
Roe *d.* Wood *v.* Doe, 229, 377.
Rogers *v.* Dallimore, 5, 86, 307, 661, 662.
— *v.* Kearns, 79.
— *v.* Stanton, 22, 588, 589.
Rolland *v.* Cassidy, 122, 213.
Rooney *v.* Whiteley, 180.
Roper *v.* Lendon, 48, 64.
— *v.* Levi, 544, 550.
Rose *v.* Redfern, 386.
— *v.* Spark, 293.
Ross *v.* Boards, 269, 413, 425, 672.
— *v.* Clifton, 5, 356, 431.
— *v.* Ross, 582, 646, 659.
— *v.* York, &c., Rail. Co., 115.
Rosse *v.* Hodges, 295, 534.
Roulstone *v.* Alliance Insurance Co., 352, 547.
Round *v.* Hatton, 3, 427, 436.
Rous *v.* Lun, 283, 444.
Rouse *v.* Meier, 157.
Routh *v.* Peach, 424, 671, 701, 702.
Routledge *v.* Carruthers, 517.
— *v.* Thornton, 234.
Rowcliffe *v.* Leigh, 181.
Rowe *v.* Rhodes, 401.
— *v.* Sawyer, 610.
— *v.* Wood, 95, 571, 712.
— *v.* Young, 545.
Rowsby *v.* Manning, 544.
Royston *v.* Rydall, 280, 416.
Rudd *v.* Coe, 582.
Rudder *v.* Price, 541.
Rudston *v.* Yates, 18.
Rule *v.* Bryde, 267, 392, 620.
Rumsey *v.* King, 28.
Rushworth *v.* Barron, 59, 660, 677.
Russell, Ex parte, 182.
— *v.* Headington, 536.
— *v.* Pelegrini, 47, 63.
— *v.* Russell, 48.
— *v.* Yorke, 611.
Rust *v.* Victoria Graving Dock Co., 318, 369, 508.
Rybott *v.* Barrell, 503, 703.

S.

Saccum *v.* Norton, 163.
Sacker *v.* Ragozine, 93.
Sackett *v.* Owen, 78, 561.
Sadler *v.* Smith, 137.
Salkeld and Slater, In re, 195, 238, 242, 243, 667.
Sallows *v.* Girling, 220, 265, 268.
Salm Kyrburg *v.* Posnanski, 606.
Salmon *v.* Osborn, 574.
— *v.* Watson, 555.
Salter *v.* Roberts, 630.
— *v.* Yeates, 137, 138, 255, 259, 353.
Samon's Case, 294, 444.
Samon *v.* Pit, 444.
Samuel *v.* Cooper, 200, 266, 666, 669.
Samways *v.* Eldsley, 117.
Sandback Trustees *v.* North Staffordshire Rail. Co., 115, 474.
Savage *v.* Ashwin, 356.
Saxby *v.* Gloucester Wagon Co., 92.
Scale *v.* Fothergill, 515.
Scales *v.* East London Waterworks, 189, 674.
Scott *v.* Avery, 63.
— *v.* The Liverpool Corporation, 42, 63, 71, 502, 503.
— *v.* Van Sandau, 158, 159, 198, 199, 202, 317, 321, 324, 635.
— *v.* Williams, 592.
— *v.* Wray, 565.
Scougull *v.* Campbell, 504, 635.
Seagrave *v.* Pope, 37.
Seal *v.* Crowe, 546.
Seaward *v.* Howey, 592, 609.
Seccombe *v.* Babb, 332, 383, 385.
Seckham *v.* Babb, 385, 672.
Secretary of State *v.* Fletcher, 440.
Selby *v.* Colne Valley and Halstead Rail. Co., 477.
— *v.* Russell, 281, 283.
Seligman *v.* Le Boutillier, 48.
Selkirk, Lord *v.* Nasmith, 168.
Sell *v.* Carter, 660.
Senior *v.* Metropolitan Rail. Co., 460.
Serle *v.* Fardell, 371, 695.
Sharman *v.* Bell, 304, 311, 316.
Sharp *v.* Eveleigh, 406.
— *v.* Nowell, 209.
Sharpe *v.* Bickerdyke, 186.
— *v.* Hancock, 440, 531, 542.
— *v.* Metropolitan District Rail. Co., 213, 471, 473, 474, 477, 540.
— *v.* San Paulo Rail. Co., 63.
Shaw *v.* Birmingham Corporation, 523.
— *v.* Pitt, 81, 484.
Shelf *v.* Bailey, 21, 449.
Shelley *v.* Wright, 545.
Shelling *v.* Farmer, 507, 558, 560.
Sheonath *v.* Ramnath, 197.
Shephard *v.* Brand, 116, 381.

Shepherd *v.* Norwich Corporation, 225, 452.
— *v.* Shepherd, 544.
Sheridan *v.* Nagle, 320.
Sherran *v.* Marshall, 68.
Sherry *v.* Oke, 322, 420, 662, 681, 682, 690.
— *v.* Richardson, 279, 300.
Short *v.* Frank, 583.
Shrubb *v.* Lee, 478.
Shubrook *v.* Tufnell, 319.
Silversides *v.* Bowley, 401.
Sim *v.* Edwards, 259, 376, 636.
Sims *v.* Lenders, 160.
Simmons *v.* Swaine, 262, 280, 294, 331, 421.
Simon *v.* Gavil, 337, 536.
Simpson *v.* Emmerson, 305.
Sinclair *v.* Great Eastern Rail. Co., 375, 639.
Sinden *v.* Banks, 38.
Sinidino *v.* Kitchen, 127, 414.
Skee *v.* Coxon, 72, 106, 108, 154.
Skeete, In re, 445, 559.
Skerratt *v.* North Staffordshire Rail. Co., 99, 140, 147, 230, 240.
Skinner *v.* Andrews, 544, 549.
Skipper *v.* Grant, 412.
Skipworth *v.* Skipworth, 130, 333.
Slack *v.* Buchanan, 507.
Slowman *v.* Wiggins, 200.
Smailes *v.* Wright, 235, 236.
Smalley *v.* Blackburn Rail. Co., 135, 268, 428, 518, 520, 522, 688.
Smith *v.* Allen, 48.
— and Blake, In re, 583, 658.
— *v.* British Marine Insurance Co., 47.
— *v.* Edge, 400.
— *v.* Festiniog Rail. Co., 358.
— *v.* Fielder, 107.
— *v.* Goff, 182.
— *v.* Hailey, 405.
— *v.* Hartley, 256, 258.
— *v.* Johnson, 517, 612.
— *v.* Jones, 525.
— *v.* Kirfoot, 544.
— *v.* Muller, 125.
— *v.* Nelson, 41, 64, 67, 153, 166, 214.
— *v.* Parkside Mining Co., 659, 677.
— *v.* Reece, 260, 342, 347, 363, 404.
and Reeves, In re, 599, 601, 605, 611, 614, 628.
— *v.* Sainsbury, 674.
— *v.* Sparrow, 182, 189.
— *v.* Symes, 58, 582.
— *v.* Troup, 494, 605, 624, 628.
— *v.* Trowsdale, 552.
— *v.* Ward, 17.
— *v.* Whitmore, 699, 700.
— *v.* Wilson, 382.
Smurthwaite *v.* Richardson, 79.
Snook *v.* Hellyer, 163, 445, 690.
Soilleux *v.* Herbst, 10, 17.
Solomon *v.* Solomon, 189, 674.
Somers, In re *v.* Metropolitan Rail. Co., 469.
Soulsby *v.* Hodgson, 208, 245.
Southampton Gas, &c., Co. *v.* Southampton Union, 98.
South Sea Co. *v.* Bumstead, 120, 573, 673.
Sowdon *v.* Mills, 129, 350, 361.
Spain *v.* Cadell, 392, 406, 407.
Sparrow *v.* Carruthers, 16.
— *v.* Hill, 638.
Spartali *v.* Van Hoorn, 49.
Spence *v.* Clarkson, 620.
— *v.* Eastern Counties Rail. Co., 176, 257.
— *v.* Stuart, 181.
Spencer *v.* Newton, 182.
— *v.* Spencer, 519.
Spettigue *v.* Carpenter, 158, 676, 698.
Spigurnell *v.* Jene, 412.
Spivy *v.* Webster, 31, 590, 599.
Spooner *v.* Payne, 56, 267, 549, 553, 593, 621, 630.
Sprigens *v.* Nash, 235.
Spurr *v.* Rayson, 85.
Squib *v.* Bolton, 315.
Squire *v.* Grevett, 327, 427, 536, 541.
Stafford *v.* Coxon, 92.
— *v.* Stafford, 486.
Stahlschmidt *v.* Walford, 337.
Stains *v.* Wild, 296.
Staite *v.* Haddon, 148, 149.
Stalworth *v.* Inns, 216, 217, 219, 249, 510, 540, 593, 689.
Standley *v.* Hemmington, 429, 535, 598.
Staniforth *v.* Lyall, 685.
Stanley *v.* Blundell, 785.
Stanway *v.* Healop, 542.
Staples *v.* Hay, 684.
Stead *v.* Salt, 20.
Steeple *v.* Bonsall, 80, 126, 364.
Steers *v.* Harrop, 58.
— *v.* Lashley, 5, 519, 520.
Steff *v.* Andrews, 4, 304, 306, 698.
Stephens *v.* Lowe, 54, 135, 140, 142, 148.
Stephenson *v.* Browning, 381, 603, 609, 655.
Stevens *v.* Chapman, 391.
— *v.* Matthews, 427, 537.
— *v.* Russell, 401.
Stevenson *v* Watson, 112, 497.
Steward *v.* East India Co., 501, 502, 703.
Stewart *v.* Williamson, 155.
Stiles *v.* Triste, 279, 587.
Still *v.* Halford, 540, 553, 554.
Stock *v.* De Smith, 592, 594.
Stockley *v.* Shopland, 22, 71, 131.
Stockport, &c., Rail. Co., In re, 462.
Stodhart *v.* Johnson, 74.

Stokes *v.* Lewis, 381, 494, 589.
Stone *v.* Knight, 19.
— *v.* Phillips, 268, 325.
— *v.* Yeovil Corporation, 468.
Stonehewer *v.* Farrar, 256, 270, 300, 342, 346, 348, 432, 439, 514, 671, 689.
Stooke *v.* Taylor, 403.
Storke *v.* De Smeth, 300, 331.
Storey *v.* Bloxham, 548.
— *v.* Garry, 593.
Story, In re, 59.
— *v.* Johnson, 443.
Strachan *v.* Dougall, 17.
Strangford *v.* Green, 20, 298.
Stratton *v.* Green, 377.
Strauss *v.* Francis, 28.
Street *v.* Rigby, 63, 65, 96, 183, 567.
Strike *v.* Benstey, 546.
Strutt *v.* Rogers, 326, 377, 599.
Stuart *v.* Nicholson, 553.
Stubbs *v.* Boyle, 372, 680.
Stunnel *v.* Tower, 601.
Sturgis *v.* Curzon, 46.
Sturt *v.* Moggridge, 116.
Styring *v.* Lloyd, 626.
Sullivan *v.* Rivington, 371.
Summers *v.* Formby, 397, 401, 708.
— *v.* Grosvenor, 401.
Sutcliffe *v.* Brooke, 34, 544, 545.
Sutton Harbour Improvement Co. *v.* Hitchens, 455, 475.
Swayne *v.* White, 612, 627.
Sweet *v.* Hole, 566.
Swiney *v.* Balleymena Commissioners, 47.
Swinfen *v.* Chelmsford, Lord, 28.
— *v.* Swinfen, 28.
Swinford, In re, 139.
— *v.* Burn, 493, 560.
— and Horn, In re, 668.
Swinglehurst *v.* Altham, 397, 398, 405.
Sybray *v.* White, 254, 255, 555.
Sykes *v.* Brook, 368.
— *v.* Haigh, 597.
Symes *v.* Goodfellow, 201.
Symonds *v.* Mills, 527, 534.
Synge *v.* Jervoise, 661.

T.

Talbot *v.* Earl of Shrewsbury, 516.
— *v.* Fisher, 583, 591, 622.
Tancred *v.* Steel Company of Scotland, 41.
Tandy *v.* Tandy, 286, 325, 428, 669, 671, 689.
Tattersall *v.* Groote, 62, 64, 65.
— *v.* Parkinson, 623.
Taverner *v.* Skingley, 449.
Tayler *v.* Marling, 163, 359, 392, 404, 499, 526, 633, 641, 678, 679.
Taylor, In re, 582, 583.
Taylor *v.* Gordon, Lady, 376, 377.
— *v.* Gregory, 85, 708.
— *v.* Grieve, 138.
— *v.* Parry, 4, 23, 54.
— *v.* Scott, 606.
— *v.* Shuttleworth, 34, 74, 163, 329, 351, 358, 359, 392, 404, 430, 434, 589, 633, 641, 670, 679, 686.
Teale *v.* Younge, 317.
Teasdale *v.* Atkins, 150.
Tebbutt *v.* Ambler, 428, 429, 597.
Temple, Ex parte, 182.
Templeman and Read, In re, 215, 221, 300, 666, 677, 689.
Tennant *v.* Belfast, Mayor of, 115.
Tew *v.* Harris, 44.
Thaire *v.* Thaire, 248.
Thames Iron Works *v.* Reg., 52, 258.
Tharsis Sulphur Co. *v.* Loftus, 497.
The Sylph, 516.
Thinne *v.* Rigby, 281, 294, 335, 428.
Thomas *v.* Atherton, 20.
— *v.* Fredericks, 44, 63.
— *v.* Harrop, 220, 259.
— *v.* Hawkes, 397.
— *v.* Hewes, 26.
— *v.* Philby, 583.
Thomlinson *v.* Arriskin, 131, 298, 544, 548.
Thompsett *v.* Bowyer, 76, 77, 80.
Thompson *v.* Atkinson, 402.
— *v.* Blythe and Tyne Rail. Co., 233.
— *v.* Charnock, 61, 62.
— *v.* Jennings, 5, 646, 660, 690, 707.
— *v.* Miller, 248.
— *v.* Noel, 564, 570.
Thomson *v.* Anderson, 157, 181.
— *v.* Austen, 508.
— *v.* Planet Benefit Building Society, 36.
Thorburn *v.* Barnes, 128, 550.
Thornton *v.* Hornby, 593.
Thorp *v.* Cole, 9, 213, 281, 284, 292, 293, 329, 381, 382, 520, 589.
— *v.* Eyre, 521, 522, 559.
Threlfall *v.* Fanshaw, 375, 386, 495, 540, 596.
Thursby *v.* Helbert, 334, 446.
Tidswell, In re, 175, 191, 193, 209, 294, 418, 488.
Tilford *v.* French, 541, 544.
Tillam *v.* Copp, 172, 174, 175.
Tillett *v.* Charing Cross Bridge Co., 563, 711.
Tipping *v.* Smith, 294, 337, 428.
Tittenson *v.* Peat, 116, 571, 665, 701.
Titus *v.* Perkins, 288.
Toby *v.* Lovibond, 126, 311, 316, 357, 362, 365, 428.
Todd *v.* Metropolitan Rail. Co., 466.
Tollit *v.* Saunders, 224, 244.
Tomes *v.* Hawkes, 53, 73, 138, 352.

Tomlin *v.* Mayor of Fordwich, 56, 282, 333, 428, 539, 542, 544.
Tope *v.* Hockin, 500.
Toussaint *v.* Hartop, 74, 167.
Travers *v.* Lord Stafford, 116, 515.
Tredwen *v.* Holman, 63.
Tregoning *v.* Attenborough, 375.
Treherne *v.* Dale, 625.
Tremenhere *v.* Tresillian, 87, 238, 540.
Trew *v.* Burton, 141, 258, 529, 603, 668.
Tribe and Upperton, In re, 287, 366, 671.
Trickett *v.* Green, 90.
Trimingham *v.* Trimingham, 124, 507, 518.
Trippet *v.* Eyre, 233.
Trusloe *v.* Yewre, 521.
Tryer *v.* Shaw, 199.
Tuck *v.* Tuck, 348.
Tunbridge Wells Local Board *v.* Ackroyd, 516.
Tunno and Bird, In re, 54, 59, 164, 232, 237, 244, 666.
Tuohey *v.* Great Southern and Western Rail. Co., 460.
Turnell *v.* Sanderson, 51.
Turner *v.* Crush, 441.
— *v.* Goulden, 42, 497, 506.
— *v.* Prince, 402.
— *v.* Rose, 381, 383.
— *v.* Swainson, 279, 415, 449, 450, 451, 672.
— *v.* Turner, 132, 264, 574.
Turnock *v.* Sartoris, 50.
Turpin *v.* Pain, 368.
Twistleton *v.* Travers, 236.
Tyerman *v.* Smith, 148.
Tyler *v.* Campbell, 611, 614, 617.
— *v.* Jones, 145, 166, 169, 590, 657, 678.

U.

Underhill *v.* Devereux, 85.
Underwood *v.* The Bedford and Cambridge Rail. Co., 249.
United States Direct Cable Co., In re, 543.
Unsted *v.* Kidd, 389.
Upton *v.* Upton, 519.
Utting *v.* Evans, 374.
Uttley *v.* Todmorden Local Board, 464.

V.

Vanderbyl *v.* McKenna, 80.
Vanlore *v.* Tribb, 327.
Veale *v.* Warner, 57, 251, 271, 297, 298, 544, 546, 550, 587, 653, 676.
Veitch *v.* Russell, 493.
Vernon *v.* Wells, 705.
Vickers *v.* Vickers, 711.
Viney *v.* Bignold, 62, 63.
Vinnikum and Morgan, In re, 232.
Virany *v.* Warne, 493.
Vynior's Case, 153, 154, 155.

W.

Waddle *v.* Downman, 288, 289, 349.
Wade *v.* Dowling, 219, 249, 549, 666.
— *v.* Huntley, 307.
— *v.* Malpas, 304, 690.
— *v.* Simeon, 78.
— *v.* Stanley, 27.
Wade-Gery *v.* Morrison, 50.
Wadsworth *v.* Marshall, 600.
— *v.* Smith, 43, 60.
Wakefield *v.* Llanelly Rail., &c. Co., 184, 468.
Wakefield Corporation *v.* Wakefield Guardians, 115, 161.
Walford *v.* Duchesse de Pienne, 16.
Walker *v.* Beckenham Local Board, 622.
— *v.* Brown, 127, 377.
— *v.* Bunkell, 370.
— *v.* Frobisher, 191, 192, 436.
— *v.* General Mutual, &c. Building Society, 37.
— *v.* Earl of Grosvenor, 590.
Wallen *v.* Smith, 641.
Waller *v.* King, 198, 303.
— *v.* Lacy, 323.
Wallis *v.* Hirsch, 48.
Waltenshaw *v.* Marshall, 242.
Walters *v.* Morgan, 53, 87, 563, 564, 567.
Walther *v.* Mees, 641.
Walton *v.* Swanage Pier Co., 484.
Wansbeck Rail. Co. *v.* Trowsdale, 113.
Wansborough and Dyer, In re, 34, 56, 590.
Wansell *v.* Southwood, 178.
Warburton *v.* Haslingden, 151, 241, 480.
— *v.* Storr, 152, 155.
Ward's Case, 117.
Ward *v.* Dean, 142, 307.
— *v.* Great North of England Rail. Co., 240, 584.
— *v.* Hall, 327, 338.
— *v.* Hall (W. N. 1880), 90.
— *v.* Mallinder, 405.
— *v.* Periam, 502, 504, 698.
— *v.* Pilley, 90, 93.
— *v.* The Secretary for War, 150.
— *v.* Uncorn, 274.
Ware, In re, 102, 464, 467, 468.
— *v.* Regent's Canal Co., 464.
Waring *v.* Manchester, &c. Rail. Co., 503.
— *v.* Pearman, 391.
Warley *v.* Beckwith, 328.
Warne *v.* Bryant, 190.

Warner, In re, 17, 19, 299, 674.
— v. Powell, 150, 151, 157, 162, 484.
Warren v. Green, 671.
Warwick v. Cox, 356, 670.
Waters v. Bridge, 128, 544.
— v. Taylor, 3, 65.
Watford, &c. Rail. Co. v. London and N. W. Rail. Co., 46, 65.
Watkins v. O'Gorman Mahon, 401.
— v. Phillpotts, 134, 258, 325, 331, 607, 624, 679.
Watson v. Clement, 228.
— v. Duke of Northumberland, 215.
— v. Watson, 288.
Watts v. Brook, 5.
— v. Kent JJ., 35.
Webb, In re, 323, 676.
— v. Ingram, 327.
— v. Sanderson, 400.
— v. Taylor, 68, 178, 181, 182.
— v. Wyatt, 375.
Webber v. Lee, 482, 487.
Webster v. Bishop, 58, 576, 590.
Weed v. Ward, 89, 367.
Weir v. Johnson, 47.
Welch v. Ireland, 545.
Wellington v. M'Intosh, 65, 96, 183.
Wells v. Benskin, 189.
— v. Cooke, 231, 233.
— v. Mitcham Gas Co., 640.
Welsh, In re, 582, 603.
Wenlock v. River Dee Co., 368.
Wenman, Lady v. Mackenzie, 557.
Wentworth v. Bullen, 87.
West v. Downman, 455.
West London Dairy Society v. Abbot, 47.
West London Rail. Co. v. Fulham, 97, 380.
Western Suburban, &c. Building Society v. Martin, 37.
Westlake v. Collard, 507.
Weston v. Faulkner, 582.
Westwood v. Cape of Good Hope, 375, 495, 640.
— v. Secretary for India, 63.
Whaley v. Laing, 397, 638.
Whalley, In re, 601.
Wharton v. King, 268, 270, 280, 331, 540.
Whatley v. Morland, 173, 665, 682.
Wheatley v. Westminster Brymbo Coal and Coke Co., 51.
Whitburn v. Staines, 542.
Whitchurch, Ex parte, 33.
White v. Gifford, 164.
— v. Sharp, 220, 258, 554.
Whiteacre v. Pawlin, 33.
Whitehead v. Firth, 325, 383, 599, 602, 603, 677.
— v. Tattersall, 256, 555, 559.
Whitehouse v. Birmingham Canal Co., 461.
Whitehouse v. Wolverhampton, &c. Rail. Co., 466.
Whiteley v. Roberts, 310, 665.
Whitmore v. Friend, 376.
— v. Smith, 210, 217, 309, 550.
Whitworth Perpetual Curate, Ex parte, 474.
Whitworth v. Halse, 267.
Wickham v. Harding, 50.
Wicks v. Cox, 244, 414.
Wigens v. Cook, 398, 399, 400, 407.
Wild v. Holt, 125, 337, 669.
Wilde v. Vinor, 153.
Wilkins v. Mayor of Birmingham, 452, 453.
Wilkinson v. Godefroy, 531.
— v. Page, 3, 4, 265, 270, 415, 424, 575, 576, 582, 704.
— v. Stewart, 646.
— v. Time, 709.
Willcox v. Storkey, 61, 582.
— v. Wilcox, 347.
Willesford v. Watson, 51, 129.
Williams v. Gwynne, 84, 85.
— v. Jones, 304, 311, 313, 316.
— v. Lewis, 22, 71.
— v. London Commercial Exchange Co., 45.
— v. Moulsdale, 267, 351, 362, 417, 514.
— v. Stepney, 378, 384.
— v. Wilson, 382.
Williamson v. Locke, 346, 347, 642.
Willis v. Osborne, 405.
— v. Wakeley, 493.
Willoughby v. Willoughby, 6, 105, 222, 442.
Wills v. Maccarmick, 497, 550, 560.
Wilmhurst v. Barrow Ship Building Co., 89, 378.
Wilmot v. Allen, 592.
Wilson v. Blythe and Tyne Rail. Co. *See* Thompson v. Blythe and Tyne Rail. Co.
— v. Conde d'Eu Rail. Co., 203.
— v. Constable, 544.
— v. Foster, 620, 624.
— v. Green, 42.
— v. Hinckley, 506.
— v. King, 200, 304.
— v. Morrell, 158.
— v. Thorpe, 75, 693.
— v. Wilson, 251, 544.
Wilts, &c. Rail. Co. v. Fooks, 234, 473.
Winch v. Saunders, 281, 284, 334.
Winn v. Nicholson, 81.
Winter v. Garlick, 290, 381.
— v. Lethbridge, 304, 328, 433, 435, 436.
— v. Munton, 22, 260, 669.
— v. White, 55, 117, 132, 539, 541.
Winterflood v. Stoveld, 107.
Winteringham v. Robertson, 148, 216, 228, 234, 242.

Winwood *v.* Holt, 601, 624, 626.
Withers *v.* Drew, 139.
Witt *v.* Corcoran, 204.
Wohlenberg *v.* Lageman, 5, 293, 600, 603, 604, 667.
Wolverhampton and Walsall Rail. Co. *v.* North Western Rail. Co., 66.
Wood *v.* Adcock, 265, 446.
— *v.* Barnicott, 368.
— *v.* Birch, 574, 575.
— *v.* The Copper Miners' Co., 45, 69, 261, 633.
— *v.* Duncan, 356, 528, 669, 708.
— *v.* Griffith, 118, 270, 303, 415, 563, 566, 567, 616.
— *v.* Hotham, 316, 320.
— *v.* Leake, 198.
— *v.* North Staffordshire Rail. Co., 570.
— *v.* O'Kelly, 377, 389.
— *v.* Rowe, 65.
— *v.* Taunton, 574.
— *v.* Thompson, 20, 444.
— *v.* Webb, 602.
— *v.* Wilson, 422, 423, 544, 672.
Woodbridge *v.* Hilton, 705.
Woodcroft and Jones, In re, 59, 61, 156, 157, 158, 180.
Woodhams *v.* Woodhams, 394.
Woodley *v.* Johnson, 75, 96, 701.
Woof *v.* Hooper, 351.
Woollen *v.* Bradford, 621.
Woolley *v.* Kelly, 708.
Worrall *v.* Deane, 610, 661, 668.
Worrel *v.* Atworth, 283.
Worthington *v.* Barlow, 30, 31, 555, 590.
Wright *v.* Burroughes, 629.
— *v.* Cromford Canal Co., In re, 317, 318, 324.
— *v.* Deley, 37.
— *v.* Fairfield, 80.
Wright *v.* Graham, 219, 610, 627.
— *v.* Howson, 187.
— *v.* Monarch Investment Building Society, 36.
— *v.* Sparks, 422.
— *v.* Webb, 253.
Wrightson *v.* Bywater, 5, 19, 75, 142, 170, 205, 261, 262, 267, 299, 610, 674, 694.
Wroithly, In re, 115.
Wyatt *v.* Curnell, 274.
Wyggeston Hospital, In re, 608, 677.
Wykes *v.* Shipton, 357, 670.
Wyld, Ex parte, 19, 33, 686.
— In re, 78.
Wynne *v.* Edwards, 5, 274, 341.
— *v.* Wynne, 126, 133, 420, 531.

Y.

Yard *v.* Eland, 29.
Yates *v.* Barnard, 698.
— *v.* Knight, 395.
— *v.* Mayor of Blackburn, 100, 472, 741.
Yeadon Local Board *v.* Yeadon Water Works Co. 151, 235, 241.
Yool *v.* Great Western Rail. Co., 105.
Young *v.* Buckett, 50.
— *v.* Bulman, 220, 383.
— *v.* Gye, 380.
— *v.* Miller, 231.
— *v.* Walter, 4, 119, 120, 306.
Younge *v.* Cooke, 667, 702.

Z.

Zachary *v.* Shepherd, 655, 676.

OBJECT OF THE TREATISE.

Object of the treatise.

THE principal object of this treatise is to assist an arbitrator in ascertaining what are his particular powers and relative duties, and how he may best exercise the one and perform the other. As ancillary thereto, the nature of a submission to arbitration, and the effect of an award, are fully considered.

PART THE FIRST.

The Submission.

Statement of the object and contents of the first part.

THIS first part, which is introductory to the main object of this work, namely, the exposition of the duty of an arbitrator, is occupied with the consideration of the agreement by which parties agree to submit their differences to the decision of an arbitrator. An agreement of this sort is termed a submission to arbitration; or, more simply, a submission. A preliminary inquiry into its nature is necessary, since it is the submission alone that invests the arbitrator with authority, defines his duties, and is the foundation of all his proceedings. The several chapters, therefore, of this part, are employed in investigating what matters may form the subject of a submission, who may be the parties to that contract, and what are the various modes of effecting it.

It is necessary here to observe that by several acts of parliament a party may be compelled to submit to arbitration; in such cases the submission cannot strictly be termed the agreement of the parties.

CHAPTER I.

WHAT MATTERS MAY BE REFERRED TO THE DECISION OF AN ARBITRATOR.

Subject of the first chapter.

In this chapter it is proposed to consider what are the subjects on which an arbitrator may be called upon to award. The first section enumerates the civil interests over which his jurisdiction may be extended; the second section discusses the propriety of submitting to his decision matters and proceedings of a criminal character.

SECTION I.

MATTERS AFFECTING THE CIVIL INTERESTS OF THE PARTIES.

All matters concerning personal chattels or personal wrongs.

1. *Civil rights of the parties.*]—All matters in dispute concerning any personal chattel or personal wrong may be referred to the decision of an arbitrator (*a*). Thus breaches of contracts generally, breaches of promise of marriage (*b*), trespass, assaults, charges of slander (*c*), differences respecting partnership transactions (*d*), or the purchase price of property (*e*), and questions relating to tolls (*f*), or the right to tithes (*g*), may all be the subjects of a reference.

Debts certain.

According to the old authorities, debts which were termed certain, such as debts on bond, or arrears of rent under a

(*a*) Bac. Ab. Arb. A.; Blake's case, 6 Rep. 43; Black. Comm. iii. 15, 15th ed.; Baker *v.* Townshend, 1 Moore, 120; S. C. 7 Taunt. 422.

(*b*) 16 Ed. IV. 2, pl. 6.

(*c*) Linch *v.* Dacy, 1 Keb. 848.

(*d*) Hewitt *v.* Hewitt, 1 Q. B. 110; Wilkinson *v.* Page, 1 Hare, 276; Waters *v.* Taylor, 15 Ves. 10.

(*e*) Round *v.* Hatton, 2 Dowl. N. S. 446.

(*f*) Allen *v.* Milner, 2 C. & J. 47.

(*g*) Prosser *v.* Goringe, 3 Taunt. 425.

lease, could not be referred alone (*h*), though they might be when joined with other matters which were uncertain (*i*). This ancient principle, however, has been long of little, if of any, practical importance (*k*).

Real property.

There was a great jealousy formerly in allowing questions respecting the title to real property to be determined by arbitration, though it was held even then, that an arbitrator might direct a feoffment or release of lands (*l*). But at the present day it is clear that a partition of the lands of joint tenants (*m*), or tenants in common (*n*), may be made by an arbitrator; and that settlements of disputed boundaries (*o*), of questions between landlord and tenant respecting waste (*p*), of title to land by devise (*q*), and of title to land in general (*r*), may all now be effected by arbitration.

Questions of law.

Pure questions of law, as, for instance, in old times a demurrer, may be referred to the decision of an arbitrator (*s*). So he may be called upon to determine the liability of a party on a promissory note (*t*), or to put his construction on an act of parliament (*u*), or on the effect of a will (*x*).

Actions at law and suits in equity.

All actions at law and in equity, excepting perhaps actions upon penal statutes by common informers (*y*), may be determined by arbitration.

Judgments.

Parties may refer to arbitration whether a judgment has been properly obtained, whether it has been satisfied, or whether it is void or erroneous (*z*).

(*h*) Rolle, Ab. Arb. R. 1, 2, 4; Bac. Ab. Arb. A.; Com. Dig. Arb. D. 3; Morris *v.* Creach, 1 Lev. 292.

(*i*) Com. Dig. Arb. D. 3; Rolle, Ab. Arb. R. 3, 5, 6. See Luddington *v.* White, Styles, 350.

(*k*) See Godfrey *v.* Godfrey, 2 Mod. 303.

(*l*) 3 Black. Com. 15, 15th ed.; Com. Dig. Arb. D. 3; Rolle, Ab. Arb. B. 14, E. 2, F. 9, K. 15, V.; Marks *v.* Marriott, 1 Ld. Raym. 114.

(*m*) Knight *v.* Burton, 6 Mod. 231.

(*n*) Johnson *v.* Wilson, Willes, 248.

(*o*) Taylor *v.* Parry, 1 M. & G. 604.

(*p*) Hunter *v.* Rice, 15 East, 100.

(*q*) Downs *v.* Cooper, 2 Q. B. 256.

(*r*) Doe *d.* Morris *v.* Rosser, 3 East, 15.

(*s*) Ching *v.* Ching, 6 Ves. 281; Young *v.* Walter, 9 Ves. 364; Matthew *v.* Davis, 1 Dowl. N. S. 679.

(*t*) Wilkinson *v.* Page, 1 Hare, 276.

(*u*) Price *v.* Hollis, 1 M. & S. 105.

(*x*) Steff *v.* Andrews, 2 Madd. 6.

(*y*) Stat. 18 Eliz. c. 5.

(*z*) Barry *v.* Grogan, 16 W. R. 727.

Reference of action at Common Law.

The reference of an action may be made, by consent, at common law at any stage of the proceedings from the issuing of the writ (*a*) to the trial at Nisi Prius (*b*); sometimes even after verdict (*c*). Contingent damages on a demurrer might have been referred equally with damages on the issues in fact (*d*).

Not matters illegal.

When the subject matter is clearly illegal, no binding award can be made.

Thus, when a bill of exchange was accepted for a sum awarded due on illegal stock-jobbing transactions, the arbitrator to whom it had been indorsed was held not entitled to sue upon it (*e*).

Illegal items in account.

But where transactions between parties have been closed by a general award apparently good, the courts have refused to reopen them on a suggestion that some illegal item has been admitted in account (*f*).

Future use of property.

The future conduct of parties with respect to the enjoyment of property, in matters beyond the power of any court to prescribe, is often submitted to the regulation of an arbitrator. Thus, an arbitrator has been called upon to set out what road one of the contending parties should have over certain lands (*g*), to determine with respect to such things as a pump, a yard, a doorway, a hedge and ditch (*h*), a flue, a watercourse, or a waterspout (*i*), how they shall in future be enjoyed and used, and even to say generally what shall be done by the parties respecting the matters in dispute (*k*).

Future differences.

Parties may also agree to refer to arbitration any future differences between them, though none at present exist (*l*).

II. *Matters referred under Arbitration Act*, 1889.]—This Act (*l*), which repeals the arbitration clauses of the Common Law Procedure Act, 1854, and of the Judicature Acts, 1873

(*a*) Rogers *v.* Dallimore, 6 Taunt. 111; Wynne *v.* Edwards, 1 D. & L. 976.

(*b*) Allenby *v.* Proudlock, 4 Dowl. 54.

(*c*) Thompson *v.* Jennings, 10 Moore, 110.

(*d*) Cooper *v.* Langdon, 9 M. & W. 60.

(*e*) Steers *v.* Lashley, 6 T. R. 61.

(*f*) Wohlenberg *v.* Lageman, 6 Taunt. 250. See Aubert *v.* Maze, 2 B. & P. 371, and Watts *v.* Brook, there cited. See Miller *v.* Robe, 3 Taunt. 461.

(*g*) Allenby *v.* Proudlock, 4 Dowl. 54.

(*h*) Boodle *v.* Davis, 3 A. & E. 200.

(*i*) Ross *v.* Clifton, 9 Dowl. 356.

(*k*) Wrightson *v.* Bywater, 3 M. & W. 199.

(*l*) Arbitration Act, 1889, 52 & 53 Vict. c. 49, s. 27.

PART I. CH. I. S. 1.

and 1884 (except s. 8 of this latter), provides, by s. 14, that in any causes or matters:

> If a "prolonged examination of documents" or a "scientific or local investigation" is necessary; or "if the question in dispute consists wholly or in part of matters of account,"

the Court or a judge may order the reference of the "whole cause or matter, or any question or issue of fact arising therein."

The subject will be considered later (*m*).

Public and private rights by statute.

III. *Matters referred under other statutes.*—It often happens that private persons cannot deal with their respective interests in lands as they wish and as is desirable, in consequence of the disability to contract of some other parties interested, or of some public right affecting the property and preventing any alteration in it. The authority, therefore, of parliament, which can bind every one, and which alone can engage for the public, is frequently sought to authorise the submission to arbitration of all the interests concerned, public as well as private.

Inclosing commons, &c.

Commuting tithes, &c.

Thus, under the sanction of an act of parliament, the inclosing of commons, the allotment of lands, the determining compensation for rights of common, the setting out public roads, the commuting tithes, the defining boundaries, and the otherwise modifying public and private interests, are frequently effected by an award (*n*).

Price and compensation for lands taken for undertakings of a public nature or injured thereby.

Modern statutes have greatly enlarged the class of cases which may be or which must be determined by arbitration. Where any lands are authorised by any act of parliament to be taken for undertakings of a public nature, the Lands Clauses Consolidation Act, 1845, provides that in case the promoters of the undertaking and the party interested in the lands cannot agree, when the compensation claimed or offered shall exceed fifty pounds, the latter may claim to have the amount of compensation due to him determined by arbitrators according to the provisions of the act (*o*).

(*m*) P. I. ch. 3, s. 6, d. 10.

(*n*) Johnson *v.* Hodgson, 8 East, 38; R. *v.* Nockolds, 1 A. & E. 245; Doe *d.* Harris *v.* Saunder, 5 A. & E. 664; Willoughby *v.* Willoughby, 4 Q. B. 687.

(*o*) 8 & 9 Vict. c. 18. See Appendix of Statutes.

Differences as to the price of lands resold by the promoters (*p*), and the compensation by reason of interests in land being injuriously affected by the works (*q*), may be determined in like manner.

Railways.

These provisions have been extended to the case of railways by the special enactments of the Railways Clauses Consolidation Act, 1845 (*r*), by which compensation for lands taken or used for the construction of any railway, or injuriously affected thereby, may be determined according to the mode pointed out in the last-named statute. They have also been made applicable for ascertaining the amount of compensation for lands authorized to be taken or used under the provisions of any act for making markets and fairs (*s*), or harbours, docks, and piers (*t*), or waterworks for supplying towns with water (*u*), or improvements in towns (*x*), or cemeteries (*y*); and also for the lands taken, and the damages caused to any lands, by proceedings under the Act to facilitate the Drainage of Lands in England and Wales (*z*).

Markets and fairs.
Harbours, docks, and piers.
Waterworks.
Improvements in towns.
Cemeteries.
Drainage.

Public Health Act.

The amount of compensation is in many cases, under the Public Health Act, 1875, to be settled by arbitration (*a*). So, also, under the Housing of the Working Classes Act, 1890 (*b*).

Housing of the Working Classes Act.

Railway companies.

Railway companies also may refer any disputes between themselves that they might settle by agreement (*c*). Differences arising on an agreement giving one railway company running powers on certain terms over the line of another may, it seems, be thus referred (*d*).

Agreement for running powers.

Injuries to mines by railways.

The amount of compensation for injuries to mines caused by any railway (*e*), and disputes respecting the sufficiency of

(*p*) 8 & 9 Vict. c. 18, s. 130.
(*q*) 8 & 9 Vict. c. 18, s. 68.
(*r*) 8 & 9 Vict. c. 20, ss. 6, 44; Clarence Railway Company *v.* Great North of England Railway, 13 M. & W. 706.
(*s*) 10 & 11 Vict. c. 14, s. 6, the Markets and Fairs Clauses Act, 1847.
(*t*) 10 & 11 Vict. c. 27, s. 6, the Harbours, Docks and Piers Clauses Act, 1847.
(*u*) 10 & 11 Vict. c. 17, s. 6, the Waterworks Clauses Act, 1847.
(*x*) 10 & 11 Vict. c. 34, s. 19, the Towns Improvement Clauses Act, 1847.
(*y*) 10 & 11 Vict. c. 65, s. 6, the Cemeteries Clauses Act, 1847.
(*z*) 10 & 11 Vict. c. 38, ss. 10 and 11.
(*a*) 38 & 39 Vict. c. 55.
(*b*) 53 & 54 Vict. c. 70. This Act repeals the Artizans' Dwellings Acts, 38 & 39 Vict. c. 36; 42 & 43 Vict. cc. 63 and 64; 45 & 46 Vict. c. 54; and, in part, 48 & 49 Vict. c. 72.
(*c*) 22 & 23 Vict. c. 59.
(*d*) Llanelly Railway and Dock Company *v.* London and North Western Railway Company, L. R. 8 Chanc. 943; on appeal, L. R. 7 App. Cas. 550.
(*e*) 8 & 9 Vict. c. 20, s. 81.

Fitness of locomotives.

engines and carriages to be run on any line by a stranger to the company (*f*), are directed by the Railway Clauses Consolidation Act to be settled by arbitration.

Danger in mine.

The question whether a mine, or any practice in it, or any special rules as to it, are dangerous, can be referred under the Coal Mines Regulation Act, 1887 (*g*).

Damage by abandoned railways.

The amount of compensation due from railway companies in respect of railways authorized to be abandoned, for certain injuries done by their works, is to be settled by arbitration under statutory provisions (*h*).

Local Government Act, 1888.

Under the Local Government Act, 1888, provision is made for arbitration as to adjustment between counties and boroughs and other matters (*i*).

Disputes between masters and workmen.

Special enactments afford peculiar advantages for the settling by arbitration differences between masters and workmen in trades or manufactures (*k*). The cases of disputes that may be so settled are enumerated in statute 5 Geo. IV. c. 96, s. 2, and include all disputes respecting the trade and manufacture carried on by the parties.

Compensation to tenants of allotments.

Compensation for tenants' crops, labour, and improvements in allotments, must in case of dispute be settled by arbitration (*l*). So, too, a single arbitrator is to decide on the compensation for lands taken for allotments (*m*).

Joint-stock companies' affairs.

By the Companies Clauses Consolidation Act, 1845, facilities are given for obtaining an award on questions authorized or directed to be decided by arbitration, by any special act incorporating a joint-stock company for the purpose of carrying on any undertaking (*n*). The Gasworks Clauses Act, 1871, 34 & 35 Vict. c. 41, s. 27, applies these provisions.

County Court actions.

The statute for the recovery of small debts and demands

(*f*) 8 & 9 Vict. c. 20, ss. 115, 117.

(*g*) 50 & 51 Vict. c. 58, ss. 42, 47, 53. See Secretary of State *v.* Fletcher, 18 Q. B. D. 339.

(*h*) 13 & 14 Vict. c. 83, s. 25.

(*i*) 51 & 52 Vict. c. 41, ss. 11 (6), 32, 62.

(*k*) 5 G. IV. c. 96; 7 W. IV. & 1 Vict. c. 67, ss. 1, 2, 3; 8 & 9 Vict. c. 77, s. 3; 8 & 9 Vict. c. 128, s. 3; 35 & 36 Vict. c. 46.

(*l*) Allotments and Cottage Gardens Compensation for Crops Act, 1887, 50 & 51 Vict. c. 26.

(*m*) Allotments Act, 1887, 50 & 51 Vict. c. 43, s. 4 (a).

(*n*) 8 & 9 Vict. c. 16, ss. 128—134. See Appendix of Statutes; see also P. I. ch. 3, s. 7, d. 6.

empowered the judge, with the consent of parties, to refer to arbitration the plaint before him, together with all claims within or without the jurisdiction of the county court. But a reference of a plaint affecting title to land was held not within that act; the award in such case could not be enforced in the county court, for a prohibition would be granted to stay the judge from proceeding on the award (*o*). The recent County Courts Act, 1888, 51 & 52 Vict. c. 43, s. 104, and Rule XX. of the County Court Rules, 1889, provide in similar terms for arbitration (*p*).

Title to land.

IV. *Civil proceedings at Quarter Sessions.*]—Until modern times civil proceedings at Quarter Sessions could not be referred to an arbitrator for final decision, but the justices might submit the matter to a referee, and adopt his report as the foundation of their judgment (*q*). Pending an appeal against a poor rate, the appellant and the assessment committee, with the consent of the guardians, the respondents, by agreement of reference out of court, referred to arbitration all questions relating to the rating of the appellant's premises, with the usual powers as to costs. It was held that the agreement of reference was invalid, and that neither the assessment committee nor the chairman who signed the agreement was liable for costs awarded to be paid to the appellant by the other party (*r*). Neither could a question determinable by appeal to the sessions be decided by an award on the mere agreement of parties without an appeal. Thus it was not lawful for a party rated to a poor rate, and the churchwardens and overseers of the parish, before appeal, to refer to arbitration the validity of the rate (*s*); and it still remains unlawful to do so on the simple agreement of the parties. But by the statute 12 & 13 Vict. c. 45, s. 12, after notice of appeal has been given to the General or Quarter Sessions against any order, rate, or other matter (except a summary conviction, or order in bastardy, or any proceeding relating to the revenue

Matters of appeal at Quarter Sessions.

Reference by assessment committee.

Poor rate.

(*o*) 9 & 10 Vict. c. 95, s. 77; Knowles *v.* Holden, 24 L. J. Ex. 223.

(*p*) See the Appendix of Statutes; see also P. I. ch. 3, s. 7, d. 3, p. 97.

(*q*) R. *v.* Natland, 3 Burr. S. C. 793; R. *v.* JJ. Northampton, 2 Bott. pl. 936, S. C. Cald. 30; R. *v.* Harding, 2 Salk. 477.

(*r*) Leicester Waterworks Company *v.* Barrow-on-Suir Assessment Committee, 4 Q. B. D. 18.

(*s*) Thorpe *v.* Cole, 4 Dowl. 457, S. C. 2 C. M. & R. 367, S. C. in error, 1 M. & W. 531.

or post-office), the parties by leave of a judge of the Court of Queen's Bench may refer the matter of the appeal to arbitration, and the award may be enforced by attachment or as a judgment of the Court of Quarter Sessions. By s. 13 of the same act, after an appeal has been entered, the Court of Quarter Sessions, with the consent of the parties, may refer it on such terms as the court shall think reasonable, and the award, on application in due time made by either party, may be entered as the judgment of the sessions.

The court has prevented parish officers from levying a poor rate by distress in fraud of an award to which they were submitting parties (*t*).

Suits for divorce.

v. *Suits in Divorce Courts.*]—Questions within the cognisance of the ecclesiastical courts have sometimes been determined by arbitration. It has been said, that causes matrimonial seem not arbitrable, because marriage ought to be free, and religion disallows the severing those whom the church has joined (*u*).

But instances are not wanting in which matrimonial matters, such as the terms of a separation, have been decided by an award (*x*).

Terms of separation.

When the parties, on the eve of the trial of a suit by a wife for judicial separation on the ground of cruelty, agreed that the cause should not be moved, and that arbitration should be resorted to as to the terms of the separation, Sir Cresswell Cresswell, Judge Ordinary of the Divorce Court, refused to allow the petitioner to proceed with the original suit, she having wilfully opposed obstacles to the progress of the arbitration (*y*).

(*t*) The London and North Western Rail. Co. *v.* Bedford, 17 Q. B. 978.
(*u*) Bac. Ab. Arb. A.
(*x*) Soilleux *v.* Herbst, 2 B. & P. 444; Bateman *v.* Olivia, Countess of Ross, 1 Dow. 235.
(*y*) Hooper *v.* Hooper, 29 L. J. Div. Cas. 59, S. C. 1 Sw. & Tr. 602.

SECTION II.

MATTERS OF A CRIMINAL NATURE.

Some criminal matters and the criminal proceedings founded on them may be submitted to arbitration.

To ascertain what these matters are, it is important to consider in what cases the law will allow a criminal charge to be disposed of by private agreement or compromise. For the power to refer must be dependent upon the power to compromise.

Felonies.

The old rule, that matters criminal are not arbitrable because they are to be punished for the public good (*z*), applies universally in cases of felony. Any agreement not to give evidence against a party accused of felony on his trial (*a*), or in any way to compound such a charge, is entirely illegal and void (*b*). An agreement by assignees of a bankrupt to forbear having him examined respecting certain sums which he had received and not accounted for is void (*c*). So also an agreement to drop proceedings on a rule for striking an attorney off the rolls, or calling on him to answer the matters of an affidavit; for the public is interested in the inquiry not being stifled (*d*). In all these instances a reference would be equally objectionable in principle.

Examination of a bankrupt.

Striking an attorney off the rolls.

Misdemeanors.

But an agreement to settle a misdemeanor may, in some cases, be perfectly valid in law (*e*); and indictments for various species of misdemeanors are continually, and with the sanction of the courts, referred to an arbitrator for decision.

Where remedy by action, criminal matters referable.

A rule of very general application as to what criminal matters may be referred is thus stated by Gibbs, C.J.:— "Where a party injured has a remedy by action as well as by indictment, nothing can deter such party from referring

(*z*) Bac. Ab. Arb. A.

(*a*) Mason *v.* Watkins, 2 Vent. 109; Jones' case, 1 Leon. 203.

(*b*) Drage *v.* Ibberson, 2 Esp. 643; Johnson *v.* Ogilby, 3 P. W. 277.

(*c*) Nerot *v.* Wallace, 3 T. R. 17.

(*d*) Kirwan *v.* Goodman, 9 Dowl. 330; Pool *v.* Bousfield, 1 Camp. 55.

(*e*) Drage *v.* Ibberson, 2 Esp. 643; Blanchard *v.* Lilly, 9 East, 497; Johnson *v.* Ogilby, 3 P. W. 277.

the adjustment of the reparation which he is to receive to arbitration, although a criminal prosecution may have been commenced" (*f*).

Indictment for conspiracy.

A similar rule is laid down in the following case. An indictment for a conspiracy to obstruct persons in carrying on their business as owners of omnibuses had been referred, at the suggestion of the judge, before whom the trial had commenced. On the case coming before the Court of King's Bench on another point, Patteson, J., in his judgment adopted, as containing a statement of the common law, the following passages from a note to Chitty's Statutes (*g*), "That criminal offences which are personal, such as assault," &c., "and for which an action of damage would lie, may, it is said, be submitted to arbitration;" and, "if an indictment has been preferred in any such case, the matter of complaint may still be referred by leave of the court" (*h*). Referring to the above case on a subsequent occasion, the court adopting the principles above cited, declined to lay it down as law, that an indictment for conspiracy could be referred (*i*).

The limits of compromise in criminal matters are still farther defined in another instance.

There, Lord Denman, C.J., in pronouncing the decision of the Court of Queen's Bench, that a compromise, though with the sanction of the court, of an indictment for riot and assault was illegal, embodied in his judgment the following rule: "That the law will permit a compromise of all offences for which the injured party might sue and recover damages in an action. But if the offence is of a public nature, no agreement can be valid that is founded on the consideration of stifling the prosecution of it." Then, applying the rule to the case before him, Lord Denman added, "In the present instance the offence is not confined to personal injury, but is accompanied with riot and obstruction of a public officer in the execution of his duty. These are matters of public concern, and therefore not legally the subject of a compromise" (*k*).

Offence of a public nature not referable.

Indictment for offence

In accordance with the rule which has been above laid

(*f*) Baker *v.* Townshend, 1 Moore, 120, S. C. 7 Taunt. 422.
(*g*) 1 Chitty's Statutes, 33. Note (*b*) to stat. 9 & 10 W. III. c. 15.
(*h*) R. *v.* Bardell, 5 A. & E. 619, S. C. reported as R. *v.* Shillibeer, 5 Dowl. 238.
(*i*) R. *v.* Hardey, 14 Q. B. 529.
(*k*) Keir *v.* Leeman, 6 Q. B. 308, S. C. Keogh *v.* Leeman, 8 Jur. 824.

down, it had been previously decided that an agreement to drop a prosecution for an offence against the Toleration Act was illegal, as impeding the course of public justice, and Le Blanc, J., had relied on the distinction, that the prosecution was for a public misdemeanor, and not for any private injury to the prosecutor (*l*).

against the Toleration Act.

In cases of ordinary assaults, where the party injured has proceeded by indictment, all the authorities concur that the policy of the law will admit of a compromise or reference (*m*).

Indictment for assault.

Indictments for nuisances of all sorts, such as raising an embankment in a river (*n*), or carrying on an offensive trade (*o*), were continually, with the sanction of the presiding judge, referred on the trial, and no objection was taken to the validity of such a reference, though the essence of an indictment for a nuisance is the injury to the public; but it is doubtful whether it would now be allowed.

Indictment for a nuisance.

It is quite clear that an indictment for perjury cannot legally be referred (*p*).

For perjury.

Notwithstanding an opinion expressed in an earlier case (*q*), it is now decided that an indictment for non-repair of a highway is not capable of being lawfully determined by arbitration, as it is not a case in which the party injured had a remedy by action (*r*).

For non-repair of highway.

After conviction a compromise has often been sanctioned by the courts. Thus, agreements of compromise made by defendants with the approval of the court, after conviction of the several misdemeanors of ill-treating a parish apprentice (*s*), and of disobeying an order of maintenance (*t*) made by justices, have been sustained as legal.

Compromise after conviction.

A presentment and proceedings before commissioners of

Presentment before com-

(*l*) Edgcombe *v.* Rod, 5 East, 294.

(*m*) Elworthy *v.* Bird, 2 Sim. & Stu. 372, S. C., not S. P., 2 Bing. 258; 9 Moore, 430; Blake's case, 6 Rep. 43; 4 Black. Comm. 363, 15th ed.; R. *v.* Rant, Kyd on Awards, 64; R. *v.* Coombs, ib.; Horton *v.* Benson, Freem. 20.

(*n*) Dobson *v.* Groves, 6 Q. B. 637; Fallowes *v.* Taylor, 7 T. R. 475.

(*o*) R. *v.* Moate, 3 B. & Ad. 237; R. *v.* Gore, 8 Dowl. 102.

(*p*) R. *v.* Hardey, 14 Q. B. 529; Collins *v.* Blantern, 2 Wils. 341.

(*q*) R. *v.* Cotesbatch, 2 D. & R. 265. See R. *v.* Cotton, 3 Camp. 444.

(*r*) R. *v.* Blakemore, 14 Q. B. 544.

(*s*) Beeley *v.* Wingfield, 11 East, 46.

(*t*) Kirk *v.* Strickwood, 4 B. & Ad. 421. See also Goodal *v.* Lowndes, 8 J. P. 771.

missioners of sewers.

sewers, to procure the removal of some weirs and hatches in a river, have been made the subject-matter of a valid award (*u*).

Indictments before Quarter Sessions.

In criminal matters, after conviction before a Court of Quarter Sessions, a reference is lawful; for where a defendant, after conviction before the Quarter Sessions on an indictment for assault, was called up for judgment, and by the recommendation of the court the prosecutor and defendant entered into an agreement of reference respecting the matters in difference between them, including the assault and the costs of the indictment, on its being contended, on the strength of *R.* v. *Harding* (*x*), that the Quarter Sessions had no power to refer the matter to be determined by another, the Court of Common Pleas sustained the validity of the submission (*y*).

Consent of court to the reference of indictments.

It seems the better opinion, though there is no express decision on the point, that the consent of the court in which an indictment is pending for trial must be obtained in order that the reference should be effectual (*z*).

(*u*) Doddington *v.* Bailward, 7 Dowl. 640.

(*x*) 2 Salk. 477.

(*y*) Baker *v.* Townshend, 7 Taunt. 422, S. C. 1 Moore, 120.

(*z*) R. *v.* Rant, Kyd on Awards, 64; R. *v.* Coombs, ib., 1 Chitty's Stat., 33, note (*b*) to 9 & 10 W. III. c. 15; R. *v.* Bardell, 5 A. & E. 619, S. C. 5 Dowl. 238; R. *v.* Hardey, 14 Q. B. 529.

CHAPTER II.

WHO MAY REFER MATTERS TO ARBITRATION.

In this chapter we proceed to examine who are the persons capable of submitting differences to arbitration.

Scope and contents of the second chapter.

This first section treats of those who are interested on their own account in the matters in dispute; the second investigates the powers and liabilities of those who have not necessarily any personal interest, but act rather in the capacity of agents or trustees for others; while the third enumerates some classes of persons who derive their authority to refer from acts of parliament.

SECTION I.

PERSONS INTERESTED IN THE SUBJECT MATTERS.

Persons capable of contracting.

1. *Parties capable of disposing of their rights.*]—Every one capable of making a disposition or release of his right can make a submission to an award (*a*). But those who are attainted or outlawed cannot submit, for they have no property, and cannot by law contravert anything (*b*). Those who are capable may, it appears, refer a cause, though some parties to the cause are under disability (*c*).

Persons that cannot contract cannot submit to arbitration. Pursuant to this leading principle it is broadly laid down in the older authorities that femes covert, persons compelled by threats and imprisonment, and persons professed in religion, cannot submit (*d*).

(*a*) Com. Dig. Arb. D. 2.
(*b*) Bac. Ab. Arb. C.
(*c*) 52 & 53 Vict. c. 49, s. 14.
(*d*) Bac. Ab. Arb. C.; Com. Dig. Arb. D. 2.

Feme coverte.

Husband civiliter mortuus.

11. *Femes covert.*]—Some exceptions exist to this proposition, as far as regards femes covert. For where the husband, by exile, banishment, abjuration, or profession of religion, was civiliter mortuus, the wife was always held capable of making contracts, and acting in every respect as a feme sole, and consequently might be a party to a reference (*e*).

Transported.

Alien enemy.

The wife of a felon, transported for life, would be equally competent (*f*). So, during the term, the wife of one transported for seven years only (*g*). So likewise the wife of an alien enemy, but not of an alien ami; for the later decisions seem to show, that it is only where the absence of the husband from the country is involuntary, that the law invests the wife with a separate character (*h*).

Sole trader in London.

Sometimes by local custom, as in the city of London, a married woman is authorised to carry on business as a sole trader (*i*). It is apprehended she might refer disputes respecting her business to arbitration.

Separate estate in equity.

Real estate not settled to her separate use.

Where a married woman has a separate estate settled to her separate use, she was considered in equity (*k*), though not in law (*l*), competent to act concerning it, in all respects as a single woman. But where she was interested in real estate, not settled to her separate use, she was not so treated, even in equity. In one instance where one of the parties was stated to be a feme covert interested in real estate, the Court of Chancery refused to permit a reference to arbitration, or even a reference to the master to inquire whether it would be for her benefit as in the case of an infant (*m*). A consent of a

(*e*) Co. Litt. 1, Inst. 133, a.; Countess of Portland *v.* Prodgers, 2 Vern. 104.

(*f*) Newsome *v.* Bowyer, 3 P. W. 37.

(*g*) Sparrow *v.* Carruthers, cited in Marsh *v.* Hutchinson, 2 B. & P. 226; also in Lean *v.* Schutz, W. Bl. 1197; Carrol *v.* Blencow, 4 Esp. 27.

(*h*) Marsh *v.* Hutchinson, 2 B. & P. 226; Barden *v.* Keverberg, 2 M. & W. 61; Deerly *v.* Duchess of Mazarine, 1 Salk. 116, S. C. 1 Lord Raym. 147. See also Walford *v.* Duchesse de Pienne, 2 Esp. 553; Franks *v.* Duchesse de Pienne, 2 Esp. 587; Kay *v.* Duchesse de Pienne, 3 Camp. 122; De Gaillon *v.* L'Aigle, 1 B. & P. 357.

(*i*) Beard *v.* Webb, 2 B. & P. 93.

(*k*) Peacock *v.* Monk, 2 Ves. sr. 190; Allen *v.* Papworth, 1 Ves. sr. 163; Pybus *v.* Smith, 1 Ves. 189; Dubois *v.* Hole, 2 Vern. 613; Jones *v.* Harris, 9 Ves. 486; Hulme *v.* Tenant, 1 Bro. C. C. 16; Heatley *v.* Thomas, 15 Ves. 596; Grigby *v.* Cox, 1 Ves. sr. 517.

(*l*) Marshall *v.* Rutton, 8 T. R. 545, overruling Corbett *v.* Poelnitz, 1 T. R. 5; Beard *v.* Webb, 2 B. & P. 93.

(*m*) Davis *v.* Page, 9 Ves. 350.

married woman to be bound by an award already made, did not bind her as it often did a feme sole (*n*).

An award, on a reference relating to lands in Jamaica, to which married women interested therein were parties, was held void by the Judicial Court of Privy Council, on account of their coverture and disability to bind themselves (*o*).

Agreeing to a reference with a married woman knowing her coverture.

Where a married woman has been a party to a submission, and an award has been made, a court of law will refuse to set aside the award, on the ground that she is not bound by it, at the prayer of a party to the submission, who, from the first, was cognizant of her coverture, for he never should have consented to refer the matters, and allow her to become a party, if he intended to make this objection (*p*).

Effect of marriage on liability of single woman.

Whether a single woman, party to a reference, is freed from liability to an attachment for disobedience to an award by a subsequent marriage is considered subsequently (*q*).

Married Women's Property Act.

The power of married women to refer is probably now enlarged by the Married Women's Property Act (*r*).

III. *Husband and wife.*]—Where a wife had instituted a suit for a divorce, and also, by her next friend, filed a bill against her husband in the Irish Court of Chancery, all matters in difference between the parties were referred, and the award was confirmed in Chancery, and also on appeal in the House of Lords, though the next friend was not a party to the reference (*s*).

Submission between husband and wife, suit for divorce.

Between husband and wife's trustee, suit for divorce.

A submission by a husband and a trustee of the wife of all matters in difference between the husband and wife, including a suit for a divorce instituted by the latter, was permitted to be made a rule of the Court of Common Pleas (*t*).

Husband's right to refer wife's chattels.

A husband might submit differences respecting the chattels he had in right of his wife to an award, for he might dispose of them (*u*). So he might refer his claims for a debt upon a bond made to his wife before coverture, and the award would bind

(*n*) Evans *v.* Cogans, 2 P. W. 450.
(*o*) Strachan *v.* Dougall, 7 Moore, P. C. 365.
(*p*) In re Warner, 2 D. & L. 148.
(*q*) Anon., 1 Cromp. 265. See P. III., ch. 6, s. 1, d. 3.
(*r*) 45 & 46 Vict. c. 75.
(*s*) Bateman *v.* Olivia, Countess of Ross, 1 Dow. 235.
(*t*) Soilleux *v.* Herbst, 2 B. & P. 444.
(*u*) Bac. Ab. Arb. C.; Smith *v.* Ward, Styles, 351.

the wife after his death (*x*); for an award in the husband's favour respecting chattels, real or personal, claimed in right of the wife, amounts to a sort of judgment, and operates as a reduction of them into possession (*y*). If the husband only had submitted it was sufficient to bring before the arbitrator a question relating to a debt due from the wife as executrix or administratrix, for the husband was chargeable with it by the marriage (*z*). So a submission by a husband only of a lease for years, which his wife had as executrix, was good; and the award would bind her after his death (*a*).

Wife's chattels as executrix.

Husband's right to refer wife's real estate.

When a husband contracted to sell his wife's interest in real estates, at a price to be fixed by arbitration, equity, in some instances, decreed him to procure her to join in conveying the lands, on the principle that he must be presumed to have gained her consent before the bargain was made. Lord Eldon, however, expressed doubts of the propriety of that course, as the policy of the law is, that a married woman is not to part with her property but by her own free will (*b*). Whether in old times he was liable to an attachment for refusing to pay a sum which an award had ordered his wife to pay before her marriage is doubtful (*c*).

Liability to attachment for wife's default.

Infant's submission voidable, not void.

IV. *Infants.*]—If an infant submit to arbitration, he may execute or avoid it at his election, as he may most of his other contracts (*d*). In an old case, an infant's submission was said to be void (*e*), and not voidable only as it is now considered. If a man of full age is jointly bound with an infant to stand to an award, such obligation will bind the former (*f*). A father or guardian may bind himself that an

Persons of full age bound for infants.

(*x*) Com. Dig. Arb. D. 2; Marsh, 77.

(*y*) Williams' Exors., 538, 687, 8th ed. 698, 874; 1 Rolle Ab. Arb. 245, D. See 1 Roper, on Husband and Wife, 185, 219, 2nd ed.; Hunter *v.* Rice, 15 East, 100; Oglander *v.* Baston, 1 Vern. 396.

(*z*) Com. Dig. Arb. D. 2; 1 Rolle Ab. 246, 2.

(*a*) Com. Dig. Arb. D. 2; Bac. Ab. Arb. C.; Lumley *v.* Hutton, Rolle Rep. 269; Cro. Jac. 447.

(*b*) Emery *v.* Wase, 5 Ves. 846; 8 Ves. 504 a; Berry *v.* Wade, Cas. Temp. Finch, 180.

(*c*) Anon., 1 Cromp. 265, 3rd ed. See P. III., ch. 6, s. 1, d. 3, p. 591.

(*d*) Bac. Ab. Arb. C.; Com. Dig. Arb. D. 2; Godfrey *v.* Wade, 6 Moore, 488; Harvey *v.* Ashley, 3 Atk. 607; Holt *v.* Ward, Fitzgibbon, 175, 275.

(*e*) Rudston *v.* Yates, March, 111, 141; 1 Rolle Ab. Arb. A. 268.

(*f*) Com. Dig. Arb. D. 2; Bean *v.* Newbury, 1 Lev. 139.

infant son or ward shall perform an award (*g*). But if the award direct that, on payment by defendant of a sum of money, the infant shall execute a release, though the submission to which he is a party may be good, as it may be for his benefit, yet the award will be void, as an infant cannot execute a binding release; and the father will be unable to enforce the arbitration bond against the defendant (*h*). An infant may be directed by the award to pay costs (*i*).

Whether equity will enforce award against infant.

Equity, it has been said, will not decree an award to bind an infant (*k*), but the rule is not without an exception (*l*).

Reference to master, whether arbitration for infant's benefit.

When an infant was a party to a suit in Chancery, the court would refer it to the master to ascertain whether it would be for the infant's benefit that the suit should be submitted to arbitration, and would make an order in accordance with the master's report (*m*).

Infant not bound by solicitor.

Infant plaintiffs in a suit in Chancery suing by their next friends were not bound by acts of the solicitor referring the suit to arbitration, and the award would be held void for the want of mutuality, if the object of the reference failed in consequence (*n*). But if parties to suits to which infants also are parties agree to refer, they cannot evade their submission, or defeat the award, on the ground that the infants were not bound; for they must be presumed to have known that the infants could not be bound, and therefore in the consent of the persons of full age they have all the consideration for which they have stipulated (*o*).

Arbitration Act, 1889.

By the Arbitration Act, 1889, s. 14, if all the parties interested in a cause who are not under disability consent, the court may order a reference (*p*).

(*g*) Gill *v.* Russell, Freem. 62, 139; Roberts *v.* Newbold, Comb. 318; Bowyer *v.* Blorksidge, 3 Lev. 17.

(*h*) Knight *v.* Stone, W. Jones, Rep. 164; S. C. Stone *v.* Knight, Latch, 207; Noy, 93.

(*i*) Proudfoot *v.* Poile, 3 D & L. 524.

(*k*) Cavendish *v.* ———, Eq. Cas. Ab. 49, S. C. 1 Cas. in Chancery, 279; Evans *v.* Cogan, 2 P. W. 450.

(*l*) Bishop of Bath and Wells *v.* Hippesley, cited in Harvey *v.* Ashley, 3 Atk. 607. See P. III., ch. 4, s. 1, d. 2, p. 567.

(*m*) Davis *v.* Page, 9 Ves. 350. See also Dowse *v.* Coxe, 10 Moore, 286.

(*n*) Biddell *v.* Dowse, 6 B. & C. 255, in error from C. P., S. C. 9 D. & R. 404. See case below, reported Dowse *v.* Coxe, 10 Moore, 272, S. C. 3 Bing. 20.

(*o*) Wrightson *v.* Bywater, 3 M. & W. 199; Jones *v.* Powell, 6 Dowl. 483; Warner, In re, 2 D. & L. 148. See Wyld, Ex parte, 30 L. J. Bank. 10, S. C. 2 De G. F. & J. 642.

(*p*) 52 & 53 Vict. c. 49, s. 14.

Partner cannot bind co-partner.

v. *Partners and parties with joint interests.*]—If a man submit for himself and his partner all matters in difference between the partnership and another, the partner submitting shall be bound to perform the award; but the other shall not, because he is a stranger to the award. If, however, the latter refuse, it is a breach of the submission by the partner who agreed to the reference (*q*).

The same rule prevails in the case of a general partnership, as well as in the case of a partnership in a particular transaction. There is no implied authority in either case for some of the partners to bind the others by a submission to arbitration made without their knowledge or assent; for it forms no part of the transaction in which they are jointly engaged, and joint contractors can only be made responsible for transactions arising in the way of their business or employment. It is not, however, necessary that that assent must be given in any particular forms of words, nor is it required to be made under the hand of the co-partner. All that is necessary is, that there should be some evidence of an actual authority conferred. Such a power does not arise out of the relation of partnership, and is not, therefore, to be inferred from such relation (*r*).

Power to sue not give power to refer.

If, on a dissolution of partnership, one partner authorise the other to collect the assets and to sue in their joint names to recover debts due to the firm, the acting partner cannot refer to arbitration an action brought on such authority so as to bind the retiring partner; for though a court of equity would have compelled the retiring partner to allow his name to be used in suing, he could not be forced to submit to arbitration (*s*).

All must execute or none bound.

Even the individual partners who are parties to the reference are sometimes not bound by the award. Thus, where by a deed of covenant purporting to have been made between several persons who were partners, the partnership accounts and all matters in difference between the parties or any two

(*q*) Bac. Ab. Arb. C.; Com. Dig. Arb. D. 2; Strangford *v.* Green, 2 Mod. 228.

(*r*) Stead *v.* Salt, 10 Moore, 389, S. C. 3 Bing. 101; Adams *v.* Bankhart, 1 C. M. & R. 681; Burnell *v.* Minot, 4 Moore, 340; Wood *v.* Thompson, Rol. Ab. Arb. F. 11, p. 249. See Boyd *v.* Emmerson, 2 A. & E. 184; Thomas *v.* Atherton, 10 Ch. D. 185.

(*s*) Hatton *v.* Royle, 3 H. & N. 500, S. C. 27 L. J. Ex. 486.

of them were referred, and two only of the partners executed the deed, an award deciding on a separate claim between the two who executed was not held binding upon them, as the consideration to each to execute his own submission was the submission of all the others, and until all had executed the deed, the arbitrators had no authority (*t*).

Party submitting for others as well as himself.

In general a man is bound by an award which he submits to for another (*u*). Thus, if the parson on the one hand and some of the parishioners on the other hand, on behalf of themselves and the rest of the inhabitants of the parish, but without the authority of the rest, submit to arbitration by bond, the parishioners submitting shall alone be answerable for a breach of the award by any of the other parishioners (*x*).

Rector referring right to tithe during his incumbency.

VI. *Corporations, sole and aggregate.*]—It is stated in the Year Books that an award made on the submission of a preceding prior shall bind his successor (*y*), but it is clear that a rector who refers a question respecting the amount of tithes cannot so provide that the award shall be conclusive beyond his own incumbency of the living (*z*).

Corporations aggregate.

Corporations aggregate may be parties to a reference. In one case it was discussed whether the attorney of a corporation required a special authority under the corporate seal to empower him to refer a cause; at all events a subsequent ratification of his acts under the corporate seal is sufficient (*a*). The reference must be an act of the corporate body. A dean without the chapter, a mayor without his commonalty, the master of a college or hospital without his fellows, cannot submit to an award, for the submission has the force of a contract, and they cannot contract without them (*b*). But where

(*t*) Antram *v.* Chace, 15 East, 209; Adams *v.* Bankhart, 1 C. M. & R. 681.

(*u*) Bac. Ab. Arb. C.; Alsop *v.* Senior, 2 Keb. 707, 718; Shelf *v.* Bailey, Com. Rep. 183; Bacon *v.* Dubarry, 1 Ld. Raym. 246, S. C. Salk. 70; Skin. 679; Carth. 412; Comb. 439; 12 Mod. 129.

(*x*) Bac. Ab. Arb. C.; Mudy *v.* Osam, Litt. 30.

(*y*) Rolle Ab. Arb. 268, A. 3, 2 H. 4, 4, b.

(*z*) Attorney-General *v.* Chomley, 2 Eden, C. C. 304; Amb. 510; Prosser *v.* Goringe, 3 Taunt. 425.

(*a*) Mayor of Ludlow *v.* Charlton, E. T. 1845, Ex.; Attorney-General *v.* Clements, 1 Turn. & R. 58.

(*b*) Bac. Ab. Arb. C., 21 Ed. IV. 13.

the body corporate properly enter into a submission, the award is binding upon them.

The Court of Chancery has on several occasions enforced an award against an eleemosynary corporation (*c*).

Attorney-General's consent in case of charities.

It may here be proper to remark, that in suits in equity respecting charity property, the court would not permit a reference, however advisable such a course might seem, unless the Attorney-General gave his consent (*d*).

Party joined on the reference of a cause.

VII. *Parties interested, added.*]—It often happens, when a cause is referred, that a third party is made a party to the submission, and under some forms of submission, the arbitrator has been held warranted in treating him as a party to the cause itself (*e*). Even when not inserted as a party in the order of reference, his assent to the proceedings will in many cases preclude him from disputing his obligation to abide by the award (*f*).

Party added afterwards.

Where a submission has in the first instance been made between two, a third party may be added afterwards, and the reference may proceed as if all three had been parties to the original order of reference (*g*).

Party by subsequent consent.

Subsequent consent to the award by a party interested in the subject matter of it, will in equity often have the effect of binding his interests (*h*); and may do so in law if a contract is made on the footing of it (*i*).

Party by acquiescence.

Even acquiescence may render a person concluded by the terms of an award. Thus, where the landlords of two adjoining estates let on lease referred to a surveyor to determine and stake out a disputed boundary between their respective properties, the tenant of one estate, who by his conduct assented to the surveyor's staking out the line, was held bound

(*c*) Attorney-General *v.* Clements, 1 Turn. & R. 58. See P. III., ch. 4, s. 3, d. 2, p. 580.

(*d*) Attorney-General *v.* Fea, 4 Madd. 274; Attorney-General *v.* Hewitt, 9 Ves. 232; Prior *v.* Hembrow, 8 M. & W. 873.

(*e*) Hawkins *v.* Benton, 2 D. & L. 465, S. C. 15 L. J. N. S. Q. B. 139; 8 Q. B. 479; Rogers *v.* Stanton, 7 Taunt. 575, n.; Morgan *v.* Miller, 6 Bing. N. C. 168; Prosser *v.* Goringe, 3 Taunt. 425; Nickalls *v.* Warren, 9 Jur. 10; Williams *v.* Lewis, 7 E. & B. 928; Stockley *v.* Shopland, 26 L. T. 586.

(*f*) Gunton *v.* Nurse, 5 Moore, 259.

(*g*) Winter *v.* Munton, 2 Moore, 723.

(*h*) Evan *v.* Cogan, 2 P. W. 450.

(*i*) Hill *v.* Levey, 3 H. & N. 286, S. C. 27 L. J. Ex. 259, S. C. in error, 3 H. & N. 702; 28 L. J. Ex. 80.

by the decision of the surveyor as if he had been an original party to the submission (*k*).

Party by laches.

So far has this principle been carried, that a third party having a claim on a subject of reference between *A.* and *B.*, and not bringing forward his claim, was held in equity bound by the award (*l*).

Party added by official referee.

The official referee invested with the powers of a judge, by the order of reference, may add a third party under Order XVI., Rule 11, 1883, without consent (*m*).

SECTION II.

PERSONS NOT INTERESTED IN THE SUBJECT MATTERS.

1. *Authorised agent.*]—The parties to a submission of whom we have hitherto treated are those who are personally bound by the award, and whose immediate interests form the subject of reference.

We now come to consider a class of parties who have no interest of their own in the matter in dispute, but who nevertheless sometimes incur personal liability.

Submission to arbitration by agent authorised to refer.

If a man authorise another on his behalf to refer a dispute between himself and a third party, an award consequent on such submission is binding on the principal alone, and it is no objection that the agent had no interest in the subject of the dispute. But if the agent expressly bind himself for the performance of the principal, not only the principal who authorised him, but the agent himself, is bound by the award (*n*).

Assignee of contract.

An assignee of a business including a contract for covering wires with gutta-percha, with a power of attorney to him to take proceedings in the name of the assignors, to enforce any existing contract and otherwise to deal in respect thereof as

(*k*) Taylor *v.* Parry, 1 M. & G. 604.

(*l*) Govett *v.* Richmond, 7 Sim. 1. See P. III., ch. 4, s. 1, d. 2, p. 569.

(*m*) Byrne *v.* Brown, 22 Q. B. D. 657.

(*n*) Bac. Ab. Arb. C.; Dyer, 216 b; Cayhill *v.* Fitzgerald, 1 Wils. 28, 58; Com. Dig. Arb. D. 2.

he might think proper, has authority not only to bring an action in the name of the assignors on the contract and to refer it, but also to consent to a reference of a cross action by the defendant, the other contracting party, against the assignors for wires spoiled in the process of covering (*o*).

Assignee of debt.

A party to whom debts had been equitably assigned, and who was authorised under a power of attorney to receive and compound for the same, having submitted to arbitration the matters in difference between his principals and one of their debtors, was held entitled to maintain an action in his own name for the sum awarded in his favour (*p*).

What a sufficient authority.

It often becomes a question whether a person who is agent for some purposes is so for the purpose of binding his principal by a reference. A person who underwrites, and settles losses for another, has an implied authority from him to refer to arbitration a dispute about a loss (*q*).

When a member of a partnership firm gave his son a power of attorney to act upon his behalf in dissolving the partnership, with authority to appoint any other person as he might see fit, it was held that this gave the son power to submit the accounts to arbitration (*r*).

Consignees of goods were by agreement, after deducting their advances, charges, and commissions, to pay over the balance. When the goods arrived, the captain of the ship, the agent of the party entitled to the balance, who was then a bankrupt, wrongfully refused to deliver them. No assignees had been appointed. The consignees were held authorised to sue the captain and also to submit the action to arbitration, and to deduct the costs of both action and reference from the balance to be paid over (*s*).

Extent of authority of agent.

An agent authorised to conduct the reference for a party has power to consent that the opponent may produce his books before the arbitrator alone at a subsequent day (*t*). He may also bind his principal by waiving an objection to an improper appointment of an umpire by lot (*u*).

(*o*) Hancock *v.* Reid, 21 L. J. Q. B. 78.

(*p*) Banfill *v.* Leigh, 8 T. R. 571.

(*q*) Goodson *v.* Brooke, 4 Camp. 163.

(*r*) Henley *v.* Soper, 8 B. & C. 16, S. C. 2 M. & R. 155.

(*s*) Curtis *v.* Barclay, 5 B. & C. 141.

(*t*) Hamilton *v.* Rankin, 3 De Gex & S. 782.

(*u*) Backhouse *v.* Taylor, 20 L. J. Q. B. 233.

Power of an attorney to bind his client by a reference.

II. *Attorneys and solicitors.*]—Attorneys and solicitors are agents who are clothed with peculiar powers of effecting their client's interests.

When a person has given an attorney any general authority to act for him in legal proceedings, the courts have always been inclined to hold him bound by his attorney's acts, and yield with reluctance to any complaint that the attorney has acted beyond or contrary to the authority given him in consenting to a reference (*x*). On one occasion, Best, C.J., seems to have assumed as clear, that an attorney in a cause has power to refer the cause, whatever be his authority as to matters out of it, and that attorneys for the parties generally have power to refer all matters in difference (*y*). In another instance, where it was necessary to prove at Nisi Prius that all the members of a firm had assented to a parol submission, the arbitrator stated in the witness-box that he had been requested by one partner only to undertake the arbitration, that the defendants had never personally attended, but were represented at the reference by their attorney, *A. B.* Taunton, J., in summing up to the jury, said that *A. B.*, having acted as attorney for the defendants, they must be taken to be bound by his acts (*z*). Even where a defendant swore that she had expressly desired her attorney not to consent to a reference, and that no step had been taken in it except the appointment of a meeting, the court refused the application to set aside the Nisi Prius order of reference, and Mansfield, C.J., said, "Here is an express agreement to refer, properly entered into by counsel and attorney; it is now said they had no authority to enter into that agreement; if so, the defendant's remedy is by action against her attorney" (*a*). So where a cause was referred by judge's order by consent of the attorneys, the court enforced the award summarily, though the defendant swore that he had never authorised the reference, and previous to the award being made had sent a protest to the plaintiffs and the arbitrator against their proceedings (*b*).

(*x*) Latuche *v.* Pasherante, 1 Salk. 86; Buckle *v.* Roach, 1 Chitt. 193; Bodington *v.* Harris, 1 Bing. 187; Jamieson *v.* Binns, In re, 4 A. & E. 945; Paull *v.* Paull, 2 C. & M. 235.

(*y*) Dowse *v.* Coxe, 3 Bing. 20.

(*z*) Adams *v.* Bankart, 1 C. M. & R. 681.

(*a*) Filmer *v.* Delber, 3 Taunt. 486.

(*b*) Smith *v.* Troup, 7 C. B. 757.

In a case against a land steward defended by the landlord, the attorney had agreed to an order of Nisi Prius compromising that action, and also other actions between the plaintiff and the landlord; a motion was made to set aside the order, on the ground that the attorney had no authority to bind the landlord by such an arrangement, and it was argued that employing an attorney in a cause gives him no authority to refer all matters in dispute between the parties; but the court said it was constantly done, and refused to interfere in a summary way (*c*).

Attorney to a corporation, authority under seal.

On one occasion, where the question was raised but not determined, whether a retainer under seal was necessary to warrant the attorney of a corporation in conducting or referring an action, Pollock, C.B., distinguished the case of *Arnold* v. *Mayor of Poole* (*d*), saying that that case did not decide that the corporation might not be bound, but only that the attorney could not recover, without such a retainer (*e*).

More recently, however, where an incorporated railway company had been served with a writ, and their attorney had entered an appearance, and ultimately referred the action, the court enforced the award against the company, although they objected that the attorney not being appointed under seal had no authority to proceed in the action, or to refer it (*f*).

The attorney's consent to an enlargement of time binds the client (*g*).

A judge's order referring a cause might be made a rule of court without any consent on the part of the client. If the attorney consented for him it was enough (*h*).

Town agent of attorney.

The acts of the attorney's town agent are as binding on the client as the acts of the attorney himself (*i*).

Confidential clerk.

But a confidential clerk of an attorney is not competent to bind his principal or the client by consenting to the appointment of an umpire by lot (*k*).

Solicitor.

A distinction was formerly taken, which, however, may

(*c*) Thomas *v.* Hewes, 2 C. & M. 519.
(*d*) 4 M. & G. 860.
(*e*) Mayor of Ludlow *v.* Charlton, Ex. E. T. 1845.
(*f*) Faviell *v.* Eastern Counties Railway Company, 2 Exch. 344.
(*g*) R. *v.* Hill, 7 Price, 636.
(*h*) Paull *v.* Paull, 2 Dowl. 340.
(*i*) Griffith *v.* Williams, 1 T. R. 710.
(*k*) Greenwood *v.* Titterington, In re, 9 A. & E. 699.

well be doubted now, between the authority of a solicitor and attorney. It was said that the assent of a solicitor to a reference by an order of a court of equity was not obligatory on the client without his actual concurrence, though in the same case it was admitted that such a reference by rule of Nisi Prius would bind him (*l*).

Attorney personally bound.

Like other agents, attorneys bind themselves by a submission if they expressly contract to be bound (*m*), and when they submit without authority they alone are bound (*n*).

Appeal at Quarter Sessions.

The attorneys of the parties to an appeal against a poor-rate at the Quarter Sessions have sufficient authority to refer the question to arbitration (*o*).

Suit in equity: infant plaintiffs.

When infants sued by their next friends in Chancery, the attorneys in the suit had no authority to bind the infants by a reference, or the next friends of the infants, for the due performance of the award by the infants (*p*).

III. *Counsel.*]—A reference by the consent of a counsel in a cause will, it is apprehended, in general be binding on the party he represents.

Power of counsel to refer to arbitration.

A counsel appeared to consent to a compromise of a suit on behalf of one of the parties. Some doubt being suggested whether the counsel was authorised by the party to the suit, the instructions not being given by the solicitor she had formerly employed, Lord Chancellor Eldon said, "It is for the counsel to consider whether he is authorised to give his consent for the widow. If he does, I must act upon it, and she will be bound by it" (*q*).

Counsel with full information of the facts.

That decision of Lord Eldon's was relied upon in the following case:—A counsel in a suit in equity, in the absence

(*l*) Bac. Ab. Arb. C.; Colwel *v.* Child, Cas. in Ch. 86; 1 Ch. Rep. 104. See Furnival *v.* Bogle, 4 Russ. 142.

(*m*) Com. Dig. Arb. D. 2; Cayhill *v.* Fitzgerald, 1 Wils. 28, 58; Iveson *v.* Conington, 1 B. & C. 160.

(*n*) Bac. Ab. Arb. C.; Bacon *v.* Dubarry, 1 Salk. 70, S. C. 1 Lord Raym. 246; Comb. 139; Carth. 412; but see Anon. 6 Mod. 16; and Wade *v.* Stanley, 1 Jac. & W. 674.

(*o*) R. *v.* JJ. of Northampton, 2 Bott. pl. 396, S. C. Cald. 30. See stat. 12 & 13 Vict. c. 45, ss. 12, 13.

(*p*) Biddell *v.* Dowse, 6 B. & C. 255. See ante, p. 19.

(*q*) Mole *v.* Smith, 1 Jac. & W. 673. See R. *v.* Corporation of Helston, 10 Mod. 202; Gresley on Evidence, 458, 2nd ed.; College *v.* Horn, 3 Bingh. 119; Elworthy *v.* Bird, 1 Taml. 43.

of his solicitor and of the client from the court, consented to an order being drawn up on certain terms proposed by the other side. When the client was informed of it he strongly objected to the terms, and moved to have the order rescinded. The case was several times brought before Lord Lyndhurst, C., who stated his opinion, that a party was bound by the consent of his counsel given in court, though they had no instructions to consent, if they were at the time apprised of all those facts of which the knowledge was essential to the proper exercise of their discretion, but that he would be relieved from an order made by such consent if they gave that consent in ignorance of material circumstances. He also intimated, that if the solicitor had been in court, and with a full knowledge of all the facts of the case had assented to the arrangement, it would have bound his client; and that if the solicitor, when he heard of the order, had dissented from it, it was his duty to have given immediate notice of his objection; that by not doing so he would be taken to have adopted it, and his client would be bound. Affidavits, however, were admitted to show that the counsel had not all the proper facts before them, and that there had been no laches in objecting on the part of the solicitor, and consequently the order was rescinded (*r*).

The principle that parties are bound by the consent of their counsel has been recognised in a later case, where a petition to restore a petition dismissed by consent upon the ground that no authority had been given to counsel to consent, was dismissed with costs (*s*).

More recently the power of counsel to bind their clients by agreeing to a compromise has been upheld, notwithstanding certain contradictory opinions expressed by members of the Courts of Chancery and of the Common Pleas (*t*).

If a party is present in court and hears his counsel state in court that the case is referred, he will be bound by the act of his counsel unless he protests openly (*u*).

(*r*) Furnival *v.* Bogle, 4 Russ. 142.

(*s*) Hobler, In re, 8 Beav. 101.

(*t*) Strauss *v.* Francis, 1 L. R. Q. B. 379; Mathews *v.* Munster, 20 Q. B. D. 141, S. C. 51 J. P. 615; Swinfen *v.* Swinfen, 18 C. B. 485, S. C. 25 L. J. C. P. 303; S. C. 26 L. J. C. P. 97; in Equity, 27 L. J. Ch. 35; on appeal, 27 L. J. Ch. 491; Swinfen *v.* Ld. Chelmsford, 5 H. & N. 890.

(*u*) Rumsey *v.* King, 33 L. T. Q. B. D. 728.

Power of counsel in the Scotch courts.

Counsel seem to have equal authority in Scotland. On the trial of two cross actions in the Scotch courts, the counsel had, at the suggestion of the judge, agreed to refer them, and had subscribed a minute of judicial reference referring them to *A. B.*, or failing him, to any arbitrator to be named by the Lord President. A party, sole plaintiff in one and sole defendant in the other action, in the course of the day protested against the reference, and moved the court to discharge it, alleging that he was not aware of the terms of it and was taken by surprise, adding (what was the fact), that *A. B.* declined the reference. But the Lord President and lords of first division, before whom the matter was heard, admitted the reference, and appointed another arbitrator in the place of *A. B.*

In the course of the same cause, however, an order made by the consent of counsel only was rescinded. For after an award was made the matter was brought by appeal before the House of Lords. On the hearing of the appeals, they were, at the suggestion of the lords present, withdrawn upon terms consented to by the counsel of the parties, and embodied in an order of the House. That order was rescinded upon petition of the appellant's agent, stating that he had not considered the terms of the compromise when the counsel consented to it, and the appeals were re-heard (*x*).

Submission by an executor and administrator.

IV. *Executors and administrators.*]—An executor or administrator may, as such, submit to arbitration matters relating to the estate of the deceased, but (it is said) if the arbitrator does not award as much as he would be entitled to at law, it will be a devastavit for the residue (*y*).

Executor not bound to appoint arbitrator.

Where a testator had agreed to refer disputes, if they should arise, and died after disputes had arisen without appointing an arbitrator, his executor is not bound to appoint an arbitrator (*z*).

When executor personally liable.

Entering into a submission relating to matters in difference between the deceased and another without the executors protesting against the reference being taken as an admission of

(*x*) Baillie *v.* Edinburgh Oil Gas Light Company, 3 C. & F. 639.

(*y*) Bac. Ab. Arb. C.; Com. Dig. Admin. I. 1; Assets, C.; Anon. 3 Leon. 53; Went. Off. Ex. 61; Vin. Ab. Executors, G. a. 3. See Yard *v.* Eland, 1 Lord Raym. 368.

(*z*) Percival, In re, 2 Times L. R. 150.

assets, will amount to such an admission, and if the award direct him to pay a sum, he will be bound personally, if the assets are insufficient, and will not be allowed to plead plene administravit to an action on the arbitration bond (*a*); for if he does not protest in the first instance that he has no assets, he will not be afterwards allowed to say so, because in that case the opposite party will have been put to the expense of an arbitration to no purpose (*b*). And an arbitration should be placed on the same footing as an action, in which, if an executor omit to plead that he is without assets, he cannot afterwards set up that ground of defence (*c*).

Reference: admission of assets.

It is often, therefore, said in terms that a submission by an executor or administrator is in itself an admission of assets (*d*). But perhaps, more strictly speaking, the submission does not so much amount to an absolute admission of assets as to a submission of the question whether there are assets or no (*e*).

No direction to pay in the award.

Thus, where the arbitrator awarded a sum to be due from the intestate's estate, but without saying by whom it was to be paid, the administrator was not held personally liable to the payment; and Lord Kenyon distinguished the case of *Barry* v. *Rush*, above quoted, by saying, "There the defendant submitted in broad terms to pay whatever should be awarded, and the arbitrator did award that he should pay a certain sum, whereas here the arbitrator has only ascertained the amount of the debt due from the intestate, but has not directed the defendant to pay it. It is impossible, then, to say that the arbitrator decided that the defendant had assets, and a submission to arbitration by an administrator is not of itself an admission of assets" (*f*). That case was followed by another in which the award directed the defendant, an administratrix, to pay the sum found due, and the same judge took the distinction,

Direction to pay in the award.

saying, "Here the arbitrator has awarded that the defendant, the administratrix, shall pay the plaintiff's demand. The submission to arbitration by the administratrix was a reference not only of the cause of action, but also of the question

(*a*) Robson *v.* ——, 2 Rose, 50; Barry *v.* Rush, 1 T. R. 691. See P. II., ch. 8, s. 1, d. 2, How arbitrator should direct executor to pay; and P. III., ch. 6, s. 1, d. 3, Attachment against executor.

(*b*) Riddell *v.* Sutton, 5 Bing. 200.

(*c*) Ibid.

(*d*) Barry *v.* Rush, 1 T. R. 691.

(*e*) Worthington *v.* Barlow, 7 T. R. 453.

(*f*) Pearson *v.* Henry, 5 T. R. 6.

whether or not the administratrix had assets. And as the arbitrator has awarded the defendant to pay the amount of the plaintiff's demand, it is equivalent to determining as between these parties that the administratrix had assets to pay this debt. The defendant, therefore, is concluded by this award, though it will not operate as an admission of assets in any other action to be brought by any other creditor" (*g*).

Direction to pay out of assets.

In a third case, where the arbitrator awarded a balance against the testator, and directed the executor to pay the amount out of the assets, Abbott, C.J., was of opinion that the latter part of the award did not conclude the question of assets, but left it open (*h*).

The practice in equity is in accordance with these decisions, and shows the effect of such a direction.

Direction to pay out of assets quando.

An award directed an executor to pay a certain sum "out of the assets which might be in his hands, or which might be coming to him." He was also directed to pay the costs. The other party, relying on the fact that the submission was general, moved in the Court of Chancery for an attachment against the executor for non-payment of the sum and costs. This motion, on an affidavit of the executor that he had no assets, was dismissed with costs by the Vice-Chancellor. It was subsequently renewed before the Lord Chancellor (Lyndhurst), but on the additional affidavit that, since the previous application, assets exceeding the sum awarded had come to the executor's hands. And on this ground the Lord Chancellor, expressing his approval of the previous decision of the Vice-Chancellor, directed an attachment to issue (*i*).

Liability of executor to costs.

A personal representative is sometimes bound to pay costs. Thus, where an action by an administrator, with a count in the declaration containing a promise to himself as administrator, was referred, the costs to abide the event, and the arbitrator awarded that the plaintiff had no cause of action, it was held that the plaintiff was personally liable to costs (*k*).

(*g*) Worthington *v.* Barlow, 7 T. R. 453.

(*h*) Love *v.* Honeybourne, 4 D. & R. 814.

(*i*) Joseph *v.* Webster, In re, 1 Russ. & M. 496.

(*k*) Spivy *v.* Webster, 2 Dowl. 46.

Submission by trustees. Liability.

v. *Trustees.*]—By the Conveyancing Act, 1881, trustees have power to submit to arbitration any debt, account, claim, or thing, but only if a contrary intention is not expressed (*l*). It is said that trustees, by submitting matters to arbitration, do not make themselves personally liable (*m*). But it is apprehended that must entirely depend upon the terms of the submission. In order to be safe, it is recommended that they should in express terms take care to exclude the construction of any personal liability, for there seems no reason why they should stand in any more favourable position than executors.

Submission by a committee of lunatic.

vi. *Committee of a lunatic.*]—A committee of a lunatic may, with permission of the Court of Chancery, but not without, bind the lunatic by submitting his interests to arbitration (*n*).

On the application of the committee, the court will, on a fitting case, refer it to the master to inquire whether it is proper and for the benefit of the lunatic's estate to refer the demands against his estate to arbitration, and upon what terms and conditions the reference should take place (*o*).

Wife of a lunatic.

Where there is no committee the wife of the lunatic has been held to have a sufficient implied authority to sue in his name for debts due to him (*p*). It does not appear whether the courts would hold that implied authority gave her power to refer either the action or the demand upon which it was founded.

Submission by public officer.

vii. *Public officer.*]—Where a public company are authorised by act of parliament to sue and be sued in the name of one of their public officers, who, however, is not to be personally answerable, the officer by consenting to refer a cause does not incur any personal responsibility. No attachment will be granted to enforce the award against him, though in many instances the company will be compelled to obey the award by a mandamus (*q*).

(*l*) 44 & 45 Vict. c. 41, s. 37.
(*m*) Davies *v.* Ridge, 3 Esp. 101.
(*n*) Shelford on Lunatics, pp. 179, 396; Dane *v.* Viscountess Kirkwall, 8 C. & P. 679.
(*o*) In re Baker, Shelford on Lunatics, 204.
(*p*) Rock *v.* Slade, 7 Dowl. 22.
(*q*) Corpe *v.* Glyn, 3 B. & Ad. 801.

SECTION III.

PERSONS EMPOWERED TO REFER BY A STATUTE.

Trustee of bankrupt.

1. *Trustees of bankrupts.*]—By the Bankruptcy Act, 1883, statute 46 & 47 Vict. c. 52, s. 57, the trustee may, with the permission of the committee of inspection, refer any dispute respecting the debts, claims, or liabilities of the bankrupt to arbitration.

On a reference between assignees of a bankrupt under the old statute 12 & 13 Vict. c. 108, s. 153, respecting a claim against the bankrupt, the proper consents to the reference had not been obtained: the claimant, however, was held bound by the award made against him, though it was stated that the bankrupt's estate would not have been bound (*r*).

Want of proper consent to the reference.

The repealed statute, the 6 G. IV. c. 16, s. 88, which required the consent of creditors to a reference, did not, it is apprehended, disable the assignees from referring without such consent, but only rendered them liable for the consequences to the creditors (*s*).

Reference: admission of sufficient funds.

Like executors, assignees of bankrupts by entering into a submission would, unless they protested against the inference, be held to have admitted that they have sufficient funds in hand to pay what the award directed (*t*).

Bankrupt no power to refer to bind his estate.

The bankrupt himself cannot make a valid submission so as to affect his estate. An award made on a submission by a bankrupt was in one case held binding on his assignee, but that decision was reversed in the House of Lords (*u*). And when an award made on a submission between a creditor and a bankrupt, after an act of bankruptcy, was received by the commissioners as conclusive evidence of the amount of the debt, the Lord Chancellor directed the proof of the debt to be expunged, and that an inquiry into the amount should be made before the commissioners (*x*).

(*r*) See Wyld, Ex parte, 30 L. J. Bank. 10, S. C. 2 De G. F. & J. 642.

(*s*) Jones *v.* Yates, 3 Y. & J. 373; Piercy *v.* Roberts, 1 M. & K. 4. See also Ex parte Whitchurch, 1 Atk. 91; Nerot *v.* Wallace, 3 T. R. 17; Bannatyne *v.* Leader, 3 M. & C. 379.

(*t*) Robson *v.* ——, 2 Rose, 50.

(*u*) Whiteacre *v.* Pawlin, 2 Vern. 229.

(*x*) Ex parte Kemshead, 1 Rose, 149.

But the submission by a bankrupt respecting his estate is not void, but binding as against himself, and if costs are awarded against him he may be made to pay them (*y*).

But binds himself.

Assignees not affected by award unless they consent.

On a reference by a party before his bankruptcy, it is only against the bankrupt that proceedings to enforce the award can be taken, for the assignees clearly could not be affected by an award to which they were not assenting parties (*z*).

If, however, the assignees are chosen while the reference is still pending, it seems proper that they should be called before the arbitrator (*a*); and if they appear before him and adopt the proceedings, they will be bound by the award (*b*).

Assignees of insolvent debtors.

Want of proper consent to the reference.

The declaration in an action on an award by the assignee of an insolvent debtor was held good, though there was no allegation of proper consent to the reference (*c*), nor could the want of it be pleaded as a defence by a stranger to proceedings by the assignee (*d*); although, like an assignee of a bankrupt, the latter, if he referred without a proper authority, might have incurred a liability to the creditors.

Liability of assignees.

Where the trustees of an insolvent debtor had submitted to a reference, and the award directed them to pay the costs, the court, in 1818, held that by entering into the arbitration bond they had confessed that they had sufficient funds, and that by referring all matters in difference and agreeing to pay what should be awarded, they had made themselves liable for the payment of costs (*e*).

Trustees of savings banks and members or their representatives.

No other remedy than arbitration.

II. *Savings banks, Friendly and Benefit building societies.*]—Under the old statute 9 G. IV. c. 92, s. 45, relating to Savings banks, it was held that the parties must refer; for the words were compulsory, and left the parties no other remedy (*f*). 26 & 27 Vict. c. 87, s. 45, and 39 & 40 Vict. c. 52, s. 2, are the sections now applicable.

(*y*) Milnes *v.* Robertson, 24 L. J. C. P. 29.

(*z*) Marsh *v.* Wood, 9 B. & C. 659. See Edwards, Ex parte, 3 Mor. Bank. Rep. 179.

(*a*) Taylor *v.* Shuttleworth, 8 Dowl. 281.

(*b*) Dod *v.* Herring, 3 Sim. 143, S. C. on App. 1 Russ. & M. 153; Michie, Ex parte, 1 Mont. D. & De Gex, 181, S. C. 9 L. J. Bank. 28.

(*c*) Sutcliffe *v.* Brooke, 9 Jur. 1112, S. C. 15 L. J. Ex. 118.

(*d*) Casborne *v.* Barsham, 6 Sim. 317.

(*e*) Wansborough *v.* Dyer, In re, 2 Ch. 40. See Davies *v.* Ridge, 3 Esp. 101.

(*f*) Crisp *v.* Bunbury, 8 Bing. 394.

Trustees compelled to name an arbitrator.

It was also decided under the old act, that if the trustees of a savings bank, when called upon by a depositor, refused to appoint an arbitrator on their part, pursuant to the statute, to adjudicate on the depositor's claim, the Court of Queen's Bench would compel them by mandamus (*g*). Not so, however, when it was doubtful whether the parties claiming the sums on behalf of a society which had deposited money in the bank were lawfully entitled to represent it (*h*).

Friendly society and members thereof.

Under the Friendly Societies Act, 1875, 38 & 39 Vict. c. 60, it is provided by s. 22, that all disputes shall be decided in the manner directed by the rules of the society, and that the decision so made shall be binding and conclusive on all parties without appeal, and shall not be removed into any court of law nor restrained by injunction. But s. 30, sub-s. 10, somewhat inconsistently allows a member of a Friendly society or person insured to apply to a county court or court of summary jurisdiction to settle any dispute, notwithstanding any provision in the rules to the contrary (*i*).

Under a repealed statute, where the justices' decision was without appeal, no case could be stated by the justices under the statute 20 & 21 Vict. c. 43 (*k*).

Under the old acts, where justices had to decide if the arbitrators neglected or refused to make an award, the justices had jurisdiction though the arbitrators had in fact made an award, if they had made it without hearing a party's witness, though tendered for examination; for awarding under such a state of things was a neglecting or refusing to make an award, *i.e.*, a valid award (*l*). But a party who had assented to an award being made by fewer arbitrators than the rules required was not allowed afterwards to treat the award as a nullity, and to go before justices, for the latter in such case had no jurisdiction (*m*). Arbitrators settling disputes under the present act are not bound to hear counsel (*n*).

Counsel.

A society which has for its object the loan of money to its

(*g*) R. *v.* Mildenhall Savings Bank, 6 A. & E. 952.
(*h*) R. *v.* Witham Savings Bank, 1 A. & E. 321; R. *v.* Cheadle Savings Bank, 1 A. & E. 323, n.
(*i*) Holt, In re, 4 Q. B. D. 29.
(*k*) Callagan *v.* Dolwin, L. R. 4 C. P. 288, S. C. 38 L. J. M. C. 110, overruling Watts *v.* Justices of Kent, 35 L. J. M. C. 190.
(*l*) R. *v.* Grant, 14 Q. B. 43.
(*m*) R. *v.* Evans, 3 E. & B. 363.
(*n*) Macqueen *v.* The Nottingham Caledonian Society, 9 C. B. N. S. 793.

members, not being by way of charitable relief, is not within the statutes (*o*).

A claim by an executor of a deceased member against the society for the amount of a policy of 1,000*l.*, effected by the deceased on his own life with the society, is not a matter which must be decided by arbitration, and it seems that policies are not within the provisions of the Friendly Societies Acts (*p*).

Benefit building societies.

The Benefit Building Societies Act, 1874, 37 & 38 Vict. c. 42, contains provisions respecting arbitrations under the act whenever the rules of the society direct disputes to be referred to arbitration (*q*). The later act, 47 & 48 Vict. c. 41, defines "disputes."

When the matters in dispute are between the benefit building society and the member, *as member*, the only tribunal for deciding them is an arbitration, if arbitrators have been duly appointed (*r*). If they have not been appointed, and the party is nevertheless willing to refer according to the rules, it does not seem clear whether the society could sue him for breach of any rule (*s*). When it was the meaning of the rules that there should be standing arbitrators, from whom three were to be chosen by lot for each dispute, and none had been appointed until after action brought, it was held that the action should not be stayed (*t*). Where the trustees disputed the plaintiff's title to be a member they could not compel him to refer the question to arbitration (*u*). It will be assumed, primâ facie, that the rules provide for the settlement of disputes by arbitration or by justices (*x*). A member withdrawing from the society claimed payment of his shares. The Board refused, on the ground that other claimants had a priority, and that there

Standing arbitrators not appointed.

Withdrawing member.

(*o*) R. *v.* Shortridge, 1 N. S. C. 56.

(*p*) Kelsall *v.* Tyler, 25 L. J. Ex. 153.

(*q*) Ss. 34, 35 and 36.

(*r*) Reeves *v.* White, 17 Q. B. 995; Thompson *v.* Planet Benefit Building Society, L. R. 15 Eq. 331; Wright *v.* Monarch Investment Building Society, 5 Ch. D. 726; Leicester Club and County Race Course Co., In re, 30 Ch. D. 629.

(*s*) Reeves *v.* White, 17 Q. B. 995.

(*t*) Christie *v.* Northern Counties, &c. Building Society, 43 Ch. D. 62.

(*u*) Prentice *v.* London, L. R. 10 C. P. 679.

(*x*) Huckle *v.* Wilson, 2 C. P. D. 410; Thompson *v.* Planet Building Society, L. R. 15 Eq. 333; Johnson *v.* Altrincham Building Society, 48 J. P. 24.

were not funds enough to pay all. It was decided that no action lay for this claim (*y*). A distinction between Benefit building societies and Friendly societies has been recently noticed in the House of Lords. By the statute 6 & 7 W. IV. c. 32, s. 4, all the provisions of the Friendly Societies Act, 10 G. IV. c. 56, *so far as the same or any part thereof may be applicable to the purpose of any benefit building society*, shall extend to the benefit building society and the rules thereof, in the same manner as if such provisions had been expressly re-enacted. And the House of Lords has held, that as questions between a member as mortgagor of land and the society as mortgagee, involving as they may do the rights of redemption or foreclosure, could not be satisfactorily dealt with on a reference under the statute 10 Geo. IV. c. 56, that the provisions of that act are not applicable to those purposes of a benefit building society which involve the adjustment of rights created by mortgage, and therefore, that notwithstanding the rules of the society providing for an arbitration of disputes, the mortgagor might well maintain an action for the redemption of the mortgaged premises (*z*). The act 47 & 48 Vict. c. 41 provides that the word "disputes" does not include disputes as to the effect or construction of any mortgage deed. The society, therefore, may sue for money due from a member under such a deed (*a*), though while the Act of 1874 was alone in force it would have had to go to arbitration (*b*). Where the vice-president of a benefit building society, who had purchased a real estate for the society with their funds, and kept it to himself, Sir John Romilly, M.R., decided that the trustees might compel a restitution of the estate, and that the jurisdiction of a court of equity was not ousted by a rule of the society for referring

Distinction between Friendly and Benefit building societies.

"Disputes," what.

(*y*) Wright *v.* Deley, 4 H. & C. 209; Walker *v.* General Mutual, &c. Building Society, 36 Ch. D. 777; Davies *v.* Chatham, &c. Building Society, 61 L. T. 680.

(*z*) Mulkern *v.* Lord, L. R. 4 App. Cas. 182; Morrison *v.* Glover, 4 Ex. 430; Doe *d.* Morrison *v.* Glover, 15 Q. B. 103; Cuthill *v.* Kingdom, 1 Ex. 494; The Queen *v.* Trafford, 24 L. J. M. C. 20; Fleming *v.* Self, 1 Kaye, 518; Seagrave *v.* Pope, 1 De Gex, M. & G. 783; Mosley *v.* Baller, 1 Hall & Tw. 301, S. C. 6 Hare, 87.

(*a*) Western Suburban, &c. Building Society *v.* Martin, 17 Q. B. D. 609.

(*b*) Municipal Permanent, &c. Building Society *v.* Kent, 9 App. Cas. 260; Hack *v.* London Provident Building Society, 23 Ch. D. 103.

disputes to arbitration (*c*). So where directors or treasurers were sued for retaining money illegally (*d*).

Award.

A court of equity cannot question an award of the appointed arbitrators of such a society, except it be bad on its face, or the arbitrators be corrupt (*e*).

A magistrate is bound to issue a distress warrant to enforce the award. He may not refuse on the ground that the society has been expending its funds illegally, and become a freehold land building society (*f*).

Parties interested in lands and the promoters of the undertaking.

III. *Promoters of public undertakings and railways.*]—Under "The Lands Clauses Consolidation Act, 1845," all parties having any estate or interest in the lands allowed by any special act of parliament to be purchased or taken for the purposes of any undertaking authorised by the special act to be executed, may require the promoters of such undertaking to refer the question of compensation to arbitration in the manner provided by the act (*g*). Provision is made in the seventh section of the statute for the case of persons under disability, trustees, and executors.

Parties under disabilities.

Railway companies.

Joint stock companies.

Railway companies formed under any act, embodying "The Railway Clauses Consolidation Act, 1845" (*h*), and joint stock companies created by any statute incorporating "The Companies Clauses Consolidation Act, 1845" (*i*), or being wound up (*k*), are respectively empowered by the specified acts to obtain the decision of arbitrators on certain matters in the manner prescribed in the respective acts. And now, any railway companies, and all owners, lessees, and contractors working any railway, have certain facilities given them by statute for referring disputes (*l*). But the power of railway companies to agree to a reference respecting any

(*c*) Mullock *v.* Jenkins, 14 Beav. 628.

(*d*) Municipal Permanent Building Society *v.* Richards, 39 Ch. D. 372, S. C. 58 L. J. Ch. 8; Sinden *v.* Banks, 3 E. & E. 623.

(*e*) Armitage *v.* Walker, 2 Kay & John. 211.

(*f*) Hughes *v.* Layton, 33 L. J. M. C. 89.

(*g*) 8 & 9 Vict. c. 18. See Appendix of Statutes; see also P. I. ch. 1, s. 1, d. 3, as to matters referable by statute; and P. I. ch. 3, s. 7, d. 5, as to the mode of submission.

(*h*) 8 & 9 Vict. c. 20. See Appendix of Statutes; see also P. I. ch. 1, s. 1, d. 3.

(*i*) 8 & 9 Vict. c. 16. See Appendix of Statutes.

(*k*) 25 & 26 Vict. c. 89, s. 162.

(*l*) 22 & 23 Vict. c. 59. See Appendix of Statutes.

differences arising in the course of their business does not depend on the authority of any act of parliament (*m*).

The Crown.

IV. *Crown.*]—If the Queen or the Duke of Cornwall consent to become parties to an arbitration, the Arbitration Act, 1889, will apply to them, but they cannot under it be compelled to refer, and it does not affect "the law as to costs payable by the crown" (*n*).

(*m*) Great Western Ry. Co. *v.* Waterford Ry. Co., 17 Ch. D. 493.

(*n*) 52 & 53 Vict. c. 49, s. 23. See Appendix of Statutes.

CHAPTER III.

HOW MATTERS MAY BE REFERRED TO ARBITRATION.

PART I. CH. III.

THE different modes in which matters may be referred to an arbitrator, and the effect of each species of submission, are considered in this chapter.

Contents of the third chapter.

Section one contains some remarks applicable to submissions generally; section two treats of submissions by private agreement at common law and their disadvantages; section three, of submissions which have the effect of or may be made rules of court under the statutes; section four discusses the effects, in law and equity, of the common provision in deeds and agreements, that if any disputes shall arise they shall be decided by arbitration; and section five, in like manner, enlarges on the effect of a negative agreement, not to proceed by action or suit respecting such differences; submissions made in a cause at common law, and under the Arbitration Act, 1889, their effects on the court and the parties, form the subject of section six; section seven comprises an enumeration of some other forms of submission of a judicial character, or made under the authority of acts of parliament; while section eight concludes the chapter with an account of the proceedings on the submission against a party who prevents an award being made.

SECTION I.

OF SUBMISSIONS IN GENERAL.

PART I. CH. III. S. 1.

1. *General qualities of a submission.*]—Matters may be referred to arbitration in any manner that expresses the agreement of the parties to be bound by the decision of the person named and chosen to determine the matters in con-

troversy. This person is styled the arbitrator, and the agreement conferring on the arbitrator his binding authority is termed the submission (*a*). The agreement to refer is not strictly a submission until the arbitrators are named (*b*). But under the Arbitration Act, 1889, s. 27, a submission is defined as "a written agreement to submit present or future differences to arbitration whether an arbitrator is named therein or not." This statute does not apply to Scotland or Ireland (sect. 28), and by Scotch law an agreement to refer future disputes to a person not named but designated only as the holder for the time being of a particular office, as, for instance, that of engineer to the Forth Bridge Railway Co., is not binding, and this, though the same engineer held office at the time when disputes arose as at the date of the agreement to refer (*c*).

Scotch law of submission.

No formal submission, either verbal or written, is necessary (*d*). It may be contained in a clause quite collateral to the main purpose of an agreement. Thus a bond conditioned "for A.'s due discharge of the duties of clerk," "to be ascertained by the inspection of A.'s accounts by J. S., and the amount so ascertained to be liquidated damages," is a submission to the award of J. S. respecting the accounts (*e*). So also a cognovit in the words, "I hereby confess the action, and that the plaintiffs have sustained damages to the amount of one shilling besides their costs, to be taxed by the prothonotary as he shall think the plaintiffs entitled," is an appointment of the prothonotary to arbitrate respecting the costs. His decision is binding, and will not be reviewed by the court (*f*).

No particular form of submission necessary.

II. *What is a reference to arbitration ?*]—The parties must manifestly intend to be concluded by the decision of the person called in, in order to clothe him with the authority of an arbitrator.

Intention of parties to bind themselves.

Hence, where it was the practice for one of the proprietors of a stage coach to adjust the accounts from time to time, apportioning the profits and charges, and the other proprietors were in the habit of receiving or paying according

(*a*) Bac. Ab. Arb. B. & D.
(*b*) Smith *v.* Nelson, 6 Times L. R. 434, S. C. 59 L. J. Q. B. 533.
(*c*) Tancred *v.* Steel Co. of Scotland, 15 App. Ca. 125.
(*d*) Bac. Ab. Arb. B.
(*e*) Jebb *v.* M'Kiernan, Moody & M. 340.
(*f*) Elvin *v.* Drummond, 1 M. & P. 88, S. C. 4 Bing. 415.

to his apportionment, it was held that he was to be considered rather the common servant of them all than an arbitrator; for the acquiescence of the others in the correctness of his past accounts did not of itself manifest any intention on their part to deprive themselves of the power of questioning the correctness of future adjustments (*g*).

Preventing differences arising.

It is not in every case where two parties intend to be concluded by the decision of a third, that that third person is an arbitrator. Thus, a valuer between an incoming and outgoing tenant of a farm (*h*), or a person appointed to determine the price to be paid for brewery premises (*i*), or the goodwill of a business (*k*), or for land (*l*), or for timber (*m*), or for dilapidations (*n*), or the amount to be paid to contractors for work done (*o*), or the compensation to be given for an error of description of property (*p*), is often not an arbitrator in the proper sense, unless there have been differences between the parties on the point previous to their submitting it to his decision. A decision which precludes differences from arising, instead of settling them after they have arisen, is for many purposes frequently not an award (*q*). Even where the reference was to two persons described as arbitators in the agreement who were directed by it to appoint an umpire in case of dispute before proceeding, and the question was as to the amount to be paid to a nurseryman for yielding up his lease, and for his plants, and the arbitrators themselves were nurserymen: the Court refused to enforce the decision of the umpire as an award, saying it did not appear that any judicial enquiry was intended, intimating that the inference might have been different if barristers instead of experts had been selected (*r*).

Architect

A building agreement authorising proceedings in case of

(*g*) Carr *v.* Smith, 5 Q. B. 128; Goodyear *v.* Simpson, 15 M. & W. 16.

(*h*) Leeds *v.* Burrows, 12 East, 1; Freeman *v.* Jeffries, L. R. 4 Ex. 189.

(*i*) Collins *v.* Collins, 28 L. J. Ch. 184, S. C. 26 Beav. 306.

(*k*) Turner *v.* Goulden, L. R. 9 C. P. 57.

(*l*) Lee *v.* Hemingway, 3 Nev. & M. 860, S. C. 3 L. J. K. B. 124.

(*m*) Wilson *v.* Green, 18 Q. B. D. 7; Dawdy, In re, 15 Q. B. D. 426, S. C. 54 L. J. Q. B. 574.

(*n*) Jenkins *v.* Betham, 24 L. J. C. P. 94.

(*o*) Scott *v.* The Liverpool Corporation, 28 L. J. Ch. 230.

(*p*) Boss *v.* Helsham, 4 H. & C. 642, S. C. L. R. 2 Ex. 72.

(*q*) See Wilson *v.* Green, 35 W. R. 43, S. C. 18 Q. B. D. 7.

(*r*) Hammond *v.* Waterton, 62 L. T. 808.

certain defaults by the builder, to be ascertained and decided on by the architect, without appeal, is not a submission to arbitration (*s*).

building agreement.

But when the words of the submission are large enough to embrace the case of a judicial enquiry, and the object of the parties is to have their respective cases heard and decided upon the evidence produced before the arbitrator, it is not less an arbitration because the ultimate object is to ascertain the value of property or the amount of compensation (*t*).

Judicial enquiry.

Stewards of a horse-race appointed to settle any disputes respecting it are not arbitrators in the strict sense (*u*).

Steward of horse-race.

A person appointed to state a case for the opinion of the court under the statute 17 & 18 Vict. c. 125, s. 5, the Common Law Procedure Act, 1854, is an arbitrator; for he is empowered to decide on facts, though not to determine everything in controversey between the parties (*x*).

Person to state a case.

The Local Government Board, in deciding disputes referred to them by statute, act as judges, not arbitrators, by consent (*y*).

Local Government Board.

Like other contracts when in writing, the submission must be duly executed; and where the accession of all parties to the reference is the consideration to each to execute the submission, it is not valid as to some who have executed it until all have done so, even although it purposes to refer all matters in difference between them or any two of them (*z*).

Submission to be executed by all.

A testator cannot make a valid appointment by will, that if any differences should arise respecting his will, these shall be determined by a specified arbitrator, whose decision is to be final (*a*).

Appointment of arbitrator by will.

It ofter happens that matters in difference are agreed to be referred to two arbitrators, one to be appointed by each party; in such case it is important to call attention to the fact that the appointment will not be considered complete until it has been *notified to the other side;* therefore, if it be one of the terms of the agreement that a party is to appoint an arbitrator

Appointment of two arbitrators.

(*s*) Wadsworth *v.* Smith, L. R. 6 Q. B. 332.

(*t*) Hopper, In re, 8 B. & S. 100, S. C. 36 L. J. Q. B. 97; L. R. 2 Q. B. 367.

(*u*) Ellis *v.* Hopper, 28 L. J. Ex. 1; Parr *v.* Winteringham, 28 L. J. Q. B. 123.

(*x*) Graham *v.* Glover, 25 L. J. Q. B. 10, S. C. 5 E. & B. 591.

(*y*) Bexley *v.* West Kent M. S. Bd., 51 L. J. Q. B. D. 456.

(*z*) Antram *v.* Chase, 15 East, 209.

(*a*) Philips *v.* Bury, Skin. 469.

by a certain day, it will be too late, though he nominate his arbitrator on the day, if he neglect to inform his opponent of the nomination till the day after (*b*). If a party is bound to appoint an arbitrator, he performs his agreement by making the appointment, though the arbitrator will not act (*c*).

Should refer to the same matters.

It is very important that the appointment of an arbitrator by each party should refer to the same subject-matter. If A. appoint his arbitrator to determine a dispute respecting the construction of a lease, and the damages A. has sustained, and B. appoint his arbitrator to decide on the construction of the lease, and not as to damages, an award of damages to A. will be invalid (*d*).

Advisable to take a warrant of attorney as collateral security.

III. *Taking collateral security to enforce the award.*]—It is sometimes prudent to take a warrant of attorney to confess judgment for a specific sum as a collateral security for the performance of an award, in order that execution may be immediately taken out, either against the property or the person of him who neglects or refuses to perform the award. This was more important formerly, though performance could then generally be enforced by attachment, yet, as that process only issued from a court of law in term time, if the award were made in vacation, or too late in term for the opposite party to show cause against a rule for an attachment, the successful party would have to wait till the next term for the assistance of the court. The defeazance of the warrant of attorney should contain the substance and effect of the bond or agreement of submission, with a declaration that no execution should issue until non-performance of the award.

Dispute as to possession of land.

Such a security was peculiarly beneficial in the case of the submission of the title to land whenever it was probable that the award might direct a change of possession; for formerly if a party in possession were awarded to deliver possession of land to the other, the only mode by which possession could be obtained was by ejectment (*e*).

Conveying lands to arbi-

When the nature of the case is such as to require convey-

(*b*) Tew *v.* Harris, 11 Q. B. 7; Thomas *v.* Fredericks, 10 Q. B. 775.

(*c*) Cooper *v.* Shuttleworth, 25 L. J. Ex. 114.

(*d*) Davies *v.* Price, 6 L. T. N. S. 713, S. C. 10 W. R. 865.

(*e*) Jarm. & Bythewood's Conv. Vol. II. p. 701, 3rd ed.; p. 639, 2nd ed. See Doe *d.* Greville *v.* Roper, Harr. Woodf. Land. & Ten. p. 790, 4th ed.; Doe *d.* Morris *v.* Rosser, 3 East, 15.

ances of lands, as when a partition is to be made, and it is considered probable that a difficulty may be experienced in compelling a party to execute conveyances pursuant to the award, the expedient may sometimes with advantage be adopted of conveying the entirety of the lands in the first instance to the arbitrator upon trust, to convey to the several parties the portions that shall be respectively awarded to them (*f*).

Arbitrator on trust to convey pursuant to award.

IV. *Arbitration pending cannot be pleaded at law or equity.*]— Notwithstanding some doubtful expressions in older cases (*g*), it is clear law now that the pendency of an arbitration cannot be pleaded to an action for the same demand (*h*); nor could it be pleaded to a suit in equity (at least where there was no covenant not to sue) even though the submission were made a rule of a court of common law (*i*).

Submission before action no bar to action.

But an agreement that in consideration that the defendants would consent to refer matters in dispute in an action, the plaintiff would accept such agreement in satisfaction of all damages in respect of certain other matters, and a reference thereon, may be pleaded as a good accord and satisfaction to an action by the plaintiff in respect of the last-mentioned matters (*k*).

Agreement to refer when accord and satisfaction.

To an action for goods sold, a plea that a dispute arose as to part, and that the defendant had by agreement paid the price of that part to an arbitrator to abide his decision upon it, and had paid the residue of the money due to the plaintiff, was held a good plea (*l*).

A plea on equitable grounds, amounting to the statement of the pendency of an arbitration in which the arbitrator had power to decide on what terms the contract declared on was to be put an end to, and that by the agreement of reference no action was to be brought between the parties, was held not good (*m*).

No plea on equitable grounds.

The effect of an arbitration on the power of a party to take

(*f*) 6 Jarm. & Bythewood's Conv. 586, 3rd ed.

(*g*) Kill *v.* Hollister, 1 Wils. 129.

(*h*) Harris *v.* Reynolds, 7 Q. B. 71. See also Livingston *v.* Ralli, 24 L. J. N. S. Q. B. 269.

(*i*) Cooke *v.* Cooke, L. R. 4 Eq. 77, S. C. 36 L. J. Ch. 480.

(*k*) Williams *v.* London Commercial Exchange Company, 10 Ex. 569.

(*l*) Page *v.* Meek, Q. B. 7 Nov. 1862, 1 N. R. 20.

(*m*) Wood *v.* The Copper Miners' Company, 25 L. J. C. P. 166.

proceedings in a court of law or equity in respect of a subject-matter of the reference, is further much considered in ss. 4 and 5 of this chapter.

Railway Companies Arbitration Act, 1859.

It would seem that an agreement to refer between two railway companies under the Railway Companies Arbitration Act, 1859 (22 & 23 Vict. c. 59), may be pleaded in bar to a suit (*n*).

Proceedings stayed in action brought after reference.

v. *Staying proceedings contrary to reference.*]—If the submission contained a stipulation that no action should be brought, the court would, on application, before the recent statutes, stay the proceedings in any action commenced contrary to the agreement (*o*).

Not so when arbitrators fail to appoint umpire.

But where, by a deed of partnership, in case of dispute each party was to appoint an arbitrator, and the two arbitrators were to appoint an umpire before they commenced proceedings, the court refused to stay proceedings in an action, as, although the arbitrators were appointed, they had not selected an umpire, and the appointment of an umpire was held by the court a condition precedent to the acting of the arbitrators (*p*).

Action by assignees after reference by insolvent.

A plaintiff after referring the action became insolvent. His assignees brought a fresh action for the same matters. The court refused the application of the defendant to stay the proceedings in the second action (*q*).

Stay under Arbitration Act, 1889.

By the Arbitration Act, 1889 (*r*), s. 4, it is provided—

If any party to a submission, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay the proceedings, and that court or a judge thereof if satisfied that there is no sufficient reason why the matter should not be referred in

(*n*) Watford, &c. Ry. Co. *v.* London and North-Western Ry. Co., 38 L. J. Ch. 448.

(*o*) Dicas *v.* Jay, 6 Bing. 519; Moscati *v.* Lawson, 1 H. & W. 572.

(*p*) Bright *v.* Durnell, 4 Dowl. 756.

(*q*) Sturgis *v.* Curzon, 21 L. J. Ex. 38.

(*r*) 52 & 53 Vict. c. 49.

accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.

Common Law Procedure Act, 1854.

This clause is similar in substance though not in language to s. 11 of the Common Law Procedure Act, 1854, now repealed. The following decisions on the terms of that section will in most cases be applicable to the new section (*s*).

Affidavit.

There ought to be an affidavit of the applicant's readiness and willingness to refer (*t*).

Reason for not referring.

Unless some reason is shown why the matters ought not to be referred, the court will presume that there is none (*u*). But the court has a discretion (*x*), and where the point is one of law and more fitted to be decided by a judge it will refuse the application (*y*). So, also, where the defendants had applied for time to plead and had agreed to take short notice of trial (*z*).

In what cases action will be stayed.

The Court of Queen's Bench held that a liberal construction ought to be given to the old section, and that if an action was brought for a claim under a contract, namely, for freight under a charter-party, to which the defendant admitted that he had no defence, but set up a cross claim for damages, by reason of the ship being unseaworthy, the defendant, as the contract provided for arbitration, was held to be in a position to pray the court in its discretion to stay the applicant's action, and so to force a reference to arbitration of their mutual claims (*a*).

In the Exchequer, however, Bramwell, B., is reported to have expressed his disapproval of that decision; and that court, in an action for freight, not against the charterer, but against a surety who guaranteed payment of the freight,

(*s*) See as to old practice, West London Dairy Society *v.* Abbott, 44 L. T. 376. See Horton *v.* Sayer, 29 L. J. Ex. 28, S. C. 4 H. & N. 643.

(*t*) See Piercy *v.* Young, 14 Ch. D. 200; Halsey *v.* Windham, W. N. (1882) 108.

(*u*) Hodgson *v.* Rail. Pass. Ass. Co., 9 Q. B. D. 188. See Fox *v.* Rail. Pass. Ass. Co., 54 L. J. Q. B. 505.

(*x*) Per Bowen, L. J., L. C. & D. Ry. Co. *v.* S. E. Ry. Co., 40 Ch. D. 579; Davis *v.* Starr, 41 Ch. D. 242; Swiney *v.* Ballymena Commrs., 23 L. R. Ir. 122.

(*y*) Lyon *v.* Johnson, 40 Ch. D. 579; Carlisle, In re, Clegg *v.* Clegg, 44 Ch. D. 200; 59 L. J. Ch. 520.

(*z*) Smith & Co. *v.* British Marine Ins. Co., W. N. (1883) 176.

(*a*) Russell *v.* Pelegrini, 26 L. J. Q. B. 75, S. C. 6 E. & B. 1020.

refused to act under that section; and said that the surety could not set up any cross claim which was not a defence to the liquidated demand for freight, or rely on any breach of warranty on the part of the shipowner, for which the charterer alone could sue (*b*).

The Court of Common Pleas, however, more recently acted on the decision in *Russell* v. *Pelegrini* (*c*).

Action charging fraud.

In an action for breach of contract, where the plaintiff's case was that the defendant had fraudulently delivered an inferior kind of linseed cake, and the contract provided that any dispute as to quality should be settled by arbitration in the usual manner, which was by two brokers, the Court of Common Pleas, in the exercise of its discretion, refused the defendant's application to stay the action, considering that a question whether a gross fraud had been committed was one unfit to be determined by such an arbitration (*d*). But where the action was for breach of warranty as to the quality of some seed sold, and no question of fraud between the parties could properly arise, the same court stayed the action (*e*).

Rule in Chancery Division.

In the Chancery Division the rule seems to be that where fraud is charged the court will in general refuse to send the dispute to arbitration if the party charged with the fraud desires a public inquiry. But where the objection to arbitration is by the party charging the fraud the court will not necessarily accede to it, and will never do so unless a primâ facie case of fraud is proved (*f*).

Construction of charter-party.

The action will be stayed though the only question be one of law on the construction of a charter-party (*g*).

Effect of clause in policy.

An arbitration clause, in a policy of insurance, though not sufficient to bar the action, may afford a good ground for application under this section (*h*).

Where an action was brought alleging unfair conduct by

(*b*) Daunt *v.* Lazard, 27 L. J. Ex. 399.

(*c*) Seligman *v.* Le Boutillier, L. R. 1 C. P. 681.

(*d*) Wallis *v.* Hirch, 26 L. J. C. P. 72, S. C. 1 C. B. N. S. 316. See Lury *v.* Pearson, 1 C. B. N. S. 639; and Smith *v.* Allen, 3 F. & F. 156.

(*e*) Hirsch *v.* Im Thurn, 4 C. B. N. S. 569, S. C. 27 L. J. C. P. 245.

(*f*) Russell *v.* Russell, 14 Ch. D. 471; Minifie *v.* Railway Passengers' Assurance Society, 44 L. T. N. S. 552.

(*g*) Randegger *v.* Holmes, L. R. 1 C. P. 679. See Forwood *v.* Watney, 49 L. J. Com. Law, 447.

(*h*) Roper *v.* London, 28 L. J. Q. B. 260, S. C. 1 E. & E. 825.

defendant to defeat the contract, the court refused to stay, as it was not a dispute within the contract (*i*).

An action has been stayed and a receiver appointed pending the winding-up of a partnership. This may be done by one order (*k*). An order to stay a counterclaim may be granted (*l*).

When statute applicable.

The old section was held not to apply where an action was brought on a charter-party, which contained no clause for arbitration, but an arbitration had been subsequently agreed upon (*m*). This construction apparently limited the operation of the section to the case of agreements for reference of *future* differences; but the statute in terms applied to agreements for reference of *then existing* differences.

Not when submission properly revoked.

In a later case, Byles, J., and Willes, J., stated that they did not assent to the doctrine there supposed to be laid down (*n*). And the Court of Queen's Bench and some of the judges of the Court of Appeal have recently expressed their view that the statute applied to an existing arbitration entered into only after the disputes had arisen, but that if such a specific submission had been effectually revoked before action brought the suit could not be stayed by the court, though the power of the court would remain if such submission had been entered into in pursuance of a previous general clause in a deed or instrument to refer all disputes (*o*).

Where one party in writing and the other verbally agreed that a voyage was to be on the same terms as a former voyage, and the old agreement, which was in writing, contained a clause for settling differences by arbitration, Keating, J., stayed an action respecting the latter voyage (*p*).

Matters of account.

In an action for wrongful dismissal by a manager of a brewery engaged under a deed containing a clause for arbitration, the Court of Exchequer, on the application of the

(*i*) Nobel, &c. *v.* Stewart, 6 Times L. R. 378.

(*k*) Halsey *v.* Windham, W. N. (1882) 108; Compagnie du Senegal *v.* Woods, 53 L. J. Ch. 166.

(*l*) Spartali *v.* Van Hoorn, W. N. (1884) 32.

(*m*) Blythe *v.* Lafone, 1 E. & E. 435, S. C. 28 L. J. Q. B. 164. See Orphan Working School *v.* Hensley, 27 L. J. Ex. 426.

(*n*) Mason *v.* Haddon, 6 C. B. 526.

(*o*) Randell *v.* Thompson, 1 Q. B. D. 748, S. C. 45 L. J. C. L. 713. See Moffatt *v.* Cornelius, 26 W. R. 914; Deutsche Springstoff, &c. *v.* Briscoe, 20 Q. B. D. 177.

(*p*) Hattersley *v.* Hatton, 3 F. & F. 116.

defendant, stayed the action, it appearing probable that matters of account would arise (*q*).

Foreign tribunal.

It is no reason for refusing to stay proceedings that the reference of the disputes is to be to a foreign court (*r*).

Several disputes, one only referable.

Where one only of the matters in dispute in respect of which an action had been brought was capable of being referred under the arbitration clause, Fry, J., refused to stay the action (*s*).

Arbitrator no power to award ejectment.

It is no reason for refusing to stay proceedings that the causes of action arise out of one deed and the arbitration clause is contained in another, if the two deeds form one contract, nor that the action is for ejectment for breach of covenants, and that the arbitrators cannot award an ejectment, for the court, if the award warrants it, may make an order equivalent to a judgment for ejectment at common law (*t*).

Bankruptcy.

A trader having sued the defendant for the price of some timber under a contract, and the defendant having sued the trader for unliquidated damages under the same contract, both actions were referred by judge's order. The trader becoming bankrupt, his assignees sued the defendant for the price of the timber. The defendant applied under the above section to stay the proceedings in the latter action. The court intimated an opinion that the section did not apply to cases where the rights of creditors under a bankruptcy could be affected, and in the exercise of their discretion declined to interfere (*u*).

Chancery.

In equity the burden of showing that the arbitrator cannot give effectual relief lies, it seems, on the party who commences a suit. And when a bill charged improper conduct in one partner entitling the other, if proved, to a dissolution of the partnership, the court refused to stay the suit (*x*).

In another case the court held that the power was discretionary, but refused to exercise it on the ground that the matters to be referred related to other matters than those in

(*q*) Wickham *v.* Harding, 28 L. J. Ex. 215.

(*r*) Law *v.* Garrett, 8 Ch. D. 26.

(*s*) Young *v.* Buckett, 51 L. J. Ch. D. 504.

(*t*) Wade-Gery *v.* Morrison, 37 L. T. N. S. 271. See Turnock *v.* Sartoris, 43 Ch. D. 153.

(*u*) Pennell *v.* Walker, 26 L. J. C. P. 9, S. C. 18 C. B. 651.

(*x*) Cooke *v.* Catchpole, 34 L. J. Ch. 60.

the suit, and that questions would arise in the suit which did not come within the reference clause (*y*).

Question whether dispute within agreement of reference.

But more recently, where a bill had been filed to restrain lessees of a mine from doing certain acts, and the lease contained an arbitration clause, the Court of Appeal in Chancery confirmed the order staying the proceedings, saying that they would leave it to the arbitrators to decide whether the matters in dispute were within the agreement to refer, and that the inability of the arbitrators to grant an injunction formed no reason against the reference, and that it was no objection to the application that two only of the three defendants were at first willing to concur in it (*z*).

Party's conduct disentitling him.

Where an employer instead of going to arbitration under the agreement between himself and his agent for the latter's alleged misconduct dismissed him, the court refused the application of the employer for a stay of the action brought by the agent for such dismissal, as the employer had disentitled himself to relief by taking the law into his own hands. An offer to withdraw the dismissal during the argument was said to be too late (*a*).

Dispute as to notice of dissolution.

On an arbitration clause in a partnership deed a suit was stayed for taking the accounts, as on a dissolution of the partnership, the defendant disputing the validity of the notice of dissolution (*b*).

Winding-up partnership.

Kay, J., refused to stay an action to wind up the partnership and take accounts, the question of winding-up not being a subject included in the arbitration clause (*c*).

Expired partnership deed.

A partnership deed containing the usual arbitration clause provided for a partnership for one year only. But the partnership, by verbal arrangement, was continued for several years; after which it was dissolved, and disputes arose as to the settlement of the partnership accounts. It was held that the arbitration clause was in force, and a suit to take the accounts was stayed (*d*).

(*y*) Wheatley *v.* Westminster Brymbo Coal and Coke Co., 2 Drew. & Smale, 347. See Piercy *v.* Young, 14 Ch. D. 200.

(*z*) Willesford *v.* Watson, L. R. 8 Ch. 473; below, L. R. 14 Eq. 572.

(*a*) Davis *v.* Starr, 41 Ch. D. 242.

(*b*) Plews *v.* Baker, L. R. 16 Eq. 566.

(*c*) Joplin *v.* Postlethwaite, 61 L. T. 629; Turnell *v.* Sanderson, W. N. (1891), 71.

(*d*) Gillett *v.* Thornton, L. R. 19 Eq. 599, S. C. 44 L. J. Ch. 398. See also Cope *v.* Cope, 52 L. T. 607.

PART I. CH. III. S. 1.

In one case Lord Hatherley, C., stayed the proceedings to the day to which the arbitrators had enlarged their time for making their award (*e*).

Varying order as to costs.

Where a partnership suit was stayed in which the costs, had it proceeded, would have come out of the estate, and the question of costs was reserved, and on a reference an award was made in favour of the plaintiff, the Master of the Rolls directed that the costs of the suit, reference and award, should be borne in the proportion that each partner would have had to bear them had the suit gone on (*f*).

An order made at chambers, staying proceedings in an action under s. 4 of the Common Law Procedure Act, 1854, contained no provisions as to costs. After an award in the plaintiff's favour, the court (Brett, J., dissentiente), relying on the proviso to the section, sustained, as valid, a subsequent order varying the terms of the original order by directing that the defendant should pay the costs of the action (*g*).

SECTION II.

OF SUBMISSIONS BY PAROL, AGREEMENT IN WRITING, OR DEED.

PART I. CH. III. S. 2.

1. *Parol submission.*] — A parol submission is generally perfectly valid. If, on the hearing of a summons before a judge, the parties consent that he shall adjudicate on the case, such consent is a parol submission to him as arbitrator, and his decision is binding as an award (*h*). It often happens in practice, where the submission originally is in writing, that it is altered or added to by parol (*i*).

Parol submission valid.

Disadvantages of a parol submission.

There are various disadvantages attending parol submissions. They are open, like other verbal contracts, to dispute respecting the exact terms used, which often become material,

(*e*) Kitchen *v.* Turnbull, 20 W. R. 253.

(*f*) Newton *v.* Taylor, L. R. 19 Eq. 14.

(*g*) Bustros *v.* Lenders, L. R. 6 C. P. 259.

(*h*) Harrison *v.* Wright, 13 M. & W. 816.

(*i*) ——— *v.* Mills, 17 Ves. 419; Ashworth *v.* Heathcote, 6 Bing. 596; Thames Iron Works, &c. Company *v.* The Queen, 20 L. T. 318.

and awards made on them cannot be enforced by attachment, since a parol submission is not and cannot be made a rule of court so as to give the court jurisdiction (*k*).

When a reference takes place at Nisi Prius, and a verdict is taken subject to it, but no order of reference is drawn up, the authority of the arbitrator depends solely on the parol submission of the parties, and in such case the jurisdiction of the court does not attach, as on a reference by order of Nisi Prius, to compel the attendance of witnesses (*l*); though, where the arbitrator has to certify the amount of damages, a verdict may be entered for the amount ascertained by his certificate (*m*).

Parol submission sometimes ineffectual.

A parol submission is sometimes ineffectual. For example, if, on such a submission, a written award is made respecting real property, and the provisions of the award are such that, if they had been verbally agreed to by the parties themselves, they would have been void by the Statute of Frauds, the award cannot be enforced as to them, since the parol submission and written award form but one parol contract (*n*).

Submission whether tenancy determined.

An award on a parol submission of the question whether a tenant has a continuing interest in land, or is bound to quit at once, is void under the Statute of Frauds (*o*). So a parol appointment of an arbitrator under the Public Health Act, 1875, is ineffectual (*p*).

The Arbitration Act, 1889 (*q*), s. 4, does not apply to a parol submission so as to authorize a stay of proceedings.

Submission in writing not under seal valid.

II. *Submission by agreement in writing not under seal.*]— Parties may refer their differences by agreement in writing not under seal. In the Arbitration Act, 1889 (*q*), by sect. 27, the term "submission" means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not. It shall (sect. 2) be deemed to include the provisions set forth in the first schedule to the Act, and (sect. 1) it is to have the same effect in all respects as if it had been made an order of court.

Submission under the Arbitration Act, 1889.

(*k*) Ansell *v.* Evans, 7 T. R. 1; ——— *v.* Mills, 17 Ves. 419.

(*l*) Curtis *v.* Bligh, 3 Jur. 1152.

(*m*) Tomes *v.* Hawkes, 10 A. & E. 32.

(*n*) Walters *v.* Morgan, 2 Cox, Ch. Cases, 369. See P. III. ch. 4, s. 1, d. 2, enforcing award in equity.

(*o*) Rainforth *v.* Hamer, 25 L. T. 247.

(*p*) Gifford *v.* Bury Town Council, 20 Q. B. D. 368.

(*q*) 52 & 53 Vict. c. 49.

PART I. CH. III. S. 2.

Notwithstanding the schedule, it will be prudent, until it has been decided that the word "arbitrators" in the schedule applies to a single arbitrator, on a reference to a single arbitrator, still to include in the submission clauses giving him all necessary powers.

Requires agreement stamp.

These submissions require in general an ordinary agreement stamp. No stamp used to be necessary if the reference was concerning a matter under the value of 20*l.* (*r*). Now, however, a stamp of 6*d.* is imposed on an agreement not otherwise charged, except where the matter is not of the value of 5*l.* (*s*). One stamp only is necessary, although there are many parties to the submission having separate legal interests, provided they have a sufficient community of interest in the subject-matter of the reference; as in the case of a submission between the party who has insured a ship, and the underwriters on the policy (*t*). Where there was a written agreement that a disputed boundary was to be set out by "an indifferent surveyor residing at a distance," and on the same sheet of paper was added a memorandum of a later date, appointing a particular surveyor, residing in the neighbourhood, to set out the boundary, the two memorandums were held to be only one agreement, and to require only one stamp (*u*).

An agreement, indorsed on an arbitration deed, or bond, enlarging the time, or changing the arbitrator, is a new submission in writing, incorporating into itself all the terms of the original submission (*v*), and requires an agreement stamp (*x*).

Effect of acknowledgment to bar the Statute of Limitations.

An agreement of reference containing an acknowledgment of the existence of some debt, but providing that the arbitrators are to fix the time of payment, is not such an acknowledgment as to support a promise to pay on request, and so to take the case out of the Statute of Limitations (*y*).

Submission by bond.

III. *Submission by bond.*]—A submission by bond is a very ordinary mode of effecting a reference.

(*r*) Lloyd *v.* Mansel, 19 L. J. Q. B. 192.
(*s*) Stat. 33 & 34 Vict. c. 97.
(*t*) Goodson *v.* Forbes, 1 Marsh, 525, S. C. 6 Taunt. 171; Stephens *v.* Lowe, 9 Bing. 32.
(*u*) Taylor *v.* Parry, 1 M. & G. 604.
(*v*) Greig *v.* Talbot, 2 B. & C. 179; Tunno & Bird, In re, 5 B. & Ad. 488; Evans *v.* Thomson, 5 East, 189.
(*x*) Stephens *v.* Lowe, 9 Bing. 32, S. C. 2 M. & Sc. 44.
(*y*) Hales *v.* Stevenson, Q. B. 11 Nov. 1862, 1 N. R. 23.

Each party usually executes a bond to the other in a certain penalty, subject to the condition of his abiding by and performing the award of the person named as arbitrator. The penalty in the bond does not limit the amount the arbitrator may award, although, if he exceed that limit, no larger sum than the penalty can be recovered by action on the bond (*z*).

Damages not limited by the penalty in the bond.

The submission of the parties is contained in the conditions of the mutual bonds, for they together make up but one agreement of reference. The terms of the condition may be altered by an instrument under seal, without affecting the bond (*a*). Where there is a dispute between A. of the first part, and B. and C. of the second, a submission to reference may be effected by a bond given by A. to B. and C. jointly, and by separate bonds given by B. and C. respectively to A., conditioned to perform the award; for the three bonds together will constitute but one submission (*b*). Two bonds, however, will be a valid, though unskilful, method of settling by arbitration the affairs of a partnership of several persons. Thus, a joint and several bond of A., B., and C., three of six partners, to D., E., and F., the other three, and a like bond of D., E., and F., to A., B., and C., both conditioned to abide an award respecting all accounts and matters in difference between the six, or any of them, will authorise an award directing, among other things, A. to pay a sum to B., and B. may maintain an action of debt on the *award* against A., but not an action against him on the *bond*, for A. is not bound to him by that instrument; it seems also that D., E., and F., to whom A. is bound, might sue him on the bond for his disobedience of the award in neglecting to pay the sum of money to B. (*c*). Instead of binding themselves by a penalty to each other, the litigant parties may join in a bond to the arbitrator, conditioned to perform his award. Such a bond was held good, although it was suggested that the arbitrator might make an unreasonable award in order to entitle himself to the penalty (*d*).

Alteration of submission by bond.

Separate bonds.

Two bonds, many parties.

Bond to the arbitrator.

An arbitration bond must be stamped with a bond stamp, and it does not require an agreement stamp also, because, in

Stamp on submission by bond.

(*z*) Browes *v.* Bruce, Watson on Awards, p. 4, note (3), 3rd ed.

(*a*) Greig *v.* Talbot, 2 B. & C. 179.

(*b*) Hayes *v.* Hayes, Cro. Car. 433.

(*c*) Winter *v.* White, 1 B. & B. 350.

(*d*) Owdy *v.* Gibbons, Comb. 100.

addition to the usual clauses, it contains a stipulation respecting the manner in which the costs are to be paid. Such a stipulation is not to be considered as a substantive agreement (*e*).

Sufficient under the Statute of Frauds as to lands.

A submission by bond, referring to an arbitrator to settle the price per acre the purchaser is to pay for an estate, seems to be a sufficient agreement in writing, respecting the sale of lands, to satisfy the requirements of the Statute of Frauds, and, when the award is made, to enable the Court of Chancery to enforce a specific performance (*f*).

Submission by deed valid.

IV. *Submission by deed.*]—A mode of referring not unfrequently adopted is by indenture, containing mutual covenants to stand to the award (*g*). Such a submission cannot be altered by parol, or written agreement, even when indorsed upon it (*h*).

One party only executing under seal.

It seems to be no objection to the validity of the submission, that one party is bound by deed and the other by agreement not under seal: as, for instance, on a reference between a private individual and a corporation, which the former signs, but to which the seal of the latter is affixed (*i*).

Submissions orders of court unless contrary intention expressed.

V. *Disadvantage of submissions which cannot be made orders of court.*]—If the parties wish the reference to be one over which the courts of law shall have no cognizance, they must, when the submission is in writing, express their intention that it shall not be made or deemed to be a rule of court by apt words in the submission (*k*). But the case must be peculiar to render such a course advisable, for its disadvantages are many.

No jurisdiction of the courts by common law.

A submission of matters in difference when there is no cause in court does not, by common law, give the court any jurisdiction, either over the submission itself, or over the proceedings before the arbitrator, or over the award.

Submission revocable.

Either party may, if the submission be by parol, or is not to have the effect of an order of court, at any time before the

(*e*) Wansborough *v.* Dyer, In re, 2 Chitt. 40.
(*f*) Cooth *v.* Jackson, 6 Ves. 11.
(*g*) Spooner *v.* Payne, 16 L. J. C. P. 225; Bac. Ab. Arb. B.
(*h*) Morphett, In re, 2 D. & L. 967.
(*i*) Tomlin *v.* Mayor (Fordwich), 6 N. & M. 594.
(*k*) 52 & 53 Vict. c. 49, s. 1.

award is made, revoke the authority of the arbitrator (*l*), and render all that has been done in the reference ineffectual, though by so doing he makes himself liable to an action.

No setting aside improper awards.

The awards made on such submissions could not have been set aside by a court of law, however gross the misconduct or corruption of the arbitrator (*m*). The only remedy was by bill in equity (*n*); and it is doubtful whether sect. 11 (2) of the Arbitration Act, 1889, enables the court to interfere.

No summary enforcement of award.

Action and suit only means.

Nor could the awards, when valid, be enforced by attachment or other summary process of the court. The benefit of them could only be obtained, as on a contract, by action, or sometimes, when the nature of the award admitted, by proceedings for specific performance (*o*). Sect. 12 of the Arbitration Act, 1889, does not seem to apply to these awards.

SECTION III.

OF SUBMISSIONS BY CONSENT WHICH HAVE THE EFFECT OF ORDERS OF COURT BY STATUTE.

1. *Effect of the Arbitration Act*, 1889.]—The Arbitration Act, 1889, sect. 27, defines a submission as follows:—"In this act, unless the contrary intention appears, submission means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not."

Submission.

Effect of.

Sect. 1 of the same act is in these words: "A submission, unless a contrary intention is expressed therein, shall be irrevocable, except by leave of the court or a judge, and shall have the same effect in all respects as if it had been made an order of court."

Object of the statute of 9 & 10 W. III.

Before the statute, the 9th & 10th W. III. c. 15, entitled, "An Act for determining Differences by Arbitration," now

(*l*) See P. II. c. 3, s. 3, d. 1, Revocation at Common Law.

(*m*) Veale *v.* Warner, 1 Saund. 327, c. note.

(*n*) Greenhill *v.* Church, 3 Rep. in Chanc. 89, p. 49; 2 Vern. 100, pl. 95; Cavendish *v.* ———, 1 Cas. in Chanc. 279.

(*o*) Blundell *v.* Brettargh, 17 Ves. 232; Bishop *v.* Bishop, 1 Rep. in Chanc. 75; Bendick *v.* Thatcher, Noy, 141; Vin. Ab. Arb. H. a. 1.

repealed by the Arbitration Act, 1889, when persons were out of court, they could not, by any agreement, bring themselves into court, and create a jurisdiction to issue process of contempt (*q*). Experience had proved the beneficial effect of terminating by arbitration suits actually existing; and it was thought that it might be extremely desirable to afford the same opportunity also where only a cause of suit subsisted, but no suit had been instituted (*r*). To effect, therefore, these two objects, first to give the parties the process of contempt for enforcing the award, and next, to make awards final unless complaint was made within a limited time (*s*), the statute of W. III. was passed (*t*).

Construction put upon the statute.

The statute was not very clearly worded, but the whole act taken together was construed to mean that, though there were no cause in court, if the submission contained an agreement for making the submission a rule of court, the party in whose favour the award was made might have his costs taxed by the master of the court (*u*), and might enforce the award by the process of the court of which the submission was made a rule, unless it appeared to *that* court that it ought to be set aside as unduly made, and in such case the *same* court would not merely refuse the aid of its process, but, if complaint were made within the time limited, would set the award aside (*x*). Many cases were decided on the effect of this repealed act of W. III., which it is now unnecessary to cite. A reference to them is, however, preserved in the notes (*y*).

(*q*) Nichols *v.* Chalie, 14 Ves. 265; Lyall *v.* Lamb, 4 B. & Ad. 468; Steers *v.* Harrop, 1 Bing. 133, S. C. 7 Moore, 466.

(*r*) Nichols *v.* Chalie, 14 Ves. 265.

(*s*) Davis *v.* Getty, 1 S. & S. 411.

(*t*) See Appendix of Statutes for the Act 9 & 10 W. III. c. 15.

(*u*) Bhear *v.* Harradine, 7 Ex. 269.

(*x*) Dawson *v.* Sadler, 1 S. & S. 537.

(*y*) As to the power of equity under the act of W. III., see Nichols *v.* Roe, 3 M. & Keen, 431, reversing judgment of Vice-Chancellor in same case, 5 Sim. 156; Nichols *v.* Chalie, 14 Ves. 265; Gwinnett *v.* Bannister, 14 Ves. 530; Heming *v.* Swinnerton, 1 Coop. C. C. 386; Cooke *v.* Cooke, L. R. 4 Eq. 77; Lomax Arbitration, 42 L. T. N. S. 391; 2 Madd. Chanc. Practice, 840, 3rd ed.; Pownall *v.* King, 6 Ves. 10; Webster *v.* Bishop, 2 Vern. 444; Smith *v.* Symes, 5 Mad. 74; Joseph *v.* Webster, In re, 1 Russ. & Mylne, 496; Dawson *v.* Sadler, 1 S. & S. 537. As to time for proceedings, Davis *v.* Getty, 1 S. & S. 411; Auriol *v.* Smith, 1 Turn. & R. 121; Allardes *v.* Campbell, 1 Turn. & R. 133, n.; Pedley *v.* Goddard, 7 T. R. 73; Harvey *v.* Shelton, 7 Beav. 455. As to enforcing award, Webster *v.* Bishop, Prec. in Chanc. 223.

A parol submission could not be made a rule of court within the statute of W. III. (z).

Submission of a cause and all matters.

Though an order of Nisi Prius, referring a cause, was made a rule of court by virtue of the inherent common-law jurisdiction of the courts, yet where a cause and all matters in difference were referred by such an order, it seems not to have been decided, though a strong opinion was expressed that the authority to make it a rule of court, as to the matters not in the cause, was derived from the common-law power of the courts (a).

Of indictment.

Criminal proceedings were not within the statute of W. III. (b), nor are they within sect. 14 of the Arbitration Act (c).

Consent clause.

As to what was a sufficient consent clause under statute of W. III. for making the submission a rule of court, see the cases in the note (d).

The following cases under the now repealed sect. 17 of the Common Law Procedure Act, 1854, may be useful.

Clause no appeal against award.

A building contract empowering the employer to take certain steps if there was unreasonable delay or unsatisfactory conduct on the part of the builder, contained this provision, "the fact of such delay or unsatisfactory conduct to be ascertained and decided in writing by the architect, against whose decision there shall be no appeal." This was held, if a submission to arbitration at all, not to be capable of being made

(z) ——— *v.* Mills, 17 Ves. 419; Ansell *v.* Evans, 7 T. R. 1.

(a) R. *v.* Hardey, 14 Q. B. 529. See as to submissions under the statute of W. III., Lord Lonsdale *v.* Littledale, 2 Ves. jun. 451; Lucas *v.* Wilson, 2 Burr. 701; Anderson *v.* Coxeter, 1 Strange, 301; Hayward *v.* Phillips, 6 A. & E. 119; Allenby *v.* Proudlock, 4 Dowl. 54, S. C. 4 A. & E. 326; Little *v.* Newton, 1 M. & G. 977, n. (a); Bhear *v.* Harradine, 7 Ex. 269; Harlow *v.* Winstanley, 19 L. J. Q. B. 430; Milstead *v.* Craufield, 9 Dowl. 124; Rushworth *v.* Barron, 3 Dowl. 317; Reynolds *v.* Askew, 5 Dowl. 682; Soilleux *v.* Herbst, 2 B. & P. 444; Lee and Hemingway, In re, 3 Nev. & M. 860, S. C. 15 Q. B. 305, n.

(b) Watson *v.* M'Cullum, 8 T. R. 520; R. *v.* Bardell, 5 A. & E. 619, S. C. sub nom. R. *v.* Shillibeer, 5 Dowl. 238.

(c) 52 & 53 Vict. c. 49.

(d) Carter *v.* Mansbridge, Barnes, 55; Greig *v.* Talbot, 2 B. & C. 179; Evans *v.* Thomson, 5 East, 189; Tunno and Bird, In re, 5 B. & Ad. 488; Jenkins *v.* Law, 8 T. R. 87, overruled; Bailey *v.* Cheesely, 1 Salk. 72, S. C. 1 Ld. Raym. 674; Dawson *v.* Sadler, 1 S. & S. 537; Harrison *v.* Grundy, 2 Stra. 1178; Anon., 2 Barnard, 163; Story, In re, 7 A. & E. 602; Pedley *v.* Westmacott, 3 East, 602; Powell *v.* Phillips, cited in Pedley *v.* Westmacott, 3 East, 602; 2 Tidd Pr. 821, 9th ed.; Woodcroft and Jones, In re, 9 Dowl. 538.

PART I. CH. III. S. 3.

a rule of court under sect. 17 of the repealed act, as the clause that the decision was not to be subject to appeal was construed as showing that the parties did not intend the submission to be made a rule of court (*e*).

Where a submission was made a rule of Chancery under the above-cited sect. 17, that court was not held authorized by sect. 50 of the said statute to compel one of the parties to make a discovery of documents in his possession (*f*).

Submission under Lands Clauses Acts.

A submission to arbitration under the Lands Clauses Consolidation Acts has, after some hesitation, been held to be a submission by consent (*g*).

SECTION IV.

OF AGREEMENTS TO REFER FUTURE DISPUTES TO ARBITRATION.

PART I. CH. III. S. 4.

1. *Effect as a submission of an agreement to refer future disputes.*]—There is often a covenant or agreement in deeds of partnership, policies of insurance, and other instruments, providing that if any disputes shall arise they shall be referred to arbitration. The arbitrators generally are to be appointed by the parties, or some third person, on the difference occurring. Sometimes the referees are designated in the original agreement.

Whether agreement to refer future disputes a submission.

When arbitrators not named.

When they are not so named, the agreement to refer cannot, it is apprehended, be considered a complete submission; for until the arbitrator is determined, there is no one who has the binding authority to decide the questions submitted. In the latter part of this section it will be seen that the Arbitration Act, 1889 (*h*), has provided for the appointment of an arbitrator in such a case. Naming the arbitrator in the instrument is the rarer course; for it is open to the reasonable

(*e*) Wadsworth *v.* Smith, L. R. 6 Q. B. 332.

(*f*) Anglo-Austrian Bank, In re, 10 L. T. N. S. 369. See Lord Fitzwilliam *v.* Dawes, 4 L. T. N. S. 508.

(*g*) Harper, Ex parte, L. R. 18 Eq. 529; Rhodes *v.* Airdale Drainage Commissioners, 1 C. P. D. 402. See post, P. I. ch. 3, s. 7, d. 6.

(*h*) Stat. 52 & 53 Vict. c. 49, s. 27.

objection, that possibly by the time a difference arises and his assistance is required, he may, from age, infirmity, or other cause, have become unwilling or unfit to perform the duty.

When arbitrator named.

But when an arbitrator is named in the original clause, it seems to differ little, if at all, from an ordinary submission, and, before the Arbitration Act, was held to be revocable (*i*). There are no matters in dispute, it is true, existing at the time of the agreement to refer, but the agreement amounts to a submission as soon as controversies have arisen (*k*).

Specifying how arbitrator to be appointed.

When the agreement, though not naming the referees, provides for their appointment in a particular manner, and they are afterwards so appointed in writing, though contrary to the will of one of the disputing parties, this has the same effect as if the referees were named in the clause itself. And an award made by such referees will be summarily enforced (*l*). Though the agreement were by deed, if the appointment of the arbitrators was by parol, it would be only a parol submission (*m*).

Form of appointment.

When arbitrators are to be named after disputes shall have arisen, if the party says, I appoint A. B. as the arbitrator on my behalf, pursuant to the agreement (describing it), it is sufficient. The appointment need not recite nor refer to the matters in difference. If the appointment be made by the party and a stranger "jointly," it would seem to be bad, though if the stranger joins in the appointment, and it is expressed to be made by the two severally, the addition of the stranger does no harm (*n*).

II. *Effect in law of an agreement to refer future disputes.*]—The maxim often quoted in the old books that an agreement to refer was not binding, and could not deprive the court of its jurisdiction, seems sometimes to have been misunderstood (*o*). The agreement did not oust the jurisdiction of the courts where there were no excluding words (*p*).

(*i*) Deutsche Springstoff, etc. *v.* Briscoe, 20 Q. B. D. 177.

(*k*) Parkes *v.* Smith, 15 Q. B. 297.

(*l*) Haddan *v.* Roupell, 9 C. B. N. S. 683; Woodcroft *v.* Jones, 9 Dowl. 538; Newton *v.* Hethering-ton, 19 C. B. N. S. 342; Willcox *v.* Storkey, L. R. 1 C. P. 671.

(*m*) Glaysher, Ex parte, 3 H. & C. 442, S. C. 34 L. J. Ex. 41.

(*n*) Haddan *v.* Roupell, 9 C. B. N. S. 683.

(*o*) Thompson *v.* Charnock, 8 T. R. 139.

(*p*) Jones *v.* St. John's College, L. R. 6 Q. B. 115.

An action would lie on such a stipulation (*q*), though it could not usually be pleaded in bar to an action on the contract (*r*).

Action lies on agreement.

Governing principle.

The governing principle now in force seems to be that if there is an absolute covenant to pay, and a collateral provision that the amount shall be ascertained by arbitration, such arbitration is not a condition precedent to the maintenance of an action on the covenant, but if the parties have covenanted that the liability is only to arise after the amount has been adjusted by arbitration, then such adjustment is a condition precedent to the right to recover (*s*).

Plea of agreement to refer.

Where a tenant covenanted not to keep an injurious quantity of rabbits and hares, and if he kept such injurious quantity to pay a reasonable compensation, to be settled, in case of difference, by arbitration, it was held on appeal, reversing the judgment of the Exchequer, that the lessor could not be prevented from suing for injury from excess of ground game by reason of the arbitration clause (*t*).

Arbitration condition precedent.

But where a tenant agreed to deliver up a house and furniture in good order, and in case of damage to pay for the same, the amount of such payment, if disputed, to be settled by two valuers, the fixing the amount by the valuers was held to be a condition precedent to the landlord's right to bring an action for the damage when disputed (*u*); and *Dawson* v. *Fitzgerald* was distinguished on the ground that in that case the covenant not to keep an excess of game was separate and independent of the arbitration clause.

When such an agreement has been acted on, and an award has been made, the jurisdiction of the courts over the matter decided by the arbitrator ceases (*x*).

No damages unless liquidated

As it is ordinarily drawn up, usually only nominal damages seem recoverable for the breach of the agreement to refer (*y*);

(*q*) Livingston *v.* Ralli, 24 L. J. Q. B. 269, S. C. 5 E. & B. 132; Donegal (Marquis) *v.* Verner, 6 Ir. Rep. C. L. 504; Tattersall *v.* Groote, 2 B. & P. 131.

(*r*) Livingston *v.* Ralli, 24 L. J. Q. B. 269, S. C. 5 E. & B. 132; Thompson *v.* Charnock, 8 T. R. 139.

(*s*) Viney *v.* Bignold, 20 Q. B. D. 172.

(*t*) Dawson *v.* Fitzgerald, 1 Q. B. D. 257, overruling same case below, L. R. 9 Ex. 7, S. C. 43 L. J. Ex. 19.

(*u*) Babbage *v.* Coulburn, 9 Q. B. D. 235.

(*x*) Cleworth *v.* Pickford, 7 M. & W. 314; per Abinger, C. B. 321.

(*y*) See Brunsden *v.* Staines L. R., 1 C. & E. 272.

for the jury generally can have no means of calculating the amount. Lord Eldon, therefore, recommended, as a prudential mode of drawing up such a covenant, that there should be added an agreement for the payment of a certain sum by way of liquidated damages in case of breach in order to compel the parties to a specific performance of its terms (*z*). This seems to have been the course usually adopted in references to arbitration under the civil law (*a*). Sometimes, however, substantial damages have been recovered. A landlord, liable to compensate his tenants for damage done by the game, let the shooting of the estate to a party who was to pay the landlord for all damages done to the tenants by the game; the amount to be settled by two indifferent persons, one to be chosen by each party. The landlord appointed a valuer, but the other party refused. In an action against the party refusing for breach of the agreement, the landlord recovered the amount found by the jury as the damage done by the game (*b*).

damages agreed on.

Substantial damages.

If the party appoint a valuer, but that valuer will not act, no action, it seems, will lie against the party (*c*).

Valuer not acting.

More recently the courts have reiterated the doctrine, that an absolute agreement by which a party contracts not to sue in case of future claims is void (*d*); but at the same time they have decided that parties may contract that no right of action (to be enforced in a court of law) shall accrue on the contract, until an arbitrator has decided on the sum to be paid in case of a breach, or difference, or loss (*e*).

Arbitration may be condition precedent.

(*z*) Street *v.* Rigby, 6 Ves. 814.

(*a*) 2 Story's Equity Jurisprudence, 682.

(*b*) Thomas *v.* Fredericks, 10 Q. B. 775.

(*c*) Cooper *v.* Shuttleworth, 25 L. J. Ex. 114. See post, d. 4, as to forcing the appointment of a new arbitrator.

(*d*) Horton *v.* Sayer, 5 H. & N. 643, S. C. 29 L. J. Ex. 28; Lee *v.* Page, 30 L. J. Ch. 857; Scott *v.* The Corporation of Liverpool, 27 L. J. Ch. 641; in error, 28 L. J. Ch. 230, S. C. 3 De G. & J. 334; Johnson *v.* Hopper, 4 Jur. N. S. 882.

(*e*) Scott *v.* Avery, 8 Ex. 487; in error, 5 H. L. C. 811, S. C. 25 L. J. Ex. 308; Tredwen *v.* Holman, 31 L. J. Ex. 398; Russell *v.* Pelegrini, 6 E. & B. 1020, S. C. 26 L. J. Q. B. 75; Hemans *v.* Picciolto, 1 C. B. N. S. 646; Braunstein *v.* Accidental Death Insurance Co., 31 L. J. Q. B. 17; Westwood *v.* Secretary for India, 1 N. R. 262; Elliott *v.* Royal Exchange Assurance Co., L. R. 2 Ex. 237; Sharpe *v.* San Paulo Railway Co., L. R. 8 Ch. 597; Dawson *v.* Fitzgerald, 1 Q. B. D. 257; Edwards *v.* Aberayron Mutual Ship Insurance Society, 1 Q. B. D. 563; Collins *v.* Locke, 4 App. Cases, 674; Viney *v.* Bignold, 20 Q. B. D. 172; Goldstone *v.* Osborne, 2 C. & P. 550, overruled.

Insurance policy.

A rule making the settlement of the amount of a loss on a policy of insurance by arbitration a condition precedent to bringing an action on the policy does not compel the party to submit to arbitration the question, whether the policy is not void by reason of a misrepresentation as to the condition of the ship (*f*).

Divorce suit.

A divorce suit was compromised during the trial on these written terms: "Petition and answer dismissed. Deed of separation, with usual covenants," &c., &c. "In case of difference in working out these terms matter to be referred to A. and B." It was held, that the agreement on the face of it being complete, the arbitration clause did not oust the jurisdiction of the Chancery Division to settle the terms of the deed of separation (*g*).

Ground for applying to stay action.

Though the clause should not be such as to bar an action, it still might have formed a very good ground for an application to stay it, under sect. 11 of the repealed Common Law Procedure Act, 1854, so as to have compelled the plaintiff to take his remedy by arbitration (*h*). See also sect. 4 of the Arbitration Act, 1889 (52 & 53 Vict. c. 49).

No specific performance of agreement to refer.

III. *Effect in equity of an agreement to refer future disputes.*]—It was quite settled law before the Judicature Acts that equity would not entertain a bill for the specific performance of an agreement to refer to arbitration, or substitute the master for the arbitrators when they were not appointed by the deed and the parties refused to name them (*i*).

A declining to refer to arbitrators named in a deed providing for a reference in case of future disputes was not a sufficient reason, in the opinion of a court of equity, for refusing costs to a successful party in a suit concerning the differences within scope of the arbitrators' authority (*k*).

No plea of, in equity.

When a bill was filed for discovery, or for discovery and relief, the mere covenant or agreement to refer, being an

(*f*) Alexander *v.* Campbell, 41 L. J. Ch. 478.

(*g*) Hart *v.* Hart, 18 Ch. D. 670.

(*h*) Roper *v.* London, 28 L. J. Q. B. 260, S. C. 1 E. & E. 825.

(*i*) Agar *v.* Macklew, 2 S. & S. 418; Mexborough (Earl of) *v.* Bower, 7 Beav. 127; Tattersall *v.* Groote, 2 B. & P. 131; Darbey *v.* Whitaker, 4 Drew. 134.

(*k*) Lees *v.* Laforest, 14 Beavan, 250.

executory agreement only, could not be pleaded as a defence (*l*).

Agreement to refer, how useful in equity.

These clauses, however, were not without their use in equity, for the Court of Chancery would in some cases take notice of them. When the interests involved were complicated, and were such as could not well be dealt with by the court, as in the case of the management of the concerns of the opera house or of a large brewery, and an arbitration seemed best adapted to do justice to all parties, a court of equity would not interpose until the prescribed step of an arbitration had been taken, and proved unavailing (*m*).

No ground for injunction.

If, after a covenant to refer, one party brought an action, although the other might exhibit his bill in equity and the covenant or agreement could not be pleaded in bar, yet the court would not grant an injunction to restrain the proceedings at law (*n*).

Agreement to refer not a covenant not to sue.

A covenant to refer was thought by some judges tantamount to a covenant not to take proceedings at law or equity (*o*), but that opinion has since been expressly overruled (*p*). For if, in addition to the agreement to refer, the parties bound themselves by negative words not to proceed at law or in equity respecting the matters intended to be decided by arbitration, the effect of the covenant was altered, and was not to be judged, at least in equity, exactly by the same rules as a mere submission or covenant to submit to arbitration.

Railway Companies Arbitration Act, 1859.

An agreement to refer between railway companies under the Railway Companies Arbitration Act, 1859, is obligatory, and if insisted upon by either company at the right time, excludes the jurisdiction of the Court of Chancery (*q*). But

(*l*) Wellington *v.* M'Intosh, 2 Atk. 569; Street *v.* Rigby, 6 Ves. 815; Mitchell *v.* Harris, 2 Ves. jun. 129, a; Nichols *v.* Chalie, 14 Ves. 265; Waters *v.* Taylor, 15 Ves. 10; Benson *v.* Heathorn, 1 Y. & C., V.-Ch. K. B. 326; Wood *v.* Rowe, 2 Bligh, P. C. 595; 1 Daniell's Chanc. Pract. by Headlam, 638; Mitford, Pleadings in Chanc. 308, 5th ed.; 264, 4th ed.

(*m*) Waters *v.* Taylor, 15 Ves. 10; Gourlay *v.* Duke of Somerset, 19 Ves. 429.

(*n*) Coop. Eq. Pl. 281.

(*o*) Tattersall *v.* Groote, 2 B. & P. 131.

(*p*) Street *v.* Rigby, 6 Ves. 814; Dimsdale *v.* Robertson, 2 Jones & Latouche, 58.

(*q*) London, Chatham and Dover Rail. Co. *v.* South Eastern Rail. Co., 40 Ch. D. 100; Caledonian Rail. Co. *v.* Greenock and Wemyss Rail. Co., L. R. 2 Scotch App. 347; Watford Rail. Co. *v.* London and North-Western Rail. Co., 38 L. J. Ch. 448.

where the standing referee was to be appointed by the parties in January, or by the Board of Trade in February, in each year, and no referee had been appointed, the Court of Chancery entertained the suit (*r*).

Provisions implied in submission by Arbitration Act, 52 & 53 Vict. c. 49.

IV. *Effect of the Arbitration Act*, 1889.]—By sect. 2 of the Arbitration Act, it is provided that "a submission, unless a contrary intention is expressed therein, shall be deemed to include the provisions of the first schedule, so far as they are applicable to the reference under the submission."

Single arbitrator.

Schedule I (a) is: "If no other mode of reference is provided, the reference shall be to a single arbitrator.

Umpire.

(b) If the reference is to two arbitrators, the two arbitrators may appoint an umpire at any time within the period during which they have power to make an award."

Power of court to appoint arbitrator.

Sect. 5 of the act is: "In any of the following cases:—

(a) Where a submission provides that the reference shall be to a single arbitrator, and all the parties do not, after differences have arisen, concur in the appointment of an arbitrator;

(b) If an appointed arbitrator refuses to act, or is incapable of acting, or dies, and the submission does not show that it was intended that the vacancy should not be supplied, and the parties do not supply the vacancy;

(c) Where the parties or two arbitrators are at liberty to appoint an umpire or third arbitrator, and do not appoint him;

(d) Where an appointed umpire or third arbitrator refuses to act, or is incapable of acting, or dies, and the submission does not show that it was intended that the vacancy should not be supplied, and the parties or arbitrators do not supply the vacancy;

any party may serve the other parties, or the arbitrators, as the case may be, with a written notice to appoint an arbitrator, umpire, or third arbitrator.

"If the appointment is not made within seven clear days after the service of the notice, the court or a judge may, on

(*r*) Wolverhampton and Walsall Rail. Co. *v.* London and North-Western Rail. Co., L. R. 16 Eq. 433.

application by the party who gave the notice, appoint an arbitrator, umpire, or third arbitrator, who shall have the like powers to act in the reference and make an award as if he had been appointed by consent of all parties."

Power for parties in certain cases to supply vacancy.

Sect. 6. "Where a submission provides that the reference shall be to two arbitrators, one to be appointed by each party, then, unless the submission expresses a contrary intention—

(a) If either of the appointed arbitrators refuses to act, or is incapable of acting, or dies, the party who appointed him may appoint a new arbitrator in his place:

(b) If, on such a reference, one party fails to appoint an arbitrator, either originally or by way of substitution as aforesaid, for seven clear days after the other party, having appointed his arbitrator, has served the party making default with notice to make the appointment, the party who has appointed an arbitrator may appoint that arbitrator to act as sole arbitrator in the reference, and his award shall be binding on both parties, as if he had been appointed by consent:

Notice.

"Provided that the court or a judge may set aside any appointment made in pursuance of this section."

Court cannot compel appointment.

The court has no power under its common law or equitable authority, or under the Arbitration Act, to compel a party to appoint an arbitrator (*s*).

Three arbitrators.

When the reference is to be to three arbitrators, one to be chosen by each party and the third by the two so chosen, and one party fails to appoint an arbitrator, the court has no power to make the appointment either under sects. 5 or 6 (*s*); nor could the other party, under the corresponding section of the Common Law Procedure Act, 1854, validly appoint his arbitrator to act as sole arbitrator (*t*).

Where reference not strictly arbitration.

Where the conditions of sale provided that if there were any error in the description of the premises, the compensation was to be settled by two referees, it was held that the

(*s*) Smith *v.* Nelson, 25 Q. B. D. 545; 59 L. J. Q. B. D. 533. See post, p. 214.

(*t*) Gumm *v.* Hallett, L. R. 14 Eq. 555.

PART I. CH. III. S. 4.

13th section of the Common Law Procedure Act, 1854, did not apply, as this was not strictly an arbitration, there being no dispute (*u*).

SECTION V.

OF AN AGREEMENT IN THE SUBMISSION NOT TO PROCEED AT LAW OR EQUITY.

PART I. CH. III. S. 5.

Agreement not to sue valid in law. Enforced by action.

1. *Effect in law of an agreement not to sue.*]—Though the courts of law agreed with those of equity, that the agreement of parties could not take away the jurisdiction of the courts, they yet asserted the validity of the clause in a submission not to take any proceedings at law or equity respecting the matters referred, on the principle that a man may renounce or deprive himself of a right which the law gives him if he shall think fit (*x*); and they held that if, contrary to this provision, a party persisted in bringing an action at law or a suit in equity, an action might be brought against him for the breach of his agreement (*y*). If the proceedings, contrary to the agreement, were in the courts of law, they would be set aside by the court (*z*); but if they were in equity, the party against whom they were brought was probably obliged to confine himself to such remedy as the court of which the submission was a rule would afford him.

By setting aside proceedings.

By attachment.

Wilfully proceeding in a suit or action contrary to the stipulation after the submission had been made a rule of a court of law, was a contempt of court, and punishable by attachment. But where there is no wilful breach, and it is doubtful whether the cause of action is included in the reference, the defendant will be left to plead the award as a defence (*a*).

(*u*) Boss *v.* Helsham, 4 H. & C. 642, S. C. L. R. 2 Ex. 72.

(*x*) Webb *v.* Taylor, 1 D. & L. 676; Heath *v.* Brindley, 2 A. & E. 365, S. C. 4 N. & M. 235; Sherran *v.* Marshall, 1 D. & L. 689.

(*y*) Webb *v.* Taylor, 1 D. & L. 676.

(*z*) Dicas *v.* Jay, 6 Bing. 519; Tidd's Pr. 529, 9th ed.

(*a*) Dicas *v.* Jay, 6 Bing. 519.

A plea on equitable grounds, stating the pendency of a reference in which the arbitrator was empowered to state on what terms the contract declared on was to be put an end to, and in which it was agreed that no action should be brought by the parties, was held bad (*b*).

No plea on equitable grounds.

In some instances where the party wilfully proceeded in Chancery, the Court of King's Bench expressed itself very strongly on the subject, and treated such conduct as a very great contempt of court (*c*). In other instances the courts of law have intimated that there might be something of a judicial discretion exercised, whether if the party proceeded in equity they would enforce compliance by attachment (*d*).

Discretion in enforcing it.

If it was supposed that there was an intention to proceed in equity, the submission should at once have been made a rule of court; for before there exists a rule of court forbidding it, filing a bill in Chancery was no contempt, though continuing the suit would be one after the submission had been made a rule of court (*e*). But submissions now have the effect of orders of court (*f*).

When an indictment and all matters in difference were referred, and one party proceeded with a suit in Chancery on one of the matters referred, notwithstanding the submission, the other party applied for an attachment; but the rule was refused, the original time for making the award having expired, and the enlargements of the time endorsed on the submission not having been made part of the rule of court, with the submission (*g*).

On the reference of a cause at Nisi Prius, the clause that no action or suit shall be prosecuted by the parties against each other, precluded a motion in arrest of judgment, or for judgment for the plaintiff non obstante veredicto (*h*). So the clause prohibiting a writ of error barred motions in arrest

Clause not to sue precluded arrest of judgment, or judgment non obstante veredicto.

(*b*) Wood *v.* The Copper Miners' Co., 25 L. J. C. P. 166.

(*c*) R. *v.* Wheeler, 3 Burr. 1257; Coulson *v.* Graham, 2 Chitt. 57; Hilton *v.* Hopwood, 1 Marsh. 66.

(*d*) Nichols *v.* Chalie, 14 Ves. 265; Burton *v.* Petrie, quoted by Ld. Loughborough in Ld. Lonsdale *v.* Littledale, 2 Ves. jun. 451. See Grimstone *v.* Bell, 4 Taunt. 253; Braddick *v.* Thompson, 8 East, 344.

(*e*) Hilton *v.* Hopwood, 1 Marsh. 66.

(*f*) Stat. 52 & 53 Vict. c. 49, s. 1.

(*g*) R. *v.* Hardey, B. C. T. T. 1849. See 19 L. J. Q. B. 196.

(*h*) Britt *v.* Pashley, 16 L. J. Ex. 240.

of judgment, and appeals for error on the record, or on a special case stated by the arbitrator (*i*).

Not prevent motion to set aside award.

But a clause providing, "That no action or suit at law or equity shall be commenced or prosecuted against the arbitrators concerning their award when made, nor to impeach the award unless some collusion or other fraud be discovered or appeared therein," does not prevent a party to the submission from moving to set the award aside for a defect apparent on the face of it, though no fraud or collusion appear, for the clause is confined to actions and suits, and does not apply to the disputing its validity on motion (*k*).

Effect in equity of agreement not to sue, not determined.

II. *Effect in equity of an agreement not to sue.*]—A difference subsisted between the courts of law and equity upon the effect of an agreement not to sue. The Court of Chancery generally held, that a man could not, by agreement to refer, deprive himself of the right to apply to a court of equity, and considered it as extraordinary that a court of law should permit parties by contract, on a reference to arbitration, to deprive themselves of the benefit they might receive in equity. The exact effect of such a clause, however, has never been determined by the English courts of equity (*l*).

In a case in equity, much discussed and often supposed to have been overruled, the bill stated that the plaintiff and defendant were partners, and prayed a discovery of moneys paid and other partnership transactions, and relief. To this the defendant pleaded, that by the articles of partnership, if any controversies should arise between the parties they should be referred to arbitration, *and that there should not be any suit at law or in equity*. The Master of the Rolls, Lord Kenyon, allowed the plea (*m*).

Plea of, sometimes allowed.

His judgment was afterwards supported by a decision of Sir Edward Sugden, Lord Chancellor of Ireland (*n*).

Doubt, however, has been thrown upon the correctness of

(*i*) Moore *v.* Butlin, 7 A. & E. 595; Chownes *v.* Brown, 2 D. & L. 706; Jones *v.* Victoria Graving Dock Co., 2 Q. B. D. 314.

(*k*) Mackay, In re, 2 A. & E. 356.

(*l*) Nichols *v.* Roe, 3 M. & K. 431; Nichols *v.* Chalie, 14 Ves. 265.

(*m*) Halfhide *v.* Fenning, 2 Brown, C. C. 336.

(*n*) Dimsdale *v.* Robertson, 2 Jones & Latouche, 58.

this decision by Lord St. Leonards, in a later case (*o*); more recently Kindersley, V.-C., expressed an opinion against the validity of a negative clause withdrawing the decision from the ordinary tribunals (*p*).

SECTION VI.

OF SUBMISSIONS MADE IN A CAUSE AT LAW.

Submission in a cause.

1. *Forms of submissions made in a cause.*]—When there is a cause depending, an order of court, or a judge's order, or master's order, or on the trial an order of Nisi Prius (which latter had, till recently, afterwards to be made a rule of court), will by common law be drawn up on consent of parties referring the cause, or the cause with other matters, to arbitration (*q*).

By parties on the record.

The parties to consent must be the parties on the record, even though they are mere nominal parties, for a submission by the persons really interested, without the parties on the record, will not refer the cause (*r*).

Strangers may be added.

Strangers to the cause are, however, often by consent made parties to the reference, and they will be bound by the award in the same manner as parties to the action (*s*).

Consent of stranger enforced against him.

If at Nisi Prius an order be drawn up by verbal consent of the parties and of a third party who is interested, settling the action on terms which include a reference to arbitration of certain matters, and it is provided that a judge's order of reference be drawn up; and the stranger afterwards refuse to be bound by it or to concur in settling the terms of the order of reference, the court will direct that it be referred to the master to settle the terms of such order, and will, if necessary, enforce it against the stranger by process of attachment (*t*).

(*o*) Scott *v.* The Liverpool Corporation, 28 L. J. Ch. 230, S. C. 3 De Gex & J. 334.

(*p*) Lee *v.* Page, 30 L. J. Ch. 857.

(*q*) Lucas *v.* Wilson, 2 Burr. 701; Harrison *v.* Smith, 1 D. & L. 876.

(*r*) Owen *v.* Hurd, 2 T. R. 643.

(*s*) Hawkins *v.* Benton, 2 D. & L. 465, S. C. 8 Q. B. 479; Stockley *v.* Shopland, 26 L. T. 586.

(*t*) Williams *v.* Lewis, 3 Jur. N. S. 1324, S. C. 7 E. & B. 928.

These modes of referring are ordinarily termed submissions by rule of court, by judge's order, or by order of Nisi Prius; but, strictly speaking, the submission is the parol consent of the parties to the rule or order being drawn up, and the rule or order is but evidence of that submission (*u*).

Submission by order of court.

II. *Submission by order of court or judge.*]—The rule of court referring a cause to arbitration by consent used to be drawn up as of course on motion papers for that purpose signed by counsel. Such a mode of submission was often also effected on a motion for a new trial or other summary application made openly in court (*x*).

Arbitration Act, 1889.

The Arbitration Act, 1889, s. 14, provides for the reference by consent of the whole cause or matter, or any questions of fact arising therein, by order of court (*y*).

Submission by judge's or master's order.

A judge or a master will grant an order referring a cause as a matter of course on a consent signed by the solicitors on both sides. Or the solicitor on one side may take out a summons calling on the other side to show cause why the action should not be referred on the terms agreed upon. To this summons a consent should be given in the usual way, and the clerk at the Central Office or in the registry will draw up the order. This mode of submission is very commonly adopted in every stage before the cause is entered at Nisi Prius (*z*).

The judge's order is sometimes by consent drawn up empowering the arbitrator to direct a verdict to be entered (*a*).

Arbitration Act, 1889, power of court given to a master.

By Order LIV. r. 12 (a), December, 1889, made pursuant to the Arbitration Act, 1889, s. 21, it is provided that "a master of the Supreme Court may exercise all the jurisdiction and powers conferred upon the court or a judge by the Arbitration Act, 1889."

Order of Nisi Prius, how drawn up.

III. *Submission by order of Nisi Prius.*]—When the cause has been entered for trial, the more ordinary mode of referring

(*u*) Carpenter *v.* Thornton, 3 B. & A. 52; Hide *v.* Petit, 1 Cas. in Chanc. 185; Skee *v.* Coxon, 10 B. & C. 483.

(*x*) Archer *v.* Hale, 4 Bing. 464; Rigby *v.* Okell, 7 B. & C. 57.

(*y*) 52 & 53 Vict. c. 49.

(*z*) Archb. Pr. 1308, 13th ed.; 1587, 14th ed.

(*a*) Hawkins *v.* Benton, 2 D. & L. 465, S. C. 8 Q. B. 479.

it is by order of Nisi Prius on its coming on to be tried. This is an order of the court of Nisi Prius drawn up on the consent of the parties, and embodying the terms on which they agree to refer. A verdict is generally taken by consent for a fixed amount of damages, in most cases for the damages laid in the statement of claim (*c*). The leading counsel on each side usually select the arbitrator and make a minute of his name and of the terms of the reference on their briefs, and from these the associate or clerk of Nisi Prius draws up the order. He usually makes out two duplicate orders, and delivers them to the solicitors of the plaintiff and defendant respectively on their application. If this is not done the solicitor for the party interested in pressing on the reference obtains the order from the associate and serves a copy on the opposite party (*d*).

Verdict taken by consent.

If the order was not drawn up, there was no reference under the control of the court, though a verdict had been taken by consent subject to the reference, and the ordinary powers of the court could not be exercised, as, for instance, to order witnesses to attend the arbitrator (*e*).

Effect when order not drawn up.

Yet where a verdict was taken, subject to the "certificate" of an arbitrator, the verdict entered pursuant to his certificate, made either during or after the assizes, would be as binding as a verdict of the jury, although no order of reference was drawn up and the parol submission was his sole authority (*f*).

Verdict pursuant to certificate valid.

The benefit of taking a verdict was, that it facilitated the enforcing the award; for when a verdict was taken, the award of the arbitrator was looked upon as the finding of the jury. The same consequences followed as on a verdict; costs might be taxed and execution issued for the amount awarded (*g*), which was, strictly speaking, money recovered in the action (*h*). Now by section 15 (2) of the Arbitration Act, 1889, an award within that section is equivalent to the verdict of a jury.

Benefit of taking a verdict

As no after amendment will be allowed (*i*), care should be taken that the verdict be entered for a sufficient amount of

Verdict limit of damages in the action.

(*c*) Prentice *v.* Reed, 1 Taunt. 151.

(*d*) Alder *v.* Savill, 5 Taunt. 453; 2 Archb. Pr. 1308, 13th ed.; 1588, 14th ed.

(*e*) Curtis *v.* Bligh, 3 Jur. 1152, S. C. B. C. M. 839.

(*f*) Tomes *v.* Hawkes, 10 A. & E. 32.

(*g*) Carpenter *v.* Thornton, 3 B. & A. 52.

(*h*) Keene *v.* Deeble, 3 B. & C. 491.

(*i*) Pearse *v.* Cameron, 1 M. & S. 675.

damages to cover all the plaintiff's claims in the action, because the arbitrator cannot in respect of those claims award a sum exceeding the amount of the damages taken. If he do, it is said his award will not entitle the plaintiff even to that amount, but will be bad altogether (*k*).

No limit to damages out of the action.

Where, however, other matters besides the cause are referred, the arbitrator is not limited by the amount of the verdict in respect of the additional matters; and the successful party, though he cannot recover on the verdict, may yet have a remedy on the award (*l*).

Verdict security for damages in the cause only.

But although the amount of damages taken be large enough, the verdict does not stand as a security for the whole sum awarded due, but only for such sum as the arbitrator may find to be the damages recoverable in the action; and if the arbitrator award a gross sum in respect of the cause and of the other matters in difference as well, the verdict will not stand as a security for any part of the sum awarded (*m*).

Juror withdrawn or jury discharged.

Sometimes, instead of taking a verdict, a juror is withdrawn on a reference being agreed to. This course does not necessarily put an end to the cause. It depends on the agreement of the parties whether the reference be in the cause, or whether the cause be terminated and the submission be of the claims between the parties but not of the cause itself (*n*). If the cause be terminated each party pays his own costs (*o*).

Real and personal actions referable by order of Nisi Prius.

All matters in difference.

Real actions, such as a quare impedit, might have been referred by order of Nisi Prius (*p*). Two actions, such as cross actions between the same parties, may be referred by one order (*q*); so also a cause and all matters in difference between the parties, including suits in equity (though it is not clear whether such a reference was by common law only as to the matters out of the cause, or whether it was under the stat.

(*k*) Prentice *v.* Reed, 1 Taunt. 151; Bonner *v.* Charlton, 5 East, 139; Hayward *v.* Phillips, 6 A. & E. 119.

(*l*) Pearse *v.* Cameron, 1 M. & S. 675.

(*m*) Taylor *v.* Shuttleworth, 8 Dowl. 281.

(*n*) Harries *v.* Thomas, 2 M. & W. 32; Moscati *v.* Lawson, 1 H. & W. 572.

(*o*) Stodhart *v.* Johnson, 3 T. R. 657; Toussaint *v.* Hartop, 7 Taunt. 571; 1 Archb. Pr. 376, 13th ed.; 648, 14th ed.

(*p*) Grimstone *v.* Bell, 4 Taunt. 253.

(*q*) Howett *v.* Clements, 1 C. B. 128.

Indictment.

9 & 10 W. III. c. 15 (*r*). A cause and an indictment against one of the parties to the cause might be referred by one order (*s*). Even several causes between several parties, and an indictment against one of them, have been submitted by a single order of Nisi Prius, verdicts having been taken by consent in the causes and indictments, subject to the reference (*t*). But an indictment cannot be referred by order of Nisi Prius when a verdict of not guilty has been taken subject to the reference, and no power is specifically given to the arbitrator to alter the verdict. A verdict of guilty should be taken subject to the award. When a verdict of not guilty was taken on an indictment for perjury, tried at Nisi Prius, and the indictment and all matters in difference were referred by order of Nisi Prius, the reference was not wholly illegal, as the attempt to refer the indictment for perjury was a nullity, but it was doubtful whether the Nisi Prius order was valid, as the verdict of not guilty put an end to any proceedings in court (*u*). The court has no power under the Arbitration Act, 1889, to refer a criminal proceeding by the Crown; nor to compel a reference of cause and all matters in difference (see p. 88).

When a cause and all matters in difference have been referred by an order of Nisi Prius, it is improper to draw up a second order referring another cause between the same plaintiff and one of the same defendants (*x*).

Not issue out of Chancery.

A judge sitting at Nisi Prius had, in old time, no authority to refer an issue directed out of Chancery (*y*). Nor on a trial by jury before the sheriff under the Writ of Trial Clause (*z*) had that officer any authority to permit a verdict to be taken by consent, subject to a reference of the cause. He was not in this respect like a judge at Nisi Prius, and could not give an arbitrator power to alter the verdict of the jury (*a*).

Not cause tried before sheriff.

(*r*) Allenby *v.* Proudlock, 4 Dowl. 54; Lucas *v.* Wilson, Burr. 701; Wrightson *v.* Bywater, 3 M. & W. 199, S. C. 6 Dowl. 359; Harrison *v.* Smith, 1 D. & L. 876; Com. Dig. Arb. D. 1; Hayward *v.* Phillips, 6 A. & E. 119; R. *v.* Hardey, 14 Q. B. 529.

(*s*) Blanchard *v.* Lilly, 9 East, 497; R. *v.* Bardell, 5 A. & E. 619, S. C. sub nom. R. *v.* Shillibeer, 5 Dowl. 238.

(*t*) Aldridge *v.* Harper, 10 Bing. 118.

(*u*) R. *v.* Hardey, 14 Q. B. 529.

(*x*) Rees *v.* Waters, 16 M. & W. 263.

(*y*) Woodley *v.* Johnson, 1 Molloy, 394.

(*z*) 3 & 4 W. IV. c. 42, s. 18.

(*a*) Wilson *v.* Thorpe, 6 M. & W. 721; Harrison *v.* Greenwood, 15 L. J. Q. B. 92.

Reference on the "usual terms."

The reference is often agreed to be made on "the usual terms," or on the usual terms with some additional provisions applicable to the particular case. It is important that the parties should know to what they consent, when they agree to refer on "the usual terms" (*b*). The form of a reference at Nisi Prius very recently in general use, and which probably will be deemed to contain "the usual terms," varies in some measure from the older precedent (*c*).

In such an order it is always specially arranged whether its terms are to apply to matters in the cause only, or are to extend further. Very frequently all other matters in difference between the parties are referred with the cause. Assuming the newer form to contain "the usual terms," the parties by agreeing so to refer when a verdict has been taken at Nisi Prius, subject to the reference, consent that the

Judgment.

arbitrator shall direct whether judgment is to be for the plaintiff or for the defendant, and for what amount of damages, not exceeding, however, the amount claimed in the action. The older form gave the arbitrator no power over the judgment.

Costs.

The parties consent, also, that the costs of the cause shall abide the event of the arbitrator's decision in the action, but that the costs of the reference and award shall be in his discretion. Practically, they give the arbitrator an unlimited time for

Death of party.

making his award. The death of either party is not to abate his authority. They agree that he shall have all the powers of certifying and amending pleadings and proceedings (*d*) as a judge of the High Court of Justice. The order used to direct that the parties and witnesses should be examined on oath; but the latest form in use omits that stipulation. The parties agree also to produce all documents relating to the matters referred. They agree further to obey his award, and to bring no action respecting the matters referred, against the arbitrator or each other. They consent, too, that if either of them

Preventing award.

wilfully prevent the arbitrator making an award, he will pay such costs to the other as the court shall think fit, and that if either party dispute the validity of the award, the court may refer the matters, or any of them, back to the arbitrator to

(*b*) Grimstone *v.* Bell, 4 Taunt. 253.

(*c*) See Appendix of Forms, Submissions, Form XVIII.

(*d*) Thompsett *v.* Bowyer, 30 L. J. C. P. 1, S. C. 9 C. B. N. S. 284.

reconsider; and also (in the newer form) that if the arbitrator dies or declines to act and the parties cannot agree, the court may appoint a new arbitrator. A clause, framed on the recommendation of the old Court of Exchequer, is now inserted, that it shall be sufficient for the arbitrator to find in the cause generally for the plaintiff or defendant, unless either party shall request him to decide some particular issues (*e*).

General finding.

On a reference after verdict for the plaintiff to an arbitrator to settle the amount of the damages, the expression "usual terms as to costs," means, that the costs of the reference and award are in the discretion of the arbitrator (*f*).

Reference to settle amount of damages.

In many of the forms of orders of reference in use by the officers of the courts, a power was given to the arbitrator to direct what he should think fit to be done by the parties respecting the matters referred. This, though a power most usefully inserted in many cases, does not fall under the category of being one of the usual terms (*g*).

Power to say what to be done.

Whether the reference take place at Nisi Prius, or at any previous time by judge's order, a reference on the usual terms means the same (*h*), except, it is submitted, that on a reference on the usual terms before trial the arbitrator would have no power given him to direct the entry of a verdict.

A clause for making an order of Nisi Prius a rule of court, though of old usually contained in such an order, was not necessary, at least when only the cause was referred; for the court has an inherent authority, independent of any consent of parties, to make an order of a judge or of the Court of Nisi Prius an order of court (*i*). It seems still less necessary since the Arbitration Act, 1889.

Rule of court.

IV. *Setting aside a submission made in a cause.*]—When a cause was referred by rule of court, judge's order, or order of Nisi Prius, although the submission removed it to a different

Jurisdiction of the courts over the submission.

(*e*) Morgan *v.* Thomas, 9 Jur. 92.

(*f*) Morel *v.* Byrne, 28 L. T. N. S. 627.

(*g*) Per Wightman, J., at Chambers, 1862.

(*h*) Thompsett *v.* Bowyer, 30 L. J. C. P. 1, S. C. 9 C. B. N. S. 284.

(*i*) Millington *v.* Claridge, 3 C. B. 609; Halden *v.* Glasscock, 5 B. & C. 390; Hart *v.* Draper, 2 Marsh. 358. See Little *v.* Newton, 1 M. & G. 977, n. (*a*); Haggett *v.* Welsh, 1 Sim. 134; Allenby *v.* Proudlock, 4 Dowl. 54; Hayward *v.* Phillips, 6 A. & E. 119.

forum, namely, that of the arbitrator, the court by common law still retained a certain jurisdiction over the submission, the proceedings in the reference, and the award. This was not analogous to its power over an ordinary judge's order drawn up by consent for payment of debt and costs. For this the court may set aside at any stage of the proceedings, whereas it will interfere with an order of reference only in a certain way and according to certain rules and regulations (*k*).

Setting it aside for fraud or mistake.

If a submission has been obtained by fraud or drawn up by mistake, the court on motion will set it aside. But it will not set aside an award on the ground of fraud or mistake in the submission (*l*). Where a third party who had agreed to join in a submission of a cause refused to proceed in the reference, the submission was set aside on the application of one of the parties on the record (*m*).

Setting it aside in equity.

Equity would not set aside an agreement of reference as obtained by undue pressure, where the party objecting had attended the reference and taken the chance of an award in his favour (*n*).

For bad faith.

So where by order of Nisi Prius a verdict was taken for the plaintiffs by consent for the penalty of a bond, the amount to be reduced according to the award of a master in Chancery, to whom it was agreed that a suit in Chancery relating to the bond should be referred by a decree of the Court of Chancery to be drawn up by consent, but owing to the plaintiffs' bad faith the decree could not be obtained; as the reference thus failed, the Court of Common Pleas set aside the order of Nisi Prius at the plaintiffs' instance, notwithstanding their bad faith, as they were mere trustees for a widow and infants; but they were compelled to pay the costs of the former trial, and of the several actions in court (*o*).

Compulsory reference.

A compulsory reference was set aside, when it appeared that there was no dispute as to the amount, but only as to liability (*p*).

(*k*) Wade *v.* Simeon, 13 M. & W. 647.

(*l*) Doe *d.* Ld. Carlisle *v.* Bailiff, &c. Morpeth, 3 Taunt. 378; Sackett *v.* Owen, 2 Chitt. 39; Prosser *v.* Goringe, 3 Taunt. 425.

(*m*) Bacon *v.* Cresswell, 1 Hodges, 189.

(*n*) Ormes *v.* Beadel, 30 L. J. Ch. 1, S. C. 2 Giff. 166; In re Wyld, 30 L. J. Bank. 10, S. C. De G. F. & J. 642.

(*o*) Morgan *v.* Miller, 6 Bing. N. C. 168.

(*p*) Brown *v.* Girard, 19 L. J. N. S. Ex. 324.

Cross actions between *Cross* and *Mitchell* being set down for trial, the attorneys entered into an agreement in writing out of court, that both actions should be referred to an arbitrator to be named by their respective counsel, the causes were to be no further proceeded with, and the reference was to be on all the usual terms. *Cross* frequently requested *Mitchell* to get an arbitrator appointed, but *Mitchell* declined, and did nothing, and no arbitrator was appointed. No order or rule of court was ever drawn up on the agreement. After three years *Cross* applied to the court in which the actions were for leave to rescind the submission, and proceed to trial of the causes; but Alderson, B., sitting alone, discharged the rule, saying that the application was unnecessary, as *Cross* might have proceeded in the causes at any time after he found that *Mitchell* refused to act on the agreement (*q*).

When unnecessary to set aside agreement to refer.

After consenting to a reference of a cause to a master as involving matter of account, the plaintiff could not after delay object to the order and have it set aside as not involving matter of account (*r*).

Delay in applying to set aside submission.

v. *Amending a submission made in a cause.*]—By the consent of parties a submission may be altered or amended at any time. Without that consent it is laid down that the court cannot alter it in any material part, because it cannot alter the parties' agreement. This is the rule, but there are many exceptions, as will be seen.

Submission not amendable without consent.

When a verdict was taken by consent for the damages in the declaration, subject to a reference, no alteration to increase the amount would be permitted, for possibly the smallness of this sum might have been an inducement to the other party to consent to the reference (*s*). Nor, though the order of reference contained no power for the arbitrator to amend the pleadings, would the court allow the declaration to be altered by adding an averment of a new breach of contract (*t*).

But the court can insert into the submission that which the parties in the legal effect of their contract assented to at the time of reference. For instance, they will correct an

Except in the furtherance of agreement.

(*q*) Cross *v.* Mitchell, Ex. May 8, 1855.

(*r*) Rogers *v.* Kearns, 29 L. J. Ex. 328.

(*s*) Pearse *v.* Cameron, 1 M. & S. 675.

(*t*) Smurthwaite *v.* Richardson, 15 C. B. N. S. 463.

erroneous provision as to the costs of the reference (*u*). On this principle, also, the court amended an agreement by order of Nisi Prius that defendant should sell certain lands at a valuation, by inserting the words, "that the defendant should make a good title and execute a conveyance of the premises," such being his implied contract (*x*). And on the same principle, a reference on the usual terms having been agreed to, a judge, with the approbation of the court pending the reference, added to the arbitrators' powers a power to amend the record (*y*). Where such an amendment is asked for to vary the original terms of reference, it will not be allowed (*z*).

Striking out clause not to file bill or bring error.

Greater alterations, however, are sometimes permitted under peculiar circumstances. The court in one case granted a rule nisi for striking out of the order of reference the clause against filing a bill in equity, the party having before the reference intended to file a bill for a discovery to aid his defence at law, and his counsel at the trial having inadvertently allowed the clause to be inserted. The rule ultimately was made absolute by consent (*a*). In another case, of a submission by bond, where the arbitrator had made his award without hearing the defendant or his witnesses, and where there was a parol waiver of the award, it was suggested by Lord Ellenborough that, on a proper case being made out by affidavit, the court would discharge so much of the rule as restrained the defendant from filing a bill in equity (*b*). A rule nisi to that effect was afterwards granted, but the matter was compromised before argument.

The rule of reference in a case before the judges of Chester was ordered to be amended after an award in favour of the plaintiff, by striking out the clause restraining the parties from bringing a writ of error, on the ground of hardship and inadvertence, the defendant stating that at the time when the cause was referred, it did not occur to him that the order of reference would contain such a clause (*c*). The case was afterwards argued in error in the Court of King's Bench (*d*).

(*u*) Morel *v.* Byrne, 28 L. T. N. S. 627.

(*x*) Evans *v.* Senor, 5 Taunt. 661.

(*y*) Thompsett *v.* Bowyer, 30 L. J. C. P. 1, S. C. 9 C. B. N. S. 284.

(*z*) Vanderbyl *v.* M'Kenna, I. R. 3 C. P. 252.

(*a*) Grimstone *v.* Bell, 4 Taunt. 253.

(*b*) Braddick *v.* Thompson, 8 East, 344.

(*c*) Fairfield *v.* Wright, cited in Steeple *v.* Bonsall, 4 A. & E. 950.

(*d*) Wright *v.* Fairfield, 2 B. & Ad. 727.

Where "all matters in difference" were referred with the cause by a compulsory order of reference, the court, after an award made stating that there were no other matters in difference, struck the words "and all matters in difference" out of the order as improvidently inserted (*e*).

Striking out "all matters in difference" in compulsory order of reference.

The Court of Queen's Bench, in a later instance of a compulsory order of reference under the Common Law Procedure Act, 1854, amended the order after award made nunc pro tunc, by inserting, according to the original intention of the parties, a clause that costs should abide the event (*f*). The particulars in such an action may be amended by leave of the court (*g*).

Amending compulsory order of reference nunc pro tunc.

In a case in the Common Pleas, it was agreed in the order of reference that the parties should admit, and that the arbitrator should take and receive, the account annexed to the order to be a correct account of certain accounts between the parties, and that the arbitrator should award on the rights of the parties, as if the items stated in the account had been proved before him. After the award had been made the plaintiff applied to the court to amend the order of reference and refer back the matter to the arbitrator on affidavits which showed clearly that in the account annexed to the order of reference, the clerk of the plaintiff's attorney in copying it had by mistake given the plaintiff credit for 460*l.*, instead of 758*l.* The court refused the application, saying that they had no jurisdiction, but suggesting that there might be a remedy in equity (*h*).

Error in copy of account.

A court of law had no power to amend an agreement of reference made a rule of a court of law so as to make it accord with the original intention of the parties. The only power to reform an agreement was in the Court of Chancery (*i*).

Court no power to amend agreement of reference.

A clerical error, or an immaterial variance, in an order of reference, will be amended by the courts without consent. Where the Christian and surname of the defendant in the cause, Thomas James, had been transposed in the order of reference, the court rectified the error (*k*).

Amending clerical error.

(*e*) Kendil *v.* Merrett, 25 L. J. C. P. 251, S. C. 18 C. B. 173.
(*f*) Bell *v.* Postlethwaite, 25 L. J. Q. B. 63, S. C. 5 E. & B. 695.
(*g*) Gibbs *v.* Knightley, 26 L. J. Ex. 294, S. C. 2 H. & N. 34.
(*h*) Winn *v.* Nicholson, 7 C. B. 819.
(*i*) Shaw *v.* Pitt, per Crompton, J., B. C. Nov. 21, 1856.
(*k*) Price *v.* James, 2 Dowl. 435.

No amendment of material mistake of officer.

But where there is a material mistake, even by the officer of the court, an amendment will often not be permitted. Thus, in one case the court refused to allow the order to be amended according to the terms of a paper signed by the counsel at the trial, the intention of the parties from their subsequent acts appearing to have been in favour of the terms of the order (*l*). In another instance, where by a mistake of the associate the order was drawn up referring all matters in difference between the parties, and not all matters in difference in the cause only, the court said they could not interfere, that the order of reference must be treated as a mere nullity, and that the cause must go down to a new trial (*m*).

Where on the reference of a cause two orders of Nisi Prius were drawn up for the several attorneys, which were not duplicates, but varied in their terms, and the defendants, after making their part of the order a rule of court, moved to set aside the award (the arbitrator having acted on the plaintiff's part of the order only), and the plaintiff made a counter-motion to set aside the rule of court confirming the defendants' order as incorrect, the court directed a reference to the associate to ascertain which of the two orders was drawn up in accordance with his minutes of the agreement made at the trial, and on receiving his report that the plaintiff's was the more correct order, set aside the rule of court confirming the defendants' (*n*).

VI. *Altering terms of reference without altering submission.*]—Without touching the submission, the courts have sometimes refused, and sometimes permitted, a practical alteration of the terms of the reference.

Allowing particular of set-off.

A judge's order permitting the delivery of a particular of a set-off after a reference, and so entitling the defendant to go into evidence of a set-off before the arbitrator, which, had the case been tried, the want of a particular would have entirely precluded him from giving before a jury, was set aside by the court as improperly altering the position of the parties (*o*).

Enlarging

In one case the Court of Common Pleas claimed the power

(*l*) Pearman *v.* Carter, 2 Chitt. 29. See as to amending proceedings, Order XXVIII. rr. 11 and 12.

(*m*) Rawtree *v.* King, 5 Moore, 167.

(*n*) Alder *v.* Savill, 5 Taunt. 453.

(*o*) Ashworth *v.* Heathcote, 6 Bing. 596.

particulars of demand.

during a reference to allow an alteration in the bill of particulars as being a mere creature of the court, and not part of the record; and fresh items were permitted to be added, and so the plaintiff's capability of recovering was enlarged after the reference of an action for work and labour, even though several meetings had been held before the arbitrator, it not being suggested that the defendant desired to have the option either to decline going on with the reference, or the liberty to plead de novo (*p*).

Later, however, though the case of *Blunt* v. *Cooke* (*q*) was cited, the Court of Exchequer held that a judge had no power without consent to order the particulars of demand to be altered by increasing the amount of one item (*r*).

No new plea allowed.

On one occasion where, pending a reference by order of Nisi Prius, the arbitrator certified to the court that it would be agreeable to justice to allow the plaintiff to amend his replication so as to traverse all the allegations in the plea; the court refused the application, on the ground that the verdict had been taken on a particular issue by consent, and that without consent it could not alter the terms on which the reference had been made (*s*).

Plea to further maintenance of action.

But the court allowed a defendant executor who had referred the cause to avail himself of a judgment recovered against him during the reference, by permitting him to plead it in a plea puis darrein continuance, although it appeared from affidavits that he had a certain amount of assets in his hands; for the granting the leave was only placing the defendant in the same situation as he would have been in had the cause been still pending before the Court of Nisi Prius (*t*).

Judge ordering principle of valuation.

After a reference in equity to a surveyor among other things to determine the damage which the plaintiff's premises had sustained by reason of the copper works of the defendants, a Vice-Chancellor has no power to make an order directing the surveyor to proceed on a particular principle; for to do that would be to alter the submission of the parties without their consent (*u*).

(*p*) Blunt *v.* Cooke, 4 M. & G. 458.
(*q*) 4 M. & G. 458.
(*r*) Morgan *v.* Tarte, 11 Ex. 82.
(*s*) Cross *v.* Metcalfe, 5 A. & E. 800.
(*t*) Alder *v.* Park, 5 Dowl. 16.
(*u*) Houghton *v.* Bankart, 3 De G. F. & J. 16.

Whether submission of a cause a stay of proceedings.

VII. *Submission in a cause a stay of proceedings.*]—A submission of a cause to arbitration used in old times to be considered as an implied stay of proceedings (*x*). But as Holt, C.J., is reported, in 2 Ld. Raym. 789, to have said that in the beginning of Queen Anne's reign the judges of the Court of Queen's Bench made a rule that no reference whatever of any cause in that court should be a stay of proceedings, unless it was expressed in the rule of reference that all proceedings should be stayed, the general practice has been in all the courts of law to abide by the rule so laid down (*y*).

But in later times, Littledale, J., held an agreement to refer a cause operated as a stay of proceedings, although it was not expressed that it should so operate, as it was a breach of faith to proceed with the cause after the reference, and said that he could not find there was any such rule of court in the reign of Queen Anne as that reported in 2 Ld. Raym. 789 (*z*).

Still more recently, Patteson, J., seemed to think that an agreement to refer a cause and all matters in difference (not containing any clause for a stay of proceedings) suspended all proceedings in the cause during the time within which the award was to be made (*a*).

Clause for staying proceedings enforced.

Whether the rule, as laid down by Holt, C.J., is to be followed or not henceforth, it is advisable, where it is intended, as is generally the case, that the proceedings at law should be stayed, that a clause expressing that intention should be inserted in the submission. When there is such a clause, any steps taken in the action after the reference will be set aside, and the party taking them will be liable to an attachment if the submission have been made a rule of court (*b*).

Time of applying to stay proceedings.

It seems that the application to set aside proceedings taken in the cause after the reference need not be made until the party affected has notice that some step has actually been taken in the cause.

Thus, where the plaintiff had given notice that he should proceed to trial notwithstanding the reference, and obtained a verdict, no one appearing for the defence, the court held that

(*x*) Anon., 1 Mod. 24.

(*y*) Lowes *v.* Kermode, 8 Taunt. 146; Tidd's Pract. 822, 9th ed.; Green *v.* Pole, 6 Bing. 443.

(*z*) Williams *v.* Gwynne, 2 H. & W. 312.

(*a*) Fontainemoreau *v.* Encontre, 4 D. & L. 425.

(*b*) Dicas *v.* Jay, 6 Bing. 519; Tidd's Pract. 529, 9th ed.; Moscati *v.* Lawson, 1 H. & W. 572.

the defendant was not bound to attend to this notice; but that the application of the defendant to set aside the proceedings made about a month afterwards was not too late, since it was made immediately after receiving notice that the plaintiff was proceeding to tax his costs, which was the first intimation that the defendant had that the plaintiff had actually gone on with the action (*c*).

Reference waiver of peremptory undertaking.

If a party under a peremptory undertaking to try at the next assizes failed to do so, his opponent, by agreeing subsequently to refer the cause, primâ facie waived his right to enforce the peremptory undertaking (*d*).

Staying proceedings under the Arbitration Act, 1889.

For staying actions commenced after an agreement to refer the subject-matter, provision is made in s. 4 of the Arbitration Act, 1889 (*e*).

Submission, when a discharge of bail.

VIII. *Submission in a cause a discharge of bail.*]—By the reference of an action before trial, if it operate as a stay of proceedings, the bail, if there be any, are discharged from their responsibility, unless their consent to the reference has been previously obtained; for during all the time in which the suit is running its ordinary course they might surrender their principal, but when time is given, they cannot proceed against him for that time, and they are therefore deprived of the opportunity of surrendering him (*f*). But when a verdict is taken subject to a reference, or at any rate when it is respecting the quantum of damage only, the bail remain as liable as if the cause had been regularly tried (*g*).

Discharge of replevin sureties.

When a replevin suit was referred, the consent of the sureties to the replevin bond should have been obtained, or probably they would be discharged. They stood, indeed, in a different position from bail, who could at any time take and render their principal while the cause was pending; for replevin sureties could not at any time take the goods distrained upon, and restore them to the landlord. Some of the cases seem to show that they were not discharged in law,

(*c*) Williams *v.* Gwynne, 2 H. & W. 312.

(*d*) Spurr *v.* Rayson, 5 M. & W. 339, S. C. 7 Dowl. 476.

(*e*) 52 & 53 Vict. c. 49. See ante, P. I. c. 3, s. 1, d. 5, p. 46.

(*f*) Moore *v.* Bowmaker, 2 Marsh. 81; Hannington *v.* Beare, 4 Dowl. 256; Underhill *v.* Devereux, 2 Saund. 72, notes; Tidd, Pr. 819, 9th ed.

(*g*) Moore *v.* Bowmaker, 6 Taunt. 379; Taylor *v.* Gregory, 2 B. & Ad. 774; Tidd, Pr. 819, 9th ed.

though they might have been in equity, by a submission of a replevin suit containing a clause for a stay of proceedings (*h*). The result of later cases seems to be this, that though a submission of a replevin suit, even though it were made by order of Nisi Prius and on a verdict taken subject to the reference, could not be *pleaded* by the sureties as a defence to an action on the replevin bond, on the ground that the parol agreement to give time to the principal could not in law vary their liability under seal, yet it might afford ground for relief by summary application to the equitable jurisdiction of the court of law, and might have had the effect of discharging them in equity (*i*).

Discharge of defendant.

Where at Nisi Prius a juror was withdrawn by consent, and the cause referred, the defendant, who had been arrested at the plaintiff's suit, was not considered entitled to his discharge, the order of Nisi Prius containing no provision on the point (*k*).

Submission enforced by attachment.

IX. *Enforcing submissions made in a cause.*]—The order of Nisi Prius, or other order containing the submission, used to require to be or to be made a rule of court before any summary proceedings could be taken to compel obedience to the submission, when a party refused to proceed with a reference, or to comply with the terms of the submission, or when the authority of the arbitrator had to be enforced (*l*). The rule for some purposes related back to the time of making the original order, but not for the purpose of grounding process of contempt against a party who had broken the conditions of the order before it was made a rule of court (*m*).

Disobedience a contempt.

Thus, disobedience to it was a contempt of court, and would be punished by attachment (*n*).

It must be remembered that now most submissions as soon as made have the effect of orders of court.

(*h*) Moore *v.* Bowmaker, 2 Marsh. 81, S. C. 6 Taunt. 379; Moore *v.* Bowmaker, 7 Taunt. 96; Moore *v.* Bowmaker, 3 Price, 214.

(*i*) Aldridge *v.* Harper, 10 Bing. 118; Archer *v.* Hale, 4 Bing. 464. See Michael *v.* Myers, 6 M. & G. 702.

(*k*) Apsley *v.* Crosley, Barnes, 54.

(*l*) Aston *v.* George, 2 B. & A. 395; Fetherstone *v.* Cooper, 9 Ves. 67; Kirkus *v.* Hodgson, 3 Moore, 64; Baker *v.* Rye, 1 Dowl. 689; Curtis *v.* Bligh, 3 Jur. 1152.

(*m*) Hilton *v.* Hopwood, 1 Marsh. 66.

(*n*) Kene *v.* Fleming, 2 Keb. 22; Carpenter *v.* Thornton, 3 B. & A. 52; Rogers *v.* Dallimore, 6 Taunt. 111; Allenby *v.* Proudlock, 4 Dowl. 54.

An action cannot be brought for disobedience to a judge's order; but it was said by Parke, J., that an action would lie for breach of the agreement of the parties on which the order of reference was founded (*o*). Doubt, however, was thrown on that statement by Pollock, C.B., in a later case (*p*).

Quære by action.

The award made on these submissions may be enforced in several ways. When a verdict has been taken, and the award directs payment of money, judgment and execution on the verdict, or an attachment, are the ready means of enforcement. Where no verdict is entered an attachment still will be granted; and later statutes (*q*) have given a power of levying the amount of money awarded by the process of execution. Debt used to lie on the award, and an action of assumpsit might have been maintained on the promise evidenced by the rule of court (*r*); and it is clear that on an award other than for the payment of money, an action for a specific performance may in many instances be maintained (*s*).

Award, how enforced.

x. *Compulsory and other references under the Arbitration Act*, 1889.]—The following important clauses providing for references of actions are contained in the Arbitration Act, 1889 (52 & 53 Vict. c. 49).

Sect. 13.—(1). "Subject to Rules of Court and to any right to have particular cases tried by a jury, the Court or a judge may refer any question arising in any cause or matter (other than a criminal proceeding by the Crown) for inquiry or report to any official or special referee."

Reference for report.

(2). "The report of an official or special referee may be adopted wholly or partially by the Court or a judge, and if so adopted may be enforced as a judgment or order to the same effect."

Sect. 14. "In any cause or matter (other than a criminal proceeding by the Crown):—

Reference for trial.

Power to refer in certain cases.

(a) "If all the parties interested who are not under disability consent: or

(*o*) Wentworth *v.* Bullen, 9 B. & C. 840.

(*p*) Hookpayton *v.* Bussell, 9 Ex. 24, S. C. 23 L. J. Ex. 267.

(*q*) 1 & 2 Vict. c. 110, s. 18; 36 & 37 Vict. c. 66. See also the Arbitration Act, 1889, 52 & 53 Vict. c. 49, s. 12.

(*r*) Bonner *v.* Charlton, 5 East, 139; Tremenhere *v.* Tresillian, 1 Sid. 452; Carpenter *v.* Thornton, 3 B. & A. 52.

(*s*) Walters *v.* Morgan, 2 Cox, 369.

(b) "If the cause or matter requires any prolonged examination of documents or any scientific or local investigation which cannot, in the opinion of the Court or a judge, conveniently be made before a jury or conducted by the Court through its other ordinary officers: or

(c) "If the question in dispute consists wholly or in part of matters of account,

the Court or a judge may at any time order the whole cause or matter, or any question or issue of fact arising therein, to be tried before a special referee or arbitrator respectively agreed on by the parties, or before an official referee or officer of the court."

Under the above sections, references to arbitration may be compelled on application to a judge or master at chambers (Order LIV. r. 12a), or to the courts.

Time of reference.

A reference for trial under s. 14 may be ordered "at any time," but a reference for inquiry and report under s. 13 cannot, it seems, until the time has passed for asking for a trial by jury.

The following is a paragraph in a rule of court relating to the present subject:—

Order XXXVI. r. 7, 1883, "(a) In every cause or matter, unless under the provisions of rule 6 of this Order a trial with a jury is ordered, or under rule 2 of this Order either party has signified a desire to have a trial with a jury, the mode of trial shall be by a judge without a jury: provided that in any such case the court or a judge may at any time order any cause, matter, or issue to be tried by a judge with a jury, or by a judge sitting with assessors, or by an official referee or special referee with or without assessors."

Special referee must be agreed on.

The court cannot refer to a special referee for trial, unless he is a person agreed on by the parties. For this rule was to be construed with reference to s. 57 of the Judicature Act, 1873, now repealed, but substantially re-enacted in s. 14 of the Arbitration Act, 1889 (*t*).

Reference of cause and matters beyond is at common law.

Section 14 does not enable the Court to refer a cause and all matters in difference. That usual form of reference is made under the common law powers of the Court (*u*).

(*t*) London, &c. Fire Ins. Co. *v.* British, &c. Ins. Co., 54 L. J. Q. B. D. 302.

(*u*) Darlington Wagon, &c. Co.

Clause as to costs.

An order of reference under the Common Law Procedure Act, 1854, generally provided that the costs of the cause should abide the event, and that the costs of the reference and award should be in the arbitrator's discretion (*v*). If it was silent as to costs the arbitrator, *semble*, had no power over them (*x*).

Reference at Nisi Prius.

A judge at Nisi Prius had no power before the Judicature Acts, on the application by a party during the trial before a jury, to compel a reference (*y*). But he might have discharged the jury, and then made an order under s. 3, sitting *in camerâ* (*z*). It seems that he is now a court with full power to refer (*a*).

Question arising in a cause.

The Arbitration Act, 1889, s. 13, provides for a reference of "any question arising in any cause or matter." It was decided in a case on the 56th section of the Judicature Act, 1873, that this means any question which must necessarily arise in the action, not one which it may become unnecessary to decide. Thus, in an action for rescission of a contract, on the ground of misrepresentation of professional income, the order of a judge made before trial referring the question of the amount of the income was set aside on the ground that it was not proved that the question of the amount would be one that must necessarily arise in the action, but was one that might not arise at all (*b*).

In what cases.

Where there was a long bill of particulars on one side, and a set-off on the other, and each party disputed many items in the other's account, the case was held to fall within the repealed Common Law Procedure Act, as involving matters of account, and a reference was enforced (*c*). An action by a rector against his predecessor for dilapidations of the rectory-

v. Harding (1891), 1 Q. B. 245; 39 W. R. 167; 7 Times L. R. 106.

(*v*) See the Appendix of Forms.

(*x*) Leggo *v.* Young, 16 C. B. 626; Wilmhurst *v.* Barrow Ship Building Co., 2 Q. B. D. 385. See post, P. II. c. 7, d. 2.

(*y*) Robson *v.* Lees, 6 H. & N. 238, S. C. 30 L. J. Ex. 235, showing that the practice adopted in Murray *v.* The Sunderland Dock Co., 1 F. & F. 179, and Adams *v.* Yeoman, 2 F. & F. 92, and Jones *v.* Beaumont, 1 F. & F. 336, was wrong. See Jeffries *v.* Lovell, 23 L. T. 782.

(*z*) Morgan *v.* Ainslie, 28 L. T. 120.

(*a*) Hoch *v.* Boor, 49 L. J. Com. Law, 665.

(*b*) Weed *v.* Ward, 40 Ch. D. 555.

(*c*) Browne *v.* Emerson, 25 L. J. C. P. 104, S. C. 17 C. B. 361; Chapman *v.* Van Toll, 8 E. & B. 396; 27 L. J. Q. B. 1; Goodred *v.* Seale, 2 F. & F. 382.

house (*d*), or of the chancel of the church (*e*); and one by a landlord against a tenant for not delivering up premises in good repair (*f*), where money had been paid into court, and the only question was, what was the amount to which the plaintiff in each case was entitled, were held properly referred to arbitration under the Common Law Procedure Act. But in an action on some bills of exchange against the drawer, who had admitted drawing the bills, the court refused to order a reference, saying, that the matter in dispute was not matter of mere account, and that there was nothing to show that it could not conveniently be tried in the ordinary way (*g*).

Where the claim was partly for matters of account, and also to recover back money paid as commission on orders alleged to be fictitious, the judge having referred the case, the court held that he had jurisdiction (*h*). After a reference by a judge, the court, in another instance, refused to direct an issue to be tried under s. 4 of the Common Law Procedure Act, 1854, to determine whether the defendant was not precluded by his own agreement from setting up a particular defence (*i*).

Reference of action, part only matters of account.

The whole action may now be referred, not the issues only, and this though the question in dispute consists in part only of matters of account (*k*).

Imputation of fraud.

An action for the price of so many feet of gas consumed was, at the instance of the defendant, compulsorily referred (Kelly, C. B., dissentiente), although the gas company alleged that the defendant had fraudulently abstracted a large quantity of gas without passing it through the meters (*l*). The court can give power to amend the particulars of demand,

(*d*) Cummins *v.* Birkett, 3 H. & N. 156, S. C. 27 L. J. Ex. 216.

(*e*) Pell *v.* Addison, 2 F. & F. 291.

(*f*) Angell *v.* Felgate, 31 L. J. Ex. 41, S. C. 7 H. & N. 396.

(*g*) Pellatt *v.* Mackwick, 3 C. B. N. S. 760. See Orphan Working School *v.* Henley, 27 L. J. Ex. 426.

(*h*) Imhof *v.* Sutton, 36 L. J. C. P. 130, S. C. L. R. 2 C. P. 406.

(*i*) Trickett *v.* Green, 35 L. J. C. P. 69.

(*k*) Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 14. See as to former practice, Clow *v.* Harper, 3 Ex. D. 198; Ward *v.* Pilley, 5 Q. B. D. 427; Ormerod *v.* Todmorden Mill Co., 8 Q. B. D. 677; Ward *v.* Hall, W. N. (1880) 69; Martin *v.* Fyfe, 49 L. T. N. S. 107; Knight *v.* Coales, 18 Q. B. D. 296; Goodwin *v.* Budden, 42 L. T. N. S. 536.

(*l*) Birmingham and Staffordshire Gas Co. *v.* Ratcliffe, L. R. 6 Ex. 224, S. C. 40 L. J. Ex. 136.

if requisite (*m*). Notwithstanding the reference the cause, under the old Act, was held still to remain in court (*n*).

Where, after the order was made, it appeared by the defendant's affidavit that the amount was admitted, and that the only question was as to the liability of the defendant as the agent of a third person, the court set aside the order (*o*).

No reference to county court judge.

The power of referring a country cause to a county court judge, given by s. 6 of the Common Law Procedure Act, 1854, was taken away by the stat. 21 & 22 Vict. c. 74, s. 5. Previous to that statute, a county court judge had no option of declining the reference; the order of reference was obligatory on him. It is still obligatory on the officers of the court (*p*).

Jurisdiction of equity to stay reference at law.

Before the Judicature Acts came into force the Court of Chancery would stay proceedings at law, and cause the accounts to be taken in equity, notwithstanding that the plaintiffs at law had desired to apply to the court of law to have the matters of account referred to arbitration under the Common Law Procedure Act, 1854, when the circumstances were such that the Court of Chancery was satisfied that the decision on such a reference at common law would be likely to be a less satisfactory determination of the question between the parties than that which would be arrived at in equity (*q*).

Where a prolonged examination of documents or accounts, or a scientific or local investigation, was necessary, and this, in the opinion of the judge, could not be conveniently made before a jury, the judge, under the Judicature Acts, as now under the Arbitration Act, 1889, had a discretion to order the issues of facts and accounts to be referred to an official referee. But the Court of Appeal had power to review any such order, and, in a strong case, where it thought that the judge below had exercised his discretion wrongly, and that injustice would be done if the order were allowed to stand, substituted its own discretion for that of the judge, and set

Appeal lies against judge's order of reference.

(*m*) Gibbs *v.* Knightley, 26 L. J. Ex. 294, S. C. 2 H. & N. 34.

(*n*) Edwards *v.* Edwards, 28 L. J. C. P. 25, S. C. 5 C. B. N. S. 536.

(*o*) Brown *v.* Girard, 19 L. T. N. S. Ex. 324.

(*p*) Cummins *v.* Birkett, 3 H. & N. 156, S. C. 27 L. J. Ex. 216.

(*q*) Croskey *v.* The European and American Steam Shipping Co., 6 Jur. N. S. 1190, S. C. 1 J. & H. 108.

aside the order of reference (*r*). But it will rarely interfere with his discretion (*s*).

Prolonged examination of documents.

The prolonged examination of documents intended by s. 57 of the Judicature Act, 1873, seems an examination required to enable the judge to leave questions of fact to the jury, and not an examination to determine a question of legal right (*t*).

Long correspondence.

There being 150 pages of correspondence to read was held not a prolonged examination of documents, within s. 57 of the Judicature Act, such as to justify a reference of the action (*u*); neither was the fact of there being 300 pages of evidence taken on commission, as to whether the condition of a ship was caused by "perils of the seas" (*x*).

Lengthy evidence on commission.

Damages.

The question as to amount of damages to be paid is often referred to an official referee (*y*).

Partnership.

Where the defendant, objecting to have the case referred, stated that he and the plaintiff were partners in respect of certain horse races, and that the alleged causes of action arose out of the partnership, which he said was still subsisting, but the plaintiff replied that it had terminated, a judge's order referring to an official referee the issues in the action, including all accounts between the plaintiff and defendant to the commencement of the action, was held good. The judge has no power to refer the accounts down to the date of the order of reference (*z*).

Fraud.

An action in which a charge of fraud is involved will not generally be referred compulsorily when the party charged with the fraud objects, and wishes the case to be tried by a jury (*a*). But the court's power is not limited, and the reference will be ordered, though misconduct or fraud be charged, if the question of fraud or misconduct can only be determined on a prolonged investigation of documents and matters of account (*b*).

(*r*) Ormerod *v.* Todmorden Mill Co., 8 Q. B. D. 664; 51 L. J. Q. B. D. 348.

(*s*) Saxby *v.* Gloucester Wagon Co., W. N. (1880) 28.

(*t*) Ormerod *v.* Todmorden Mill Co., 8 Q. B. D. 664, per Brett, L. J.

(*u*) Barrett *v.* Rosenthal, W. N. (1875) 204.

(*x*) Hamilton *v.* Merchant Marine Ins. Co., 58 L. J. Q. B. 544.

(*y*) Stafford *v.* Coxon, 25 W. R. 788; Dunkirk Colliery *v.* Lever, 9 Ch. D. 20.

(*z*) Goodwin *v.* Budden, 42 L. T. N. S. 536.

(*a*) Leigh *v.* Brooks, 5 Ch. D. 592.

(*b*) Hoch *v.* Boor, 49 L. J. Com.

Form of order of reference.

It was said that the form of order of reference under the Judicature Acts ought to point out clearly whether the referee was to report only under s. 56, or whether he was to try all or some of the issues under s. 57, and if not all, which he was to try (*c*).

Time for applying for summons to refer.

It was held that Order XXXVI., r. 5, 1875, now repealed, which limited the time for application for change of the mode of trial, did not apply to limit the time for applying for a summons to refer the issues in an action to the official referee (*d*).

Official referees.

Under the Judicature Act, 1873 (36 & 37 Vict. c. 66, s. 83), four official referees have been appointed, who are permanently salaried officers of the Supreme Court of Justice. They have to perform the duty of trying or reporting on the questions referred to them.

The following Rules of Court of December, 1888, apply to them:—

Distribution of business.

Order XXXVI. r. 45. "When an order is made referring any business to the official referees appointed under the principal Act, the order may refer such business to any one in particular of the referees; but if no particular referee is named in the order the business shall be distributed among the official referees by the clerk to the senior official referee, in rotation or in such other manner as the Lord Chancellor may from time to time direct."

Rule 46. "When an order shall have been made referring any business to the official referees, not naming any one of them in particular, the order, or a duplicate of it, shall be produced to the clerk in the last preceding rule mentioned, who shall indorse on the order the name of the official referee to whom that business is to be referred, in accordance with last preceding rule, and the order so indorsed shall be sufficient authority for the official referee to proceed with the business so referred."

Rule 47. "When an order shall have been made referring any business to any one in particular of the official referees, the clerk in making the distribution of the business as by these rules directed shall have regard to such reference."

Law, 665; Sacker *v.* Ragozine, 44 L. T. N. S. 308.

(*c*) Longman *v.* East, 3 C. P. D. 142, 163, S. C. 47 L. J. C. P. 211. See Appendix, p. 734.

(*d*) Ward *v.* Pilley, 5 Q. B. D. 427; overruling Lascelles *v.* Butt, 2 Ch. D. 588.

PART I. CH. III. S. 6.

Transfer.

Rule 47B. "The Lord Chancellor and the Lord Chief Justice of England, or either of them, shall have power to order the transfer of any causes or matters from any one or more of the official referees to any other or others of them whenever in his opinion it shall be expedient so to do, having regard to the state of the business pending before the referees."

Which official referee to try case.

It is provided, as to references by consent out of court, by the Arbitration Act, 1889, s. 3, "Where a submission provides that the reference shall be to an official referee, any official referee to whom application is made shall, subject to any order of the court or a judge as to transfer or otherwise, hear and determine the matters agreed to be referred."

Directions of Lord Chancellor.

The Lord Chancellor directed (February 4, 1889) that all references of causes, other than those involving questions of costs or questions of retainer, and all references to assess damages, except those under writ of inquiry, should in future be made to the official referees, and that the examination of judgment debtors and witnesses under Order XLII. r. 32, should be ordered to be taken before an official referee.

Fees of official referees in London or Middlesex.

The Orders of 1884, and December 1887, as to Supreme Court fees on proceedings before an official referee, provide that in proceedings before an official referee in London or Middlesex the fee on every reference shall be, for every hour or part of an hour the referee is occupied, including examination of witnesses (if any), 10*s*.

Outside.

As to references not in London or Middlesex: On every reference the fee is £5; and for every hour or part of an hour the official receiver is occupied beyond two full days, 10*s*.; with a further fee for every night that he be absent from London of £1 : 11*s*. 6*d*.; and for his clerk, 15*s*.

When payable.

The fees become due and payable by the party conducting the proceedings on the report of the result of the reference, or, when no such report is made, and no certificate or order, on the completion of the proceedings.

If the proceedings are not completed, a due proportion shall be payable on so much of the proceedings as shall have taken place, the amount to be fixed by the officer.

How.

The fees are to be paid by stamps impressed upon or affixed to a memorandum, stating on what account such fees are paid.

A deposit of stamps on account may be required before the proceeding is commenced (*e*).

PART I. CH. III. S. 6.

SECTION VII.

OF JUDICIAL AND STATUTABLE SUBMISSIONS NOT MADE IN A CAUSE AT COMMON LAW.

PART I. CH. III. S. 7.

1. *Submission by order of equity.*]—In like manner as an action in the courts of law, so a suit in equity, and all matters in difference, might have been referred by order of a court of equity, and obedience to it was enforced by the usual process of the court for compelling obedience to its orders (*f*).

Submission by order of equity.

They would sometimes be so referred though one of the parties were beyond the jurisdiction of the Court (*g*).

In equity, the submission of a suit, even when made out of court, prevented a party afterwards proceeding in it. On the trial of an action in the Queen's Bench the cause and suits in equity were referred. Notwithstanding the reference, the plaintiff in one of the equity suits served a subpœna to hear judgment, and set down the cause in the registrar's book for hearing; but the court of equity, on motion, set aside the subpœna with costs, and struck out the cause from the list (*h*).

A stay of proceedings in equity.

If after a suit had been instituted, it was agreed between the parties that the suit be dismissed on certain terms, some of which were to be settled by arbitration, though it seems this agreement could not have been pleaded to the further maintenance of the suit, in the nature of a plea puis darrein continuance, yet the whole benefit of it might have been obtained on a motion to stay the proceedings in the cause (*i*).

When the Court of Chancery directed an issue to be tried

Submission at Nisi Prius of

(*e*) See Appendix of Statutes.

(*f*) Haggett *v.* Welsh, 1 Sim. 134; Prior *v.* Hembrow, 8 M. & W. 873; Dowse *v.* Coxe, 3 Bing. 20.

(*g*) Duxberry *v.* Isherwood, 12 N. R. 821.

(*h*) Ambler *v.* Tebbutt, 2 Beav. 442.

(*i*) Rowe *v.* Wood, 1 J. & W. 315, S. C. 2 Bligh, P. C. 595; Daniell's Chanc. Pract. by Headlam, 637.

before a jury, as the judge at Nisi Prius had no authority to refer it, if on the trial of the issue the parties agreed to submit to arbitration, it seemed like a reference out of court. The effect of such submission was to abandon not merely the direction to try the issue, but the whole proceedings in the suit; and the jurisdiction of the Court of Chancery was at an end just as much as if there had been a consent to dismiss the bill and stay further proceedings (*k*).

issue from Chancery.

Bill of discovery in aid of the arbitration.

A court of equity would not entertain a bill for a discovery in order to assist parties who had sought their relief by voluntary submission to arbitration. The reason assigned by Lord Eldon, C., was, that it was beneath the dignity of the Court of Chancery to be ancillary to the domestic forum of an arbitrator (*l*). That reason, however, was held not to operate, when the reference was compulsory under the provisions of the Common Law Procedure Act, 1854. On such a reference a bill of discovery in aid of the proceedings of the arbitrator was held to lie (*m*).

Commission to take evidence.

The same reasoning applies to an arbitration under the 162nd section of 25 & 26 Vict. c. 89, which provides for arbitration as the only tribunal for ascertaining the value of a dissentient member's share on a winding up of a company. On such a reference the court will assist and grant a commission to obtain evidence in India (*n*).

Submission by recognizance, not alterable by rule of court.

II. *Submission by record.*]—Proceedings on the revenue side of the Court of Exchequer might sometimes give rise to a submission by matter of record. Where a person's goods were seized under an extent, a reference of all matters in difference between him and the prosecutor of the extent might have been effected by a recognisance conditioned to abide the award of an arbitrator. Such a recognisance, when returned and filed as of record, could not be altered by a rule of court, which was not matter of record. And when a rule of court was drawn up by consent, changing the arbitrator, the award of the substituted arbitrator could not be enforced by a

(*k*) Woodley *v.* Johnson, 1 Molloy, 394.

(*l*) Street *v.* Rigby, 6 Ves. 815; Wellington *v.* Mackintosh, 2 Atk. 569; Brown *v.* Brown, 1 Vern. 157, and the cases cited in the note thereto.

(*m*) British Empire Shipping Co. *v.* Somes, 26 L. J. Ch. 759, S. C. 3 K. & J. 433.

(*n*) In re Mysore West Gold Mining Co., 37 W. R. 794.

scire facias on the recognisance, though possibly an attachment would issue on the rule of court embodying the terms of the original recognisance (*o*).

Submission by order of a county court.

III. *Submission by order of a county court.*]—An order of a judge of a county court may, by consent of parties, be obtained to refer an action before him with or without other matters within the jurisdiction of the court. The submission is not revocable without leave of the judge, and the award is to be entered as the judgment in the action (*p*).

Submission by order of quarter sessions.

IV. *Submission by order of Quarter Sessions.*]—By the statute 12 & 13 Vict. c. 45, s. 13, a Court of General or Quarter Sessions may order with consent of parties matters of appeal (with few exceptions) before it to be referred to arbitration, in such manner and on such terms as it shall think proper, and the award may be entered as the judgment of the court (*q*). The order of reference may be made a rule of the Court of Queen's Bench.

The order of reference may give the arbitrator power over costs, and possibly the Court of Quarter Sessions may in the order reserve to itself power over the costs of the appeal; but if the order of reference is silent as to costs, no subsequent Court of Quarter Sessions can order them to be paid, even though the appeal have been respited from sessions to sessions. In entering the award as the judgment of the Quarter Sessions, the court is performing only a ministerial act, and cannot vary the terms of the award (*r*).

Taxing costs out of sessions.

An appeal to the Quarter Sessions against a rate was referred by consent under the statute 12 & 13 Vict. c. 45, s. 13. By the order of reference the costs of the appeal and reference were to be in the discretion of the arbitrators. The arbitrators awarded in favour of the respondents. The award was thereupon entered under the provisions of that section

(*o*) R. *v.* Bingham, 3 Y. & J. 101. See also Carter *v.* Carter, 1 Vern. 259; Anon. Dyer, 242, a.

(*p*) 51 & 52 Vict. c. 43, s. 104; County Court Rules, 1889, Order XX. See the Appendix of Statutes.

(*q*) See ante, ch. 1, s. 1, d. 4, p. 9. See the Appendix of Statutes.

(*r*) R. *v.* West Riding Justices, 34 L. J. N. S. M. C. 142; West London Extension Rail. Co. *v.* Fulham, L. R. 5 Q. B. 361; also sub nom. R. *v.* Justices of Middlesex, L. R. 6 Q. B. 220.

as the judgment of the Quarter Sessions, and the costs having been taxed after the sessions, an order of sessions was subsequently drawn up confirming the rate, and ordering the appellants to pay the taxed costs. The appellants objected that the order was made without jurisdiction, because the costs had not been taxed during the sessions. It was held that it was implied in the terms of the reference that the costs should be taxed out of sessions, and that the order was therefore valid (*s*).

Appeals: Highway and Land Drainage Acts.

On appeals under the Highway Act, 1864 (*t*), and under the Land Drainage Act, 1861 (*u*), the Court of Quarter Sessions, if it appears that the matters in question consist wholly or in part of matters of account, and cannot satisfactorily be tried by the court, may order the matters wholly or in part to be referred to arbitration, the award to be enforceable by the same process as an order of court; and the provisions of the Common Law Procedure Act, 1854, as to compulsory references, are made applicable to such arbitrations. The Arbitration Act, 1889, will apparently apply to these references. See s. 24.

Submission under the Lands Clauses Act.

v. *Submissions under the Lands and Railways Clauses Consolidation Acts.*]—When the promoters of an undertaking sanctioned by act of parliament have given notice of their intention to take lands authorised by their special act to be taken for the purposes of the undertaking [s. 18], and a party interested in the lands claims more than fifty pounds compensation [s. 22], and desires to have the amount of such compensation settled by arbitration, the Lands Clauses Consolidation Act, 1845 (*x*), enacts that (unless the special act provides otherwise) [s. 1], "if the party signify such desire by notice in writing to the promoters of the undertaking before they have issued their warrant to the sheriff to summon a jury in respect of such lands under the provisions" contained in the general act, "stating in such notice the nature of the interest in respect of which such party

Compulsory on demand of party.

(*s*) Southampton Gas, &c. Co. *v.* Southampton Union, 2 Q. B. D. 371.

(*t*) 27 & 28 Vict. c. 101, ss. 40, 41.

(*u*) 24 & 25 Vict. c. 133, ss. 48, 49.

(*x*) 8 & 9 Vict. c. 18. See the Appendix of Statutes.

claims compensation, and the amount of compensation so claimed, the same shall be so settled accordingly" [s. 23] (*y*).

Submission should be limited to compensation.

The notice to the company should state the nature of the claimant's interest specifically, whether as tenant in fee-simple, or for life, or for years, whether in possession or subject to an underlease, as all these points affect the value of the interest, and an omission to state them may endanger the award: the notice should not call upon the company to do anything with respect to any other lands, except those which the company have signified their intention to take, and the appointment of the arbitrator should be confined to assessing the compensation for the lands taken only, and the damage contemplated by the act. Unless the submission is limited according to the statute the award cannot be enforced by attachment (*z*).

Voluntary reference.

If there be a question of disputed compensation respecting land required by the promoters, and the latter and the claimant refer it to a single arbitrator, it is not material that there has not been a perfect compliance with the statutory forms. The notices required by the act are only requisite where the reference is compulsory (*a*).

Land injuriously affected.

When any interest in land is injuriously affected by the execution of the works, and the party interested claims more than 50*l*., he may have the same settled by arbitration if he think fit [s. 68].

Appointing arbitrators.

Section 25 points out the mode of proceeding in the above and other cases as follows: "When any question of disputed compensation by this or the special act, or any act incorporated therewith, authorised or required to be settled by arbitration shall have arisen, then, unless both parties shall concur in the appointment of a single arbitrator, each party, on the request of the other party, shall nominate and appoint an arbitrator to whom such dispute shall be referred; and every appointment of an arbitrator shall be made on the part of the promoters of the undertaking under the hands of the

(*y*) See P. I. ch. 1, s. 1, d. 3, p. 6.

(*z*) Bradshaw's Arbitration, 12 Q. B. 562; The North Staffordshire Rail. Co. *v.* Wood, 17 L. J. Ex. 354; The North Staffordshire Rail. Co. *v.* Landor, 17 L. J. Ex. 350; Skerratt *v.* North Staffordshire Rail. Co., 17 L. J. Ch. 161; Levick *v.* Epsom and Leatherhead Rail. Co., 1 L. T. N. S. 60.

(*a*) Collins *v.* South Staffordshire Rail. Co., 7 Ex. 5.

said promoters or any two of them, or of their secretary or clerk, and on the part of any other party under the hand of such party, or if such party be a corporation aggregate, under the common seal of such corporation; and such appointment shall be delivered to the arbitrator, and shall be deemed a submission to arbitration on the part of the party by whom the same shall be made; and after any such appointment shall have been made, neither party shall have power to revoke the same without the consent of the other; nor shall the death of either party operate as a revocation; and if for the space of fourteen days after any such dispute shall have arisen, and after a request in writing, in which shall be stated the matter so required to be referred to arbitration, shall have been served by the one party on the other party, to appoint an arbitrator, such last-mentioned party fail to appoint such arbitrator, then upon such failure the party making the request, and having himself appointed an arbitrator, may appoint such arbitrator to act on behalf of both parties, and such arbitrator may proceed to hear and determine the matters which shall be in dispute, and in such case the award and determination of such single arbitrator shall be final." Before either party nominates a separate arbitrator, an attempt should be made to agree on a single arbitrator (*b*). Care should be taken that the appointment of the arbitrator by each party should refer the same subject-matter for decision. If the appointments do not in substance agree, it may be said that there is no submission, and consequently the award might not be valid. The claimant, it would seem, should first appoint his arbitrator, then notify the appointment to the promoters. It is not sufficient to notify his intention to appoint a particular person as arbitrator to justify his afterwards appointing him sole arbitrator. After notifying the appointment he should, by request in writing, call on the promoters to appoint their arbitrator. If they fail for fourteen days to do so, the claimant after that time may appoint his arbitrator to act for both (*c*). It seems that if, instead of agreeing on an arbitrator, or of each party nominating one, the parties agree that two persons named shall nominate the arbitrator, the reference will not be one under the statute, though it may be on the terms of it (*d*).

Appointment of arbitrator, the submission.

Submission not revocable.

Party refusing to appoint.

Same subject-matter.

Claimant to notify appointment.

Appointing own arbitrator to act for both.

(*b*) Yates *v.* Mayor of Blackburn, 29 L. J. Ex. 447, S. C. 6 H. & N. 61.

(*c*) Bradley *v.* London and North Western Rail. Co., 5 Ex. 769.

(*d*) Martin *v.* Leicester Water-

Whether the reference be compulsory or by agreement, the signature of the clerk or secretary will bind the promoters (*e*).

Appointment is submission by consent.

The appointment of an arbitrator being by the statute to be deemed a submission to arbitration, it was recently held in the Court of Appeal that such a submission was a submission by consent within the meaning of the Common Law Procedure Act, 1854 (*f*). This last decision was arrived at with hesitation by some members of the court, and expressly reverses previous decisions (*g*).

Appointing new arbitrator on death, &c.

Section 26 enacts, "If before the matters so referred shall be determined, any arbitrator appointed by either party die, or become incapable, the party by whom such arbitrator was appointed may nominate and appoint in writing some other person to act in his place, and if for the space of seven days after notice in writing from the other party for that purpose he fail to do so, the remaining or other arbitrator may proceed ex parte; and every arbitrator so to be substituted as aforesaid shall have the same powers and authorities as were vested in the former arbitrator at the time of such his death or disability as aforesaid."

Appointing umpire.

The effect of other clauses may be shortly stated. An umpire is to be appointed before the matters referred are entered upon, and he is to decide on any such matters upon which the arbitrators differ, or which shall be referred to him under the provisions of the recited act or the special act [ss. 27, 28]. On the death or incapacity of a sole arbitrator, the matter shall be referred de novo [s. 29]. When there are two arbitrators, if either refuse or for seven days neglect to act, the other may proceed and award alone [s. 30]. The costs of the arbitration are to be borne by the promoters, unless the arbitrators award the same or a less sum than the promoters offered, in which case each party is to bear his own costs, and half the costs of the award [s. 34]. The submission might be made a rule of any of the superior courts, on the

One arbitrator refusing to act.

Costs of reference.

Submission rule of court.

works Co., 3 H. & N. 463, S. C. 27 L. J. Ex. 432. See Collins *v.* South Staffordshire Rail. Co., 7 Ex. 5, S. C. 21 L. J. Ex. 247.

(*e*) Collins *v.* South Staffordshire Rail. Co., 7 Ex. 5, S. C. 21 L. J. Ex. 247.

(*f*) Rhodes *v.* Airedale Drainage Commissioners, 1 C. P. D. 402; Dare Valley Rail. Co., In re, L. R. 4 Ch. 554; Harper, Ex parte, L. R. 18 Eq. 539.

(*g*) Harper *v.* Great Eastern Rail. Co., L. R. 20 Eq. 39; Newbold *v.* Metropolitan Rail. Co., 14 C. B. N. S. 405; Rhodes *v.* Airedale Drainage Commissioners, L. R. 9 C. P. 508.

application of either party [s. 36] (*h*). But this could not be done under the act in question, if the submission contained any special stipulations so as to call on the arbitrator to do more than assess the amount of compensation (*i*).

Submission under the Railways Clauses Act.

Very similar provisions to the above, as to the mode of settling certain disputes by arbitration, are contained in the Railways Clauses Consolidation Act, 1845 (*k*). Every appointment of an arbitrator is to be made on the part of the railway company "under the hand of the secretary or any two of the directors of the company" [s. 126].

Costs of reference.

Another difference may be noted: the costs of the arbitration, unless otherwise provided, are to be in the discretion of the arbitrators [s. 135]. This clause, it is apprehended, does not extend to the costs of a reference respecting compensation for lands taken for constructing the railway [s. 6], but such costs, it is presumed, will follow the rule laid down in the Lands Clauses Consolidation Act, 1845.

Railway Companies Arbitration Act, 1859.

The Railway Companies Arbitration Act, 1859 (*l*), for settling disputes between railways, has enactments of the same character. Unless one arbitrator be agreed on, each company is to appoint one, and to supply a new one if he fail or be unable to act: and the arbitrators, before entering on the business of the reference, are to appoint an umpire, and another umpire if the first fail or be unable to act. If the companies or arbitrators do not make the requisite appointments, the Board of Trade will make them for them. Unless otherwise agreed, the costs of the arbitration and award are to be in the discretion of the arbitrators or umpire. The submission might be made a rule of court.

The Regulation of Railways Act, 1873, Railway Commissioners.

The Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), s. 8, provides that where any difference between railway companies, or between canal companies, or between a railway company and a canal company, is under the provisions of any general or special act required or authorised to be referred to arbitration, such difference shall, at the instance of any company party to the difference, and with the consent of

(*h*) See P. III. ch. 5, as to making the submission a rule of court.

(*i*) Ware, In re, 9 Ex. 395; Dawson *v.* York and North Midland Rail. Co., 9 Ex. 401, in notis.

(*k*) 8 & 9 Vict. c. 20. See Appendix of Statutes.

(*l*) 22 & 23 Vict. c. 59. See Appendix of Statutes.

the [railway] commissioners, be referred to the commissioners for their decision in lieu of being referred to arbitration. This section only applies where some specific difference is "required or authorised to be referred" by some general or special act. And the railway commissioners have no jurisdiction when two railway companies, empowered by a special act to enter into a working agreement, had agreed among other things to a clause that any difference between the companies should be determined by arbitration (*m*). Nor where an original agreement containing a clause for arbitration was afterwards embodied in a special act (*n*).

Submission under the Companies Clauses Act, 1845.

VI. *Other submissions by statute.*] — The enactments of the Companies Clauses Consolidation Act, 1845 (*o*), are very similar to those of the Railways Clauses Act. It is necessary, however, to note these differences. It is not expressly stated that the appointment of the arbitrator is to be deemed a submission [s. 128]. Either party has the power of appointing a fresh arbitrator, in case the one he has appointed refuses or neglects to act [s. 129]. Except when a railway company is a party to a reference, there is no provision for the appointment of an umpire in case the arbitrators cannot agree in their appointment of one [s. 130].

Submission under the Public Health Act, 1875.

The arbitration clauses of the Public Health Act, 1875 (*p*), are of a similar character. Provision is made for the appointment of arbitrators and umpires. And these provisions are mandatory, so that when one party neglected to sign the appointment of his arbitrator, the appointment of the umpire by the arbitrators and the award of the umpire were void (*q*).

Costs.

The costs of the reference are in the discretion of the arbitrators. The award is to be final. The Local Government Board may, in default of the arbitrators, appoint an umpire, probably within any reasonable time (*r*).

Under the repealed act of 1848, a party who had given notice for an arbitration was held entitled to abandon it before

(*m*) Great Western Rail. Co. *v.* Waterford, &c. Rail. Co., 17 Ch. D. 493.

(*n*) Great Western Rail. Co. *v.* Midland Rail. Co., 19 Q. B. D. 540.

(*o*) 8 & 9 Vict. c. 16, ss. 128—134. See the Appendix of Statutes.

(*p*) 38 & 39 Vict. c. 55, s. 179. See Appendix of Statutes.

(*q*) Gifford *v.* Bury Town Council, 20 Q. B. D. 368.

(*r*) Ringland *v.* Lowndes, 7 C. B. N. S. 514.

PART I. CH. III. S. 7.

the Local Board appointed an arbitrator, and even after they had expressed their willingness to concur in the appointment of a single arbitrator (*s*).

Submission under the Local Government Act, 1888.

It is provided by the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 11 (6), that any question between a County Council and a highway or sanitary authority in respect of the vesting or user of any sewer or drain, may be referred to arbitration in manner provided by the act.

New quarter sessions boroughs.

By the same act, s. 32 (3 b), the amount to be paid by a county borough having a new grant of quarter sessions to redeem its liability to contribute to the expenses of the county quarter sessions, is to be settled by arbitration in case of disagreement; and by s. 244 of the Lunacy Act, 1890, arrangements respecting lunatic asylums are to be settled in like manner after the powers of the commissioners have ceased.

Lunatic asylums.

Adjustment.

So also by s. 62, sub-s. (2) of the Local Government Act, any matter requiring adjustment under the act, if not prescribed to be settled by the commissioners under the act, may be determined by an arbitrator appointed by the parties, or in case of difference by the Local Government Board.

Appointment of arbitrator.

Arbitrator.

By s. 62, sub-s. (3), the arbitrator is to be deemed an arbitrator within the meaning of the Lands Clauses Acts. He may state a special case and determine the amount of costs and disallow such as he deems incurred unnecessarily.

By sub-s. (4), the award may provide for any matter for which an agreement might have provided; and by sub-s. (5), the sum awarded may be paid out of specified funds with consent of the Local Government Board.

Award re-opened.

At the end of every five years the agreement or award between a county and a county borough may be opened if the Local Government Board think that the adjustment has become inequitable, and may be re-settled by an arbitrator appointed by the parties, or in case of difference by the Local Government Board. Sect. 32 (6).

Local Government Board.

By s. 63, when the Local Government Board are required to decide any matter referred to arbitration, the provisions of the Regulation of Railways Act, 1868, respecting arbitration by the Board of Trade are to apply. By the last-named act the Local Government Board may appoint an arbitrator

(*s*) Bayley *v.* Wilkinson, 16 C. B. N. S. 161.

to act for them, whose award is to be their award (31 & 32 Vict. c. 119, s. 30).

Submission by private act of parliament.

By a private act of parliament, arbitrators are often appointed by consent of parties to determine questions, such as the amount of a rent-charge to be paid in lieu of tithes (*t*); or to revise a corn rent (*u*); or to settle the rights of shareholders, creditors, and mortgagees of an insolvent railway company (*x*); or disputes between two classes of shareholders in a railway company (*y*); or to the exclusion of the courts of law, to determine disputes between two railway companies (*z*).

Tramways Act.

Under the Tramways Act, 33 & 34 Vict. c. 78, differences are to be referred to an arbitrator to be appointed by the Board of Trade. Where a tramway company refused to remove pavement put down by them notwithstanding the objection of the corporation, the matter was held to be a matter in difference under sect. 33 of the act, and therefore to be decided by arbitration, and the corporation were precluded from obtaining a mandamus to the company to remove the paving (*a*).

Housing of Working Classes Act, 1890.

Under the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), in Part I., schemes for improving unhealthy areas in urban sanitary districts are dealt with, and an arbitrator may be appointed by the "confirming authority," Schedule II. (4); *i.e.*, the Secretary of State in London and the Local Government Board elsewhere, s. 8 (2). An appeal lies from the arbitrator's decision to that of a jury in certain cases, Schedule II. (26). Part II. of the act deals with the removal of unhealthy and obstructive buildings. The arbitrator for settling compensation is appointed by the Local Government Board, and his award is to be final and binding, s. 41.

(*t*) Willoughby *v.* Willoughby, 4 Q. B. 687.
(*u*) R. *v.* Lindsay, 13 Q. B. 484.
(*x*) 30 & 31 Vict. c. ccix.
(*y*) Yool *v.* Great Western Rail. Co., 39 L. J. Ch. 562.
(*z*) Caledonian Rail. Co. *v.* Greenock and Wemyss Bay Rail. Co., L. R. 2 Scotch App. 347.
(*a*) Croydon Corporation *v.* Croydon and Norwood Tramways Co., 18 Q. B. D. 39, S. C. 56 L. J. Q. B. 125.

SECTION VIII.

OF PROCEEDINGS ON THE SUBMISSION WHEN ONE PARTY HAS PREVENTED AN AWARD BEING MADE.

1. *Remedy by action and attachment.*]—Every submission contains some words expressing or implying the agreement of the parties to abide by and perform the award of the arbitrator.

Preventing making award, breach of submission, forfeiture of bond.

Preventing the award being made is a breach of this agreement, as much as not performing it when made; and when the submission is by bond, is a forfeiture of the penalty (*b*). Where there was a judgment in ejectment to recover a mill, and the principal question in the reference was, whether the successful party should have possession of the mill or the other retain it, the former by obtaining possession of it under his judgment was held to have committed a breach of the arbitration bond, which was conditioned to stand to the award of the arbitrator respecting all matters and judgments, since the taking possession rendered it impossible for the arbitrator to decide the question submitted to him (*c*).

Punishable by attachment.

An attachment was held to lie if, after the submission had been made a rule of court, a party served the arbitrator with a subpœna out of Chancery, which hindered his making his award (*d*).

Revocation a breach of submission.

Wilfully revoking the authority of the arbitrator after the submission had been made a rule of court was also a ground for an attachment (*e*). As such revocation was a breach of the agreement to abide by the award of the arbitrator, an action lay for the breach, whether the submission were by order of Nisi Prius or by any other form of submission, whether it were made a rule of court or not, and the expenses incurred in the reference might be recovered as damages (*f*).

Party not liable for default of

When matters are to be referred to two valuers, a party is not liable to an action for the failure to act of the valuer

(*b*) Baldway *v.* Ouston, 1 Vent. 71.

(*c*) Green *v.* Taylor, Sir T. Jones, Rep. 134.

(*d*) Davila *v.* Almanza, 1 Salk. 73.

(*e*) Milne *v.* Gratrix, 7 East, 607; King *v.* Joseph, 5 Taunt. 452.

(*f*) Skee *v.* Coxon, 10 B. & C. 483; Charnley *v.* Winstanley, 5 East, 266; R. *v.* Hardey, 14 Q. B. 529. See P. II. ch. 3, s. 3, d. 1, as to revocation.

appointed by himself, or for refusing to appoint a fresh valuer. If there is no valuation, each party seems remitted to his original right of action (*g*).

arbitrator to act.

II. *Motion for costs under the submission.*]—A more summary method than that by action, of obtaining compensation in case of a breach of the submission, is often provided by a clause, "that if either party, by affected delay or otherwise, prevent the arbitrator from making his award, he shall pay to the other such costs as the court shall think fit." Revoking the arbitrator's authority was a breach of the submission; and if done without good cause, the party revoking would be visited with the costs of the reference. When a cause was referred by a judge's order, it was held that the order might by common law be made a rule of court even after the submission had been revoked, for the purpose of applying for costs under this provision (*h*).

Clause to give costs when award prevented wilfully.

Judge's order made rule of Court after revocation.

The applicant for costs must show to the court that the other party, by wilful, wrongful, and unreasonable delay, has prevented the arbitrator from making an award. Therefore, where it appeared that the party sought to be charged with costs had revoked the submission in consequence of being unable to procure the attendance of some material witnesses, whose attendance might have been compelled in a court of law, the court refused the application, considering that a revocation on that ground could not be considered an affected delay within the meaning of the order of reference (*i*).

Revocation.

As revocation is, primâ facie, a breach of the agreement, in order to free himself from liability to costs, he who revokes the arbitrator's power must satisfy the court that he had reasonable ground for such revocation, and that he acted on that ground (*k*).

The court made the plaintiff pay the costs of the reference in the following case:—Both parties had agreed to attend the arbitrator on a particular day, but the plaintiff, though attending, not being prepared with the necessary books and

Plaintiff not attending.

(*g*) Cooper *v.* Shuttleworth, 25 L. J. Ex. 114.

(*h*) Aston *v.* George, 2 B. & A. 395; Clapham *v.* Higham, 1 Bing. 87, S. C. 7 Moore, 403; Smith *v.* Fielder, 3 M. & Sc. 853.

(*i*) Aston *v.* George, 2 B. & A. 395.

(*k*) Winterflood *v.* Stoveld, Watson on Awards, 3rd ed. p. 43, n. (2); 2nd ed. p. 34, n. (2).

witnesses, and the arbitrator declining to examine the plaintiff in support of his own case, the meeting was at the plaintiff's request adjourned. The latter refused to agree to another appointment, alleging that he could not procure the books, and so the time for making the award expired without anything being done (*l*).

Court no power to give costs without the clause.

Without this clause the court has no jurisdiction to compel a party in default to pay costs, not even where there was a special provision in the order of reference that the defendants should at once during the reference repair a ship, the subject of the action, and the plaintiff had revoked the submission after the defendants had gone to expense in repairing it (*m*).

Where, in consequence of some suspicious delay by the defendant, and false excuses for non-attendance at the meetings, the arbitrator proceeded ex parte, and the award was afterwards set aside on the ground of the arbitrator's proceeding ex parte too hastily, the court refused to allow a clause directing the defendant to pay costs, under the provision against wilful delay, to be inserted in the rule for setting aside the award, and said that such an application must be the subject of a separate motion, so as to give the defendant an opportunity of answering the statement made against him (*n*).

No power where award ultimately made.

It seems that the clause against affected delay is confined to cases where the completion of the award is prevented, and does not apply where an award has in fact been made (*o*).

(*l*) Morgan *v.* Williams, 2 Dowl. 123.

(*m*) Skee *v.* Coxon, 10 B. & C. 483.

(*n*) Gladwin *v.* Chilcote, 9 Dowl. 550.

(*o*) Bradley *v.* Phelps, 6 Ex. 97.

PART THE SECOND.

The Power and Duty of the Arbitrator.

Statement of the object and contents of the second part.

To assist an arbitrator in the proper performance of his functions, by setting before him a statement of the various powers which he possesses, and of the relative duties which he has to perform, in all ordinary cases, from the time that he first takes upon himself the office of judge, until the completion of all that the submission requires of him by the execution of a just and unimpeachable award, is the leading object of this work, and is attempted to be effected in this part.

The subject naturally commences with a general consideration of the qualifications requisite in an arbitrator, and of the principles of decision by which he ought to be guided. His attention is then directed to the importance of observing over what questions the language of the particular submission, by which he is appointed, gives him jurisdiction. The duration of his authority in point of time, how it may be extended, and in what cases it may be prematurely cut short by revocation, next demands his examination.

Passing from these more general points, he will find, it is hoped, in the fourth chapter, a full practical exposition of his authority and duty in conducting the reference at every step until the case is ripe for adjudication; and this, whether he be acting alone, or jointly with other arbitrators. The same chapter treats also of the office and duty of an umpire.

In the four following chapters the arbitrator will see, laid down at considerable length, rules and principles for the framing his award; some general, applicable to the valid formation of every award; others particular, showing him how he should award respecting a cause referred, or respecting

costs; what special directions he may give, and what injunctions in certain cases he may add, regulating the enjoyment by the parties of their own property, or affecting the property of strangers.

The course to be pursued in references under the Lands Clauses Consolidation Act, 1845, forms the subject of the succeeding chapter.

The next matter separately considered is the duty of the arbitrator when the award is referred back to him for reconsideration.

The part concludes with a chapter concerning the personal interests and liabilities of the arbitrator.

The powers and duties of official and special referees are also set forth under their proper heads in the various chapters.

CHAPTER I.

THE OFFICE OF ARBITRATOR.

Contents of the first chapter.

THIS first chapter treats of the office of arbitrator: section one shortly considers who are qualified to fill the situation; section two points out the moral qualities requisite in the holder of it; the third section discusses the important question, by what principles the arbitrator ought to be guided in awarding on the matters submitted to his decision.

SECTION I.

OF WHO MAY BE AN ARBITRATOR.

Any person may be an arbitrator.

An arbitrator is a person selected by the mutual consent of the parties to determine the matters in controversy between them, whether they be matters of law or fact (*a*). Neither natural nor legal disabilities hinder a person from being an arbitrator (*b*). It has indeed been laid down as law in works to which great respect is due, that idiots, lunatics, infants, married women, persons attainted and excommunicated, are disqualified for the office (*c*); but the better opinion is, that they may be arbitrators; for every person is at liberty to choose whom he likes best for his judge, and he cannot afterwards object to the manifest deficiencies of those whom he has himself selected (*d*).

(*a*) Bac. Ab. Arb. D.; West. Symb. Part II. tit. Compromise, p. 164, s. 21; Armstrong *v.* Marshall, 4 Dowl. 593.

(*b*) Vin. Ab. Arb. A. 2.

(*c*) Com. Dig. Arb. C.; West. Symb. Part II. tit. Compromise, pp. 164, 165, ss. 23, 26.

(*d*) Bac. Ab. Arb. D.; Huntig *v.* Ralling, 8 Dowl. 879.

Acceptance of office.

Acceptance of the office by the arbitrator seems necessary to perfect the appointment (*e*).

Person interested.

The arbitrator ought to be a person who stands indifferent between the parties.

If he have any secret interest in the subject in question, or have any bad feeling towards either disputant, he is not a proper person to be a judge between them (*f*). So also when it turns out that, unknown to one or both of the parties, there is some circumstance in the situation of the arbitrator which tends to bias his mind. Thus if an architect engages with his employer, or even if he assures his employer, though he expressly declines to guarantee his assurance, that the cost of building a church or house will not exceed a certain sum, and the builder is not informed of this engagement or assurance, the court will not allow him to decide as arbitrator on the builder's claim for extras (*g*). But owing a debt to or being a creditor of one of the parties is not such an interest as renders a person incompetent for the office (*h*), though the case is different if the debt be discreditably contracted and in relation to the subject of the reference (*i*).

Known interest does not disqualify.

This objection as to interest only applies to the case of a concealed interest. For if the arbitrator have an interest in the subject of reference well known to the parties before they sign the submission, as if they refer to an owner of lands a question respecting the mode and expense of making a drain which will benefit the arbitrator's own estate, the award is good notwithstanding his interest (*j*). The architect or surveyor employed by a gentleman to superintend a builder in building his house is often an arbitrator between his employer and the builder (*k*), although his remuneration is a commission on the amount of the building charges. Where the parties had bound themselves in a bond to the arbitrator to abide his award, and it was argued that the submission

(*e*) Ringland *v.* Lowndes, 15 C. B. N. S. 173, S. C. 33 L. J. C. P. 25.

(*f*) Parker *v.* Burroughs, Colle's Parl. Cas. 257; Earl *v.* Stacker, 2 Vern. 251.

(*g*) Kemp *v.* Rose, 1 Giff. 258; Kimberley *v.* Dick, L. R. 13 Eq. 1.

(*h*) Morgan *v.* Morgan, 1 Dowl. 611; Drew *v.* Drew, H. L. March 8, 1855; Malmesbury Rail. Co. *v.* Budd, 2 Ch. D. 113.

(*i*) Beddow *v.* Beddow, 9 Ch. D. 89.

(*j*) Johnston *v.* Cheape, 5 Dow, 247; Drew *v.* Drew, H. L. March 8, 1855.

(*k*) Morgan *v.* Birnie, 9 Bing. 672. See Stevenson *v.* Watson, 4 C. P. D. 148.

was void, because the arbitrator had an interest in making an unreasonable award to obtain the penalty, the objection was overruled (*l*). Where a valuer, frequently called in by a railway company to value lands taken by them, was appointed umpire, to assess the value of neighbouring property, which they were about to take, and the landowner made no objection, though the position of the umpire was known to him, it was held that he could not set aside the award on the ground of the umpire's interest, though otherwise the objections might have been good (*m*). A railway company's engineer is often arbitrator between them and the contractors making the line (*n*).

Company's valuer.

On a reference under the Lands Clauses Consolidation Act, 1845, between a party interested in land taken by a railway company and the company, the latter appointed as their arbitrator the agent they had employed to make an offer as to the price. After this the party appointed his arbitrator. The two arbitrators selected an umpire, whom the party swore he had, since the award, discovered to be a shareholder in and a surveyor employed by the G. W. Railway Company, which was interested in the line in question. Before the reference began, the counsel for the party protested against the company's agent being an arbitrator; but the reference went on before the arbitrators and umpire together. The award was made by the umpire alone. V.-C. Knight Bruce refused the party's application to set the award aside, saying, that though the company's agent ought not to have been an arbitrator, the course taken showed that that objection was waived; and that it would be going too far to set aside the award merely in respect of the umpire's interest (although it was objectionable in point of delicacy to have appointed him), considering that his connection with the G. W. Railway Company was known. He added, the award was saved very narrowly indeed (*o*).

Interest of surveyor and shareholder of a railway.

It has been said that a party cannot be a judge in his own cause, but if his opponent consent to his deciding the question between them, the courts will not allow an objection afterwards, though he decide it in his own favour (*p*).

Party arbitrator in his own cause.

(*l*) Owdy *v.* Gibbons, Comb. 100.

(*m*) Clout *v.* Metropolitan District Rail. Co., 46 L. T. 141.

(*n*) Wansbeck Rail. Co. *v.* Trowsdale, L. R. 1 C. P. 269.

(*o*) Elliot *v.* South Devon Rail. Co., 2 De Gex & S. 17, S. C. 12 Jur. 445.

(*p*) Matthew *v.* Ollerton, 4 Mod.

Judge.

Matters in a cause are often referred to the presiding judge as arbitrator (*q*).

Stewards of a horse race.

Stewards of a horse-race are not disqualified from deciding disputes by reason of their being interested by betting on the race, the parties knowing that it was probable that they might bet. They are not strictly arbitrators (*r*). The question, what is a reference to arbitrators, has been previously considered (*s*).

Fluctuating body.

A reference may apparently be made to a society consisting of a fluctuating body of members (*t*).

French law.

It seems that by the law of France, when parties agree to submit any difference that shall arise to two arbitrators who are merchants, an appointment by one of the parties of a foreigner as arbitrator is not a valid appointment (*u*).

Arbitrators by statute.

Sometimes by statute the class from which arbitrators are to be selected for settling particular disputes is pointed out.

Mining engineer.

Under the Coal Mines Regulation Act, 1887 (*x*), the arbitrator is to be a "practical mining engineer or person accustomed to the working of mines," and the umpire to be a county court judge, stipendiary magistrate, recorder, or registrar.

Manufacturers and workmen.

Under the 5 G. IV. c. 96, for settling by arbitration disputes between masters and workmen, the referee, if the disputants can agree on one, is to be a justice of the peace; if not, there are to be two arbitrators, one a master manufacturer, or agent or foreman of a master manufacturer, the other a workman in the manufacture respecting which the dispute has arisen (*y*).

Justice or person appointed by justices.

Under the Allotments and Cottage Gardens (Compensation for Crops) Act, 1887 (*z*), if the landlord and tenant do not appoint an arbitrator within twenty-eight days after the end of the tenancy, justices in petty sessions are to appoint one of their number or some other competent person.

Barrister.

On differences arising respecting the expenses of prisoners

226, S. C. Comb. 218. See Hunter *v.* Bennison, Hard. 43.

(*q*) Durham County Permanent Building Society, In re, L. R. 6 Ch. 45.

(*r*) Ellis *v.* Hopper, 28 L. J. Ex. 1; Parr *v.* Winteringham, 28 L. J. Q. B. 123.

(*s*) P. I. ch. 3, s. 1, d. 2, p. 41.

(*t*) Rathven *v.* Elgin, L. R. 2 Scotch App. 535.

(*u*) Alivon *v.* Furnival, 1 C. M. & R. 277.

(*x*) 50 & 51 Vict. c. 58, s. 47.

(*y*) S. 3.

(*z*) 50 & 51 Vict. c. 26, s. 38.

from a borough kept in a county gaol, a barrister was required by statute to be the arbitrator (*a*).

Barrister to certify rules of savings banks.

The barrister to certify the rules of Savings Banks was by the old statute to decide in many cases as an arbitrator (*b*), but his functions are now transferred to other persons (*c*).

Nominee of Board of Trade.

The Board of Trade and Local Government Board in many cases have by statute to appoint arbitrators (*d*), whose appointment seems often irrevocable (*e*).

Master to settle costs of compensation inquiry.

The costs of the inquiry before a compensation jury or arbitrators under the Lands Clauses Consolidation Act, 1845, are to be settled by one of the masters of the Court of Queen's Bench as an arbitrator, not as an officer of the court (*f*).

Master.

So a reference was often made to the master under the Common Law Procedure Act, 1854, and the Judicature Act, 1873 (*g*).

County court judge.

It might, under the Common Law Procedure Act, have been made to a county court judge, and he could not have declined it (*h*). But as far as county court judges are concerned, the act was repealed by the stat. 21 & 22 Vict. c. 74, s. 5. A county court judge cannot now in any case act as arbitrator for reward (*i*).

Official referees.

The official and special referees appointed under the Judicature Acts perform functions analogous to those of arbitrators at common law, and must be guided by the same general principles.

Arbitrator deemed officer of court.

By the Arbitration Act, 1889, s. 15, all official or special referees or arbitrators on a reference under an order of court or a judge within the act are to be deemed officers of the court.

(*a*) Stat. 5 G. IV. c. 85, s. 2; 5 & 6 W. IV. c. 76, s. 114; 5 & 6 Vict. c. 98, s. 20; 13 & 14 Vict. c. 91, s. 5.

(*b*) 9 G. IV. c. 92, s. 45.

(*c*) 26 & 27 Vict. c. 87, s. 45; 39 & 40 Vict. c. 52, s. 3.

(*d*) 33 & 34 Vict. c. 78, s. 33; the Housing of the Working Classes Act, 1890, 53 & 54 Vict. c. 70, s. 41.

(*e*) Wakefield Corporation *v.* Wakefield Guardians, 4 Times L. R. 561.

(*f*) Sandback Trustees *v.* North Staffordshire Rail. Co., 3 Q. B. D. 1; Owen *v.* London and North Western Rail. Co., 7 B. & S. 758; Tennant *v.* Mayor of Belfast, 11 Ir. Law Rep. 290. See Wroithly, In re, 4 H. C. 74, overruling Metropolitan Railway *v.* Turnham, 14 C. B. N. S. 212; Ross *v.* York, &c. Rail. Co., 5 D. & L. 695.

(*g*) Cruikshank *v.* Floating Swimming Baths Co., 45 L. J. N. S. Com. Law, 684, S. C. 1 C. P. D. 260.

(*h*) Cummins *v.* Birket, 27 L. J. Ex. 216.

(*i*) The County Courts Act, 1888, 51 & 52 Vict. c. 43, s. 14.

SECTION II.

OF THE MORAL QUALITIES REQUISITE IN AN ARBITRATOR.

Arbitrator must be incorrupt.

It is hardly necessary to state, that in conducting the reference, the first duty of the arbitrator is to be incorrupt and impartial. If there be any ground for imputing corruption, fraud, or partiality to him, the award cannot stand (*k*). Though the courts will rarely review the bonâ fide exercise of the arbitrator's authority, yet evidence of the merits will always be let in, so far as it may throw light upon his conduct with reference to the above imputations (*l*), but to induce the court to interfere with the award on the ground of misconduct of the arbitrator there must be something more than mere suspicion (*m*).

Removal for misconduct.

Under the Arbitration Act the court may now remove an arbitrator or umpire for misconduct (*n*).

Taking money before award made.

Where the arbitrators took money of one of the parties alone for their charges without any bill delivered, and before the making of the award, Lord Hardwicke, C., thought this a sufficient reason to set the award aside, for if this were suffered it would, he said, be hard to distinguish what was corruption (*o*).

Purchasing claims in dispute.

It will not be permitted to a person chosen as an arbitrator to buy up the unascertained claims of any of the parties to the reference; or to purchase an interest in those rights upon which he is to adjudicate. Such a proceeding would corrupt the fountain of justice and contaminate the award (*p*).

Arbitrator must be impartial.

The arbitrator must also as much as possible keep his mind free from all personal feelings respecting the case, for if an arbitrator use any expressions towards either party, which discover a strong bias or prejudice in his mind, or show that

(*k*) Morgan *v.* Mather, 2 Ves. 15; Clarke *v.* Stocken, 2 Bing. N.C. 651; Bac. Ab. Arb. K.; Com. Dig. Arb. C.; Tittenson *v.* Peat, 3 Atk. 529; Earle *v.* Stocker, 2 Vern. 251; Burton *v.* Knight, 2 Vern. 514; Travers *v.* Ld. Stafford, 2 Ves. sen. 19; Emery *v.* Wase, 5 Ves. 846; Ld. Lonsdale *v.* Littledale, 2 Ves. jun. 451; Sturt *v.* Moggeridge, 2 Tidd Pr. 841, 9th ed.

(*l*) Goodman *v.* Sayers, 2 J. & W. 249; Anon., 2 Vern. 100.

(*m*) Crossley *v.* Clay, 5 C. B. 581.

(*n*) 52 & 53 Vict. c. 49, s. 11.

(*o*) Shephard *v.* Brand, Cas. temp. Hardwicke, 53, S. C. 2 Barnardiston, 463; Bac. Ab. Arb. K.

(*p*) Blennerhasset *v.* Day, 2 Ball & Beatty, 104.

he has been actuated by any hostile feeling, the award may be set aside, and this even where there is nothing to impeach the conduct of another arbitrator, who has joined in the award (*q*).

Private bonâ fide agreement.

Any private agreement between the arbitrator and a party respecting the subject of reference intended to be considered in the award is objectionable, though perfectly bonâ fide; as, for instance, if the question be respecting the amount of rent a tenant is to pay, the arbitrator should not, in making his valuation, take into account an agreement with himself by the tenant to lay out a large sum upon the premises, of which agreement the landlord has no power to enforce performance (*r*).

Imposing terms on party.

Commissioners appointed by statute to ascertain by their award the bounds of the respective mines in a certain district, and to fix the rent payable to the Crown by the several miners who work them, are not justified in imposing on a miner the condition, that he shall pay up to the Crown arrears due for the last workings of his mine, before they give him the benefit of the act of parliament by inserting his name and portion of mine in their award (*s*).

SECTION III.

OF THE PRINCIPLES BY WHICH THE ARBITRATOR SHOULD BE GUIDED.

Characters filled by arbitrator.

In order for an arbitrator to ascertain what are his powers and duties, he must look in each case to the submission which confers the one, and imposes the other, and gather therefrom the intention of the parties (*t*), and this intention he should

(*q*) Burton *v.* Knight, 2 Vern. 515, S. C. Bac. Ab. Arb. K.; Parker *v.* Burroughs, Colle's Parl. Cas. 257; Ward's case, cited 2 Atk. 155, 396; Chicot *v.* Lequesne, 2 Ves. sen. 315.

(*r*) Chichester *v.* M'Intire, 1 Dowl. N. S. 460.

(*s*) Attorney-General *v.* Jackson, 5 Hare, 355.

(*t*) Samways *v.* Eldsley, 2 Mod. 73; Winter *v.* White, 1 B. & B. 350, 357.

be careful to carry out (*u*). The characters which arbitrators have to sustain vary materially according to the effect of the respective submissions.

Judge of law and fact.

Jury.

An arbitrator is generally the final judge of law and fact (*x*). On the reference of an action at the trial, he usually stood in the place of the jury, and his award was looked upon as their verdict (*y*); at times he was clothed with many of the powers of a judge at Nisi Prius (*z*); and occasionally some of the functions of the Court in Bank devolved upon him (*a*).

Judge of Nisi Prius.

Court in Bank.

Master in Chancery.

Lord Chancellor.

With respect to matters in Chancery referred to a master, sometimes he represented only a master of that court, and his award was open to revision as a master's report (*b*); at other times his decision was looked upon as that of the Chancellor himself (*c*); under special circumstances he was vested with the powers of the Attorney-General as to informations in charity cases (*d*).

Attorney-General.

Dictator.

An arbitrator is often also a sort of dictator armed with powers beyond those of any court of justice to control the future conduct of parties, and to regulate their enjoyment of their property (*e*).

Principles of decision generally.

A very important question here presents itself for solution. According to what principles is the arbitrator to act? What control ought the rules of the courts to have over his decision? The following proposition (which, however, only gives a partial answer) is hazarded as the safest general rule that can be drawn from a consideration of the cases—that an arbitrator should endeavour to arrive at his conclusions upon the same rules and principles which would have actuated the tribunal or tribunals for which he is substituted in coming to a decision.

(*u*) Hooper *v.* Balfour, 62 L. T. 646; Couvela *v.* Volkart, 4 Times L. R. 209.

(*x*) Morgan *v.* Mather, 2 Ves. 17; Dick *v.* Milligan, 2 Ves. 23; Armstrong *v.* Marshall, 4 Dowl. 593; Perriman *v.* Steggall, 9 Bing. 679; Angus *v.* Redford, 11 M. & W. 69, S. C. 2 Dowl. N. S. 735.

(*y*) Angus *v.* Redford, 11 M. & W. 69, S. C. 2 Dowl. N. S. 735; Lee *v.* Lingard, 1 East, 400; Borrowdale *v.* Hitchener, 3 B. & P. 244; Bury *v.* Dunn, 1 D. & L. 141.

(*z*) Caila *v.* Elgood, 2 D. & R. 193.

(*a*) Allen *v.* Lowe, 4 Q. B. 66.

(*b*) Knox *v.* Simmonds, 1 Ves. jun. 369; Cruikshank *v.* The Floating Swimming Baths Co., 1 C. P. D. 260, S. C. 45 L. J. Com. Law, 684.

(*c*) Pitcher *v.* Rigby, 9 Price, 79.

(*d*) Prior *v.* Hembrow, 8 M. & W. 873.

(*e*) Wood *v.* Griffith, 1 Swanst. 43; Boodle *v.* Davies, 3 A. & E. 200.

Thus, on a reference at Nisi Prius, where the arbitrator stands very much in the place of a jury, he should, it is presumed, ordinarily decide the cause upon the same principles which a judge at Nisi Prius would have laid down for the guidance of the jury. And yet in one instance, where the verdict in a cause had depended on the result of the award, Lord Kenyon, without expressing any disapprobation, suggested that possibly, in arriving at his conclusions as to the verdict, the arbitrator had proceeded to cut the knot, rather than unloose it according to the strict rules of law, from a wish to do complete justice between the parties (*f*).

When all matters referred.

The various statements of judges respecting the principles of decision by which an arbitrator should be guided, especially on a reference "of all matters in difference," it is not quite easy to reconcile. But disregarding special exceptions, there is abundant authority for laying down a general rule that an arbitrator, like every other judge, is bound by the principles of law (*g*), and that it is beyond his authority to award anything contrary to law; for the ordinary presumption is, that the parties intend to submit to him only the legal consequences of their transactions and engagements (*h*); so that when parties refer their *legal* rights to arbitration, the arbitrator must endeavour to award according to law; although a mere mistake in law, as we shall see hereafter, is rarely fatal to the award (*i*).

Power according to law.

Legal and equitable authority.

The word "legal" is here used in an enlarged sense, for an arbitrator on a general reference should always have taken into his consideration the rights of the parties in equity as well as at common law (*k*).

Reforming a deed.

On a reference between two partners, it being contended that the deed of partnership had been erroneously drawn up, the arbitrator allowed the draft of the deed to be put in evidence to show the mistake, and pronounced the deed to be wrong, and decided between the parties, on the construction of the deed, according to what he thought the deed was

(*f*) Habershon *v.* Troby, 3 Esp. 38.

(*g*) Aubert *v.* Maze, 2 B. & P. 375; Badger, In re, 2 B. & A. 691.

(*h*) Badger, In re, 2 B. & A. 691; Morgan *v.* Mather, 2 Ves. jun. 15; Young *v.* Walter, 9 Ves. 364.

(*i*) Blennerhasset *v.* Day, 2 Ball & Beatty, 104. See P. II. ch. 5, s. 8, as to a mistake in law.

(*k*) Delver *v.* Barnes, 1 Taunt. 48; Craven *v.* Craven, 7 Taunt. 642.

intended to have been; on its being objected that he had exceeded his authority in so doing, Parke, B., said "All disputes respecting the interests of the parties were referred to the arbitrator; he consequently had power to decide all questions of law and equity; therefore, if it were a question in dispute before him whether the deed was drawn up in mistake, and he thought it was, he had power to reform it under his equitable authority; but if he had been called upon only to decide upon the construction of the deed, of course he could not have altered it" (*l*).

Arbitrator not bound by rule of practice.

The arbitrator is not fettered by the mere rules of practice which the courts of law and equity have adopted for general convenience. Thus, he may allow interest in taking an account between the parties, when a known rule of practice would have prevented the courts from allowing it; for the authority to adjust the account between the parties carries with it an implied authority to allow interest, unless expressly excluded by the terms of the submission (*m*).

He may allow a deduction in weight according to the custom of the place (*n*).

Moral considerations.

It has been said by judges of great celebrity that under a general reference of all matters in difference the arbitrator is not confined within the rules of law and equity, that he has greater latitude than the courts of law in order to do complete justice between the parties, and that he may take all moral questions into consideration in forming his judgment, and decide according to equity and good conscience; for instance, that he may relieve against a right which lies hard upon one party, but which having been acquired legally and without fraud, cannot be resisted in a court of justice (*o*).

In one instance the Court of Queen's Bench is said to have laid down the following rule, "That when arbitrators, knowing what the law is, or laying it entirely out of their consideration, make what they conceive, under all circumstances,

(*l*) Keene and Atkinson, In re, Exch. April 16, 1847.

(*m*) Badger, In re, 2 B. & A. 691.

(*n*) Harris *v.* Smith, 4 T. L. R. 569.

(*o*) South Sea Co. *v.* Bumstead, 2 Cas. in Eq. Ab. 80; Knox *v.* Symonds, 1 Ves. jun. 369; Delver *v.* Barnes, 1 Taunt. 48; Young *v.* Walter, 9 Ves. 364; Hanson *v.* Liversedge, 2 Vent. 242; West. Symb. Part II. title Compromise, s. 21; 2 Story's Equity Jurisprudence, 675—684; 12th ed. 707 et seq.

to be an equitable decision, it is no objection to the award that in some particular point it is manifestly against law"(*p*).

Power beyond law intended.

But these and similar general observations must, in general, at least, it is humbly suggested, be considered and explained by reference to the matters in dispute in the particular case, showing the intention of the parties to give the arbitrator power beyond law. Thus in the case which gave rise to the expression of the above rule (*q*), the arbitrators to whom the differences respecting a testator's estate had been referred, awarded, that they were of opinion that the intention of the testator was by his will to have disposed of his property in a particular manner which they specified, and with which they directed the parties to be satisfied (*r*). This distribution was clearly contrary to that which the law and legal construction of the will would have effected. The court, however, sustained the award, though the arbitrators stated on affidavit, that in disposing of the residue not included in the will they did not conceive that they were making any distribution of it according to any fixed rules of law upon the subject, but that they were dealing out to the several parties interested, what appeared to them to be according to the best of their judgment, under all the circumstances of the case, strict and impartial justice, agreeably to what they believed to have been the intention of the testator. From the terms of the award, the statement of the arbitrators, and the mention made in the report that the arbitrators were gentlemen who were well acquainted with the intentions of the deceased, it may probably be inferred that the question in difference was, not what was the legal effect of the will and the legal rights of the parties to the property, but what was the distribution of his estate which the testator intended by his will to have made. If this view be correct, the arbitrators, by the very nature of the matters in difference, were called upon by the parties to decide irrespectively of their legal rights, and thus in one sense authorized to award against law, or rather beyond law (*s*).

A dictum, however, of Wilde, C.J., in a later case, that the

(*p*) Ainsley *v.* Goff, B. R. 1799; Kyd on Awards, 351.

(*q*) Ainsley *v.* Goff, Kyd on Awards, 351.

(*r*) In Kyd on Awards, the form of the submission is given in the Appendix, p. 424; and of the award in the Appendix, p. 427.

(*s*) Delver *v.* Barnes, 1 Taunt. 52, n. (a).

courts will not set aside an award for a mistake in law of the arbitrator, unless they can on the face of the award distinctly see that the arbitrator, *professing and intending to decide in accordance with law*, has unintentionally and mistakenly decided contrary to it, may be quoted to assist the argument, that if the arbitrator avowedly threw the law overboard, his decision, notwithstanding, might be supported (*t*).

Aimiables compositeurs, Canada.

By the law of Lower Canada, persons may be appointed as arbitrators and "aimiables compositeurs." Though "aimiables compositeurs" may be exempt from the strict rules governing arbitrators by that law, the Privy Council, per Lord Selbourne, said that they should hesitate much before they held that arbitrators named as "aimiables compositeurs" could disregard all law and be arbitrary in their dealings with the parties (*u*).

(*t*) Fuller *v.* Fenwick, 3 C. B. 705.

(*u*) Rolland *v.* Cassidy, 13 App. Cas. 770.

CHAPTER II.

OVER WHAT MATTERS THE SUBMISSION GIVES THE ARBITRATOR JURISDICTION.

Scope and contents of the second chapter.

THIS chapter examines over what particular matters the arbitrator acquires a jurisdiction. The first section discusses the effect of particular words and phrases used in the submission as enumerating the matters referred. Section two considers how far, when there are more than one person on each side, a matter, to be accounted a matter in difference, must be one in which all are jointly interested. Section three points out the limit as to time, which divides the matter in difference existing previous to it, and on which the arbitrator has to award, from matters in difference arising subsequently, upon which he may not adjudicate.

SECTION I.

OF THE EFFECT OF PARTICULAR TERMS TO REFER PARTICULAR MATTERS.

All matters in difference.

The question, over what subject-matters the arbitrator is to exercise his powers, must be answered by a reference to the particular words of the submission enumerating the subject-matters. The most general and comprehensive form of words is that which refers to the arbitrator's decision "all matters in difference between the parties." The arbitrator, on such a submission, may consider all questions affecting the parties' civil rights (*a*); he may adjudicate on a demand made by one

(*a*) Baker *v.* Townsend, 7 Taunt. 422; Co. Litt. 1 Inst. s. 511.

Demand in auter droit.

Demand admitted.

Within former submission.

Claim abandoned.

All suits, controversies, and demands.

All debts, trespasses, and injuries.

All demands due and owing.

All actions.

of them in auter droit as executor or administrator (*b*); or on differences relating to things which a party has in right of his wife (*c*). Though a claim made by one side before the arbitrator is admitted by the other to be correct, it is still a matter in difference within the meaning of such a submission, and ought to be considered in the award (*d*); but a claim within scope of a former reference in which the arbitrator has directed mutual releases to be executed, is not a matter in difference on a subsequent reference, although it was not in fact considered or awarded on by the former arbitrator (*e*). A claim made and abandoned before the arbitrator, or withdrawn, is not a matter in difference (*f*).

A reference of "all suits, controversies, and demands," has been held to extend to a liability for a debt due from the wife of one of the parties as executrix (*g*). On a submission "to end all controversies," it was held that an indictment for a battery was not a controversy between the parties within the meaning of the submission, since it was a proceeding at the suit of the King (*h*).

A submission of "all debts, trespasses, and injuries," includes all demands, all manner of wrongs, all matters of equity and of law (*i*); of "all debts," comprises specialities and judgments (*k*); and of "all demands due and owing," embraces everything one party has a right to exact of the other at the time of the submission, and is not limited by the words "due and owing" to a debt or other special demand which is more strictly speaking a duty, but may extend to a right of entry into land, or a suit for partition (*l*). By a submission "of all actions," causes of action are not referred (*m*), but by a submission "of all actions and com-

(*b*) Elletson *v.* Cummins, 2 Stra. 1144, S. C. Com. Dig. Arb. D. 4.

(*c*) Bac. Ab. Arb. E. 1; Berry *v.* Perry, 3 Bulst. 65.

(*d*) Robson and Railston, In re, 1 B. & Ad. 723; Hutchinson *v.* Shepperton, 13 Q. B. 955. See P. II. Ch. 5, s. 4, d. 2, as to awarding on all matters in difference.

(*e*) Trimingham *v.* Trimingham, 4 N. & M. 786.

(*f*) Bird *v.* Cooper, 4 Dowl. 148; Lawrence *v.* Bristol and North Somerset Rail. Co., 16 L. T. N. S. Ex. 326. See P. II. ch. 5, s. 4, d. 2.

(*g*) Lumley *v.* Hutton, Cro. Jac. 447; 1 Rolle, Rep. 268. See Co. Litt. 1 Inst. ss. 508, 509.

(*h*) Horton *v.* Benson, Freem. 204.

(*i*) Cable *v.* Rogers, 3 Bulst. 311.

(*k*) Roberts *v.* Marriett, 2 Saund. 190; Com. Dig. Arb. D. 4.

(*l*) Knight *v.* Burton, 6 Mod. 231; Com. Dig. Arb. D. 4.

(*m*) Com. Dig. Arb. D. 4; Rolle, Ab. Arb. c. 1, p. 245; 1 Co. Litt. s. 492.

plaints" they are (*n*). Actions real were included in a reference "of actions personal ac sectis et querelis" (*o*), but not if the word ac was omitted, for then the word personal would limit the whole (*p*).

All actions and complaints.

A slight variation in the collocation of the words of a submission will sometimes make a most important difference in the powers of the arbitrator. Thus, if besides an action pending there are cross-demands and other differences of various kinds, and it is intended to empower the arbitrator to settle them all, the submission is often expressed to be "of all matters in difference between the parties in the cause;" but if it is proposed to authorize him to dispose of nothing but the questions in the action, the submission very frequently purports to be "of all matters in difference in the cause between the parties" (*q*). As the distinction between the two phrases is rather too refined for the ordinary apprehension of unprofessional arbitrators, it has been suggested that to prevent error, when a general reference is intended the words should be "of all matters in difference between the parties;" but when the reference is to be limited to the action, "of all matters in difference in the cause" (*r*).

Matters in difference between parties in the cause.

Matters in difference between the parties in the cause.

In the Scotch courts it is curious to observe that by a technical construction put upon the words a judicial reference "*of a cause and all questions*," is a reference only of all matters in dispute in the cause (*s*).

"Cause and all questions" in Scotland.

A reference "of a cause," and "of all matters in difference in a cause," means exactly the same thing, and only gives the arbitrator power to decide on the questions raised by the pleadings which are necessary for the determination of the cause (*t*).

"Cause" or "all matters in the cause."

By the reference of a cause at Nisi Prius the cause, as it stands, is referred, and the arbitrator is entitled to decide on the same claims and defences alone, which the jury would have done, had it been decided by them at the time of

(*n*) Com. Dig. Arb. D. 4; Rolle, Ab. Arb. c. 2, p. 245.

(*o*) Com. Dig. Arb. D. 4; Rolle, Ab. Arb. D. 7, p. 246.

(*p*) Com. Dig. Arb. D. 4; Rolle, Ab. Arb. D. 6, p. 246.

(*q*) Malcolm *v.* Fullarton, 2 T. R. 645.

(*r*) Smith *v.* Muller, 3 T. R. 624.

(*s*) Baillie *v.* Edinburgh Oil Gas Co., 3 C. & F. 639.

(*t*) Wild *v.* Holt, 9 M. & W. 161; Angus *v.* Redford, 11 M. & W. 69; Dresser *v.* Stansfield, 14 M. & W. 822; Hobson *v.* Stewart, 4 D. & L. 589.

trial (*u*). He has no power to settle any other matters in difference between the parties than those in respect of which the plaintiff can recover in the cause (*x*).

Whether issues of law referred.

It does not seem clear when a *cause only* was referred *at Nisi Prius*, under the common law powers of the court, whether the arbitrator ought to decide the issues of law as well as of fact, as, for instance, a demurrer in the cause pending before the court, or whether his functions should be confined to those of a jury in determining the questions of fact.

Demurrer.

In one instance, where some of the pleas had been demurred to, and the cause was referred on the trial of the issues in fact, a verdict being taken subject to the reference, and the arbitrator awarded a verdict for the defendant, an objection was made to the award that the arbitrator had not assessed contingent damages on the demurrer, but it never was suggested that it fell within his duty to dispose of the demurrer itself, and the demurrer was subsequently argued before the court (*y*).

Judgment non obstante veredicto.

In another case, however, of a reference of a cause only at Nisi Prius, where the arbitrator found in the defendant's favour a plea going to the whole cause of action, and therefore awarded no damages to the plaintiff, the plea being immaterial, the court said the arbitrator ought to have given damages to the plaintiff notwithstanding the plea, and thus held it to be his duty to have decided practically the issue in law whether the plaintiff was entitled to judgment non obstante veredicto (*z*).

But the Courts of Common Pleas and Exchequer more recently held that the question of the plaintiff's right to judgment non obstante veredicto is not a matter in difference in the cause at the time of the reference at Nisi Prius, and therefore not determinable by the arbitrator (*a*).

Now by R. S. C., 1883, without regard to the stage of the

(*u*) Ashworth *v.* Heathcote, 6 Bing. 596.

(*x*) Atkinson *v.* Jones, 1 D. & L. 225.

(*y*) Cooper *v.* Langdon, 9 M. & W. 60.

(*z*) Grenfell *v.* Edgcome, 7 Q. B. 661. See Steeple *v.* Bonsall, 4 A. & E. 950; Britt *v.* Pashley, 16 L. J. Ex. 233, S. C. 1 Ex. R. 64. See P. II. ch. 6, s. 5, d. 1, as to the arbitrator's duty to decide on the plaintiff's right to judgment non obstante veredicto.

(*a*) Toby *v.* Lovibond, 5 C. B. 770; Linegar *v.* Pearce, 9 Ex. 417.

action at which the reference takes place, the arbitrator has power to direct judgment to be entered for either party (*b*).

When cause and all matters referred.

When matters *beyond the cause* are referred with the cause even at Nisi Prius, it would seem an arbitrator should decide a demurrer, for the submission manifestly contemplates his possessing more extended powers than the jury (*c*). At any rate, when the *cause and all matters in difference* are referred *not on the trial*, but at some other stage, as, for instance, by a judge's order before trial, the power and duty of the arbitrator to determine a demurrer is quite settled (*d*).

As further illustrating the effect of a general reference of all matters in difference, see the chapters which consider the effect when a matter apparently within scope of the submission is not treated as a matter in difference by the parties, or brought before the consideration of the arbitrator (*e*).

Costs of reference.

A power to award as to the costs of the reference was held to give power over the costs of the award (*f*).

Wool in process of wooling, &c.

Under a submission to arbitration, which referred the amount of compensation for a loss by fire in respect of "wool in the process of wooling, carding, scribbling, and spinning," but which in other parts spoke of "raw" wool, the arbitrator was held to have acted rightly in refusing to take into his consideration as a subject for which compensation could be given, a quantity of wool on the premises, which had undergone a part of the process of manufacture, but was not at the time of the fire in any of the engines (*g*).

Right to reject goods as inferior in quality.

Where on disputes as to the quality of goods delivered—in one case the question only of the buyer's right to reject the contract in consequence of alleged inferiority, and in another case the question only whether the goods were deficient in quality, was referred; it was held that the arbitrator was not entitled to make his award that the purchaser should take them at a reduced price (*h*).

(*b*) Order XXXVI. rr. 50, 55c.
(*c*) Allen *v.* Lowe, 4 Q. B. 66; Wynne *v.* Wynne, 4 M. & G. 253.
(*d*) Mathew *v.* Davis, 1 Dowl. N. S. 679; Doe *d.* Simpson *v.* Emmerson, 9 Law Times, 199.
(*e*) See P. II. ch. 5, s. 4, d. 1; P. III. ch. 1, d. 3.
(*f*) Walker *v.* Brown, 51 L. J. Q. B. D. 424.
(*g*) Hurst, In re, 1 H. & W. 275.
(*h*) Sinidino *v.* Kitchen, 1 C. & E. 217; Green & Co. *v.* Balfour & Co., 63 L. T. 97; 6 Times L. R. 395 and 445.

Money laid out on request.

On a submission respecting moneys laid out by the plaintiff for a woman at her request before her marriage, an award directing the defendant, her husband, to pay a certain sum for moneys laid out by the plaintiff for his wife before her marriage, was held bad as not being limited to what was laid out *at her request* (*i*).

All disputes.

Where on an agreement for sale of locomotives the purchasers were to pay on the certificate of their own engineer that the engines were in working order, and by another clause "all disputes" were to be settled by arbitration, and the engineer refused to certify and a reference took place, an award directing the payment of the contract price was enforced (*k*).

Brokers.

In a contract by brokers it was agreed that if the bulk was inferior to sample the amount of allowance, and any dispute that might arise under the contract, should be referred to arbitration, it was held by a majority of the Court of Appeal that the arbitrator exceeded his jurisdiction by awarding that there was a custom by which the brokers were relieved from liability on disclosing their principals (*l*).

Dispute arising out of contract.

On the reference of every dispute "arising out of the contract," the arbitrator may decide a dispute as to the construction of the contract (*m*).

Disputes between partners.

A clause, "that any differences or disputes that may arise between the partners shall be settled by an arbitrator," does not include a dispute whether the partnership has been terminated, or whether certain shares have been bought on account of the partnership or of the defendant alone (*n*).

Bill of lading and charter party.

A clause in a charter party for the reference of disputes arising under it does not authorize the reference of disputes arising under the bill of lading, though the words "all other terms and conditions as per charter party" are stamped on and form part of the bill of lading (*o*).

Mining lease.

On a reference of every question touching a mining "lease

(*i*) Waters *v.* Bridge, Cro. Jac. 639.

(*k*) Hohenzollern, &c. Gesellshaft *v.* The Contract Corporation, 54 L. T. 596.

(*l*) Hutcheson *v.* Eaton, 13 Q. B. D. 861.

(*m*) Thorburn *v.* Barnes, 36 L. J. C. P. 184, S. C. L. R. 2 C. P. 384.

(*n*) Piercy *v.* Young, 14 Ch. D. 200.

(*o*) Hamilton *v.* Mackie, 5 Times L. R. 677.

or any clause or matter therein contained or the construction thereof," the arbitrators have power to decide a dispute whether the lease warrants particular acts being done; and the words "touching the rights, duties, and liabilities of either party in connection with the premises" include everything relating to the demised property and the use of it, even things which might arise out of collateral matters between the parties, and would authorise the arbitrators to consider questions of good faith and to award damages (*p*).

Duty limited to assessing damages.

Where a verdict was taken subject to a reference to a valuer, who was to decide whether there was any damage to the plaintiff by reason of certain premises being out of repair, and if there was to assess the amount, and the valuer was to say what compensation, if any, the plaintiff was entitled to in consequence of certain alterations in the premises, and the valuer was to be attended by two witnesses only on each side, to point out the past and present state of the premises, the costs to be left to the master: it was held that the valuer's functions were limited to the question of damage by non-repair and alterations; that he could not direct a verdict for the defendant, and was not bound to decide upon the issues (*q*).

Effect of recital.

Where the submission recited that the plaintiffs claimed a certain specified balance, and then referred all disputes and differences between the parties to an arbitrator, who was "to determine the account between the said parties," the court held that the arbitrator's authority was general, extending to all matters in dispute, and was not limited to the matters included in the recited balance, and that the recital merely indicated the motive of the submission, but did not limit his power (*r*).

Respecting settled account.

But where the submission, after reciting that a certain amount of profits had been made on a farm by trustees, referred to an arbitrator, among other things, the trustees' accounts of the profits of the farm and farming business carried on by them, so far, and so far only, as the said profits and produce had not been already ascertained, the arbitrator

(*p*) Willesford *v.* Watson, L. R. 8 Ch. 443; below, L. R. 14 Eq. 572.

(*q*) Sowdon *v.* Mills, 30 L. J. Q. B. 175.

(*r*) Charleton *v.* Spencer, 3 Q. B. 693.

was held by the Master of the Rolls to have no power to open the settled account as to the profits of the farm, and disallow a portion of it (*s*).

Suit recited not referred.

A submission between two partners, after reciting that disputes had arisen between them, and that a bill had been filed in Chancery for a dissolution of the partnership, stated, that in order to put an end to the suit they agreed to refer all matters in dispute, arising out of the partnership accounts or otherwise, to certain arbitrators, who were also empowered to decide on the proportions each should pay of the costs of the reference and the costs of the bill in Chancery. The court held that the arbitrators were not bound to award in respect of the Chancery suit, or to take any notice of it except to apportion the costs of it (*t*).

Paving expenses. Public Health Act.

By the old Public Health Act, 1848 (stat. 11 & 12 Vict. c. 63), s. 69, the expenses incurred by a local board in paving, &c., streets, where the owners failed to do so, were to be paid by the owners in default, according to the frontage of their respective premises, in such proportion as should be settled by the surveyor, or, in case of dispute, by arbitration. The arbitrator could not examine the total amount of the expenses. Those were for the local board to determine. He was only to decide what proportion a particular owner had to pay (*u*).

Very similar provisions are contained in the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 150.

Damage from railway works.

What should be taken into consideration in assessing the compensation for damage by railway and other works is discussed further on (*x*).

(*s*) Skipworth *v.* Skipworth, 9 Beav. 135.

(*t*) Marsh, In re, 16 L. J. Q. B. 330.

(*u*) Bayley *v.* Wilkinson, 16 C. B. N. S. 161.

(*x*) P. II. ch. 9.

SECTION II.

OF THE SUBJECT-MATTERS, WHETHER JOINT OR SEVERAL.

All suits "between them two."

If A. and B. submit "all suits and actions depending between them two," the arbitrator has no power to make an award respecting an action between B. and his wife on one side as plaintiffs or defendants, and A. on the other (*y*); nor, on a general reference between the plaintiff and defendant, can he make the defendant pay to the plaintiff a compensation for the taking of property in which the plaintiff and others are jointly interested (*z*).

Between A. and B. of the one part, and C. of the other.

But a submission by A. and B. of the one part, and C. of the other, "of all matters in difference between them," it is often said, authorises the arbitrator to decide on all matters that either of the two has against the third jointly or severally, such as an action by A. alone against C., on the ground that the words are to be taken distributively (*a*).

Joint or several.

The above proposition was adopted in the Court of Exchequer, and affirmed in the Exchequer Chamber (*b*).

In some old cases, however, a different construction was adopted (*c*). Where the arbitrator refused to receive evidence respecting separate injuries alleged to have been sustained by each of two defendants, Gibbs, C. J., supported the award, and held the arbitrator justified in refusing to consider any but a damage sustained by both jointly (*d*).

Adverse rights of defendants in equity.

It has been decided in Chancery that on a reference of all matters in difference between the parties to a Chancery suit to enforce a claim against the real and personal estate of a testator, where the executor and parties interested in the real estate are defendants, the arbitrators should not only adjudicate between the plaintiffs on one side and the defen-

(*y*) Brocas *v.* Savage, Rolle, Ab. Arb. D. 4; Com. Dig. Arb. D. 4; Morse *v.* Sury, 8 Mod. 212.

(*z*) Fisher *v.* Pimbley, 11 East, 188.

(*a*) Arnold *v.* Pole, Rolle, Ab. Arb. D. 5; Libtrat *v.* Field, 1 Keb. 885; Athelston *v.* Moon, Com. Rep. 547; Carter *v.* Carter, 1 Vern. 259; Thomlinson *v.* Arriskin, Com. Rep. 328; Bac. Ab. Arb. E.; Com. Dig. Arb. D. 4. See also Rees *v.* Waters, 16 M. & W. 263.

(*b*) Adcock *v.* Wood, 6 Ex. 814. In error, 7 Ex. 468; Stockley *v.* Shopland, 26 L. T. 586.

(*c*) Bean *v.* Newbury, 1 Lev. 139.

(*d*) Garland *v.* Noble, 1 Moore, 187.

PART II. CH. II. S. 2.

dants on the other, but decide respecting the claims of the co-defendants as against each other, and adjust the individual rights of each (*e*).

All matters between the parties "or any of them.'

If the submission between A. and B. on the one part, and C. and D. on the other, be "of all matters in difference between them, *or any of them*," it is clear that the arbitrator may consider a claim by A. and B. against C. only (*f*). And it would seem that the arbitrator might award on a separate matter between A. and B.

Six partners by two bonds submitted to arbitration all matters relating to their trade. By the one bond, three of them became jointly and severally bound to the other three to obey the award as to all matters between the partners *or any of them;* by the second bond the latter three became bound to the former three in like manner. The court, with the exception of Richardson, J., held that the arbitrator was authorised to award on a matter in dispute between two co-obligors only, on the ground that the reference was of all matters between them *or any of them* (*g*).

SECTION III.

UP TO WHAT DATE MATTERS IN DIFFERENCE MAY ARISE.

PART II. CH. II. S. 3.

It is an important question for an arbitrator to consider, what is the limit as to time within which a matter in difference arising is properly within his jurisdiction.

No claim in cause arising after writ.

When the matters in difference in a cause only are referred, as the arbitrator can decide upon nothing but what the plaintiff could recover in the action, it follows that he is not justified in receiving evidence of a claim arising after the date of the writ (*h*).

By special provisions: claim after writ.

But special provisions in the submission often carry down his jurisdiction to matters subsequent to the commencement

(*e*) Turner *v.* Turner, 3 Russ. 494.
(*f*) Joyce *v.* Haines, Hard. 399.
(*g*) Winter *v.* White, 1 B. & B. 350.
(*h*) Atkinson *v.* Jones, 1 D. & L. 225; Ashworth *v.* Heathcote, 6 Bing. 596.

of the action. Sometimes the power is expressly given; sometimes, indeed, it is rather to be inferred from the terms of the submission.

Matters relating to annuity in the cause.

In an action of replevin for a distress, taken by virtue of a rent-charge or annuity charged on land, a reference "of the cause, and all matters relating to the annuity in question in the cause," was held to include more than the cause itself, and to justify the arbitrator in directing payment of the arrears of the annuity accruing in the interval between the commencement of the action and the date of the order of reference (*i*).

Indictment, clause for compensation.

On the reference of an indictment for a conspiracy, the arbitrator was to be at liberty to receive evidence touching any compensation to be awarded to the prosecutor. Evidence of loss accruing to the prosecutor between the time of filing the indictment and the trial (a period of nine months) was offered, but rejected by the arbitrator. The award stated that the arbitrator had not taken into account any compensation for damages accruing between the filing the indictment and the trial. On a motion to set aside the award, or to refer it back, Lord Denman, C. J., said the arbitrator was wrong, if he thought himself precluded from inquiry into a loss arising from the old conspiracy, though after the filing the indictment; but right, if he merely excluded evidence of damage from a new conspiracy; and as the award was ambiguous, he directed an inquiry to be made of the arbitrator, as to the principle on which he had acted in rejecting the evidence (*k*).

All matters in difference means generally to the time of the reference.

A reference of all matters in difference gives an arbitrator power over all matters down to the period of the submission, but does not, except under very special circumstances, enable him to award on future and contingent claims, or to give damages in respect of money demands becoming due after the date of the submission, though pursuant to an agreement made previous to it, or indeed respecting any subjects of dispute arising after the reference (*l*).

(*i*) Wynne *v.* Wynne, 4 M. & G. 253.

(*k*) R. *v.* Brewer, Q. B. June 11, 1845.

(*l*) Brown *v.* Croydon Canal Co., In re, 9 A. & E. 522; Cockburn *v.* Newton, 2 M. & G. 899; Manser *v.* Heaver, 3 B. & Ad. 295; Harding *v.* Forshaw, 1 M. & W. 415.

PART II. CH. II. S. 3.

If the submission be of all differences and "of anything in anywise relating thereto," these latter words do not extend the power of the arbitrators to matters which, though relating to the existing differences, arise after the date of the submission; nor do they authorise the calculation and awarding of interest subsequent to that date (*m*).

Re-executing submission.

Where arbitration bonds, dated the 9th of December, were on the 4th of January, before the proceedings had commenced, altered by the parties substituting a later day as the limit for making the award, and were then re-executed and re-delivered, the arbitrator was held to have cognizance of claims arising after the 9th of December, and up to the 4th of January, since the execution of the bonds not only extended the time, but amounted to a new submission on the 4th of January (*n*).

Ewes with lamb.

It is said if the submission be respecting ewes with lamb, and the ewes, after the submission, but before the award, have lambs, that the arbitrator has no power to make any award touching the lambs (*o*).

Parties may submit future claims.

The parties, however, may, if they please, give the arbitrator power to determine on contingent claims, or on matters in dispute or demands arising after the date of the submission (*p*), and such course is often pursued.

Costs.

Leaving to the arbitrator to decide as to the costs of the reference and award, all of which necessarily accrue after the date of the submission, is a familiar instance (*q*).

Money not due till after reference.

A reference "of all matters in difference, including the claim of the defendant in her set-off in the action," was construed to authorise the arbitrator to award to the defendant a sum which was not pleadable as a set-off strictly, since by agreement it was not due when the action commenced, nor till after the date of the reference (*r*).

Mesne profits down to award.

Where a railway company had taken the plaintiff's lands and holden them many years, on a reference of all matters in difference to an arbitrator who was to settle the price to be

(*m*) Morphett, In re, 2 D. & L. 967.

(*n*) Watkins *v.* Phillpotts, M'Lel. & Y. 393.

(*o*) West's Symbol, Part II. tit. Compromise, s. 33.

(*p*) Brown *v.* Croydon Canal Co., In re, 9 A. & E. 522; Morphett, In re, 2 D. & L. 967; Lewis *v.* Rossiter, 44 L. J. Ex. 136.

(*q*) Leeming *v.* Fearnley, In re, 5 B. & Ad. 403; Carpenter *v.* Joynes, 14 Pract. Reg. 45.

(*r*) Petch *v.* Fountain, 5 Bing. N. C. 442, S. C. 7 Dowl. 426.

paid for the lands and to direct conveyances, he was held entitled to take into consideration all claims for mesne profits down to the time of making his award (*s*).

Periodical award of damages.

When an arbitrator was appointed so that he made his award as to existing damages before a certain day, and as to damages which should be thereafter sustained from the working of a certain mine, at the expiration of every two months from the day specified, the arbitrator was held empowered to make, at the end of each two months, a periodical assessment of the damages accruing during the respective intervals, but not, after delaying till a third month, to include in one award a compensation for damages incurred subsequent to the second month, as well as for damages occurring during the two months (*t*).

Money not due at date of award.

From what has been said already, it must be evident that claims not due at the date of the award cannot, under ordinary circumstances, be properly adjudicated on. An award of payment of rent admitted by the award not yet due at the date of the award is void, as the rent may become extinct either by surrender or eviction before it is due (*u*).

(*s*) Smalley *v.* Blackburn Rail. Co., 27 L. J. Ex. 65, S. C. 2 H. & N. 158.

(*t*) Stephens *v.* Lowe, 9 Bing. 32.

(*u*) Barnardiston *v.* Fowler, 10 Mod. 204.

CHAPTER III.

THE DURATION OF THE ARBITRATOR'S AUTHORITY.

PART II. CH. III.

Contents of the third chapter.

WE now proceed to consider the duration in point of time of the arbitrator's authority; when it commences, and when it terminates. Section one treats of its commencement, and of its termination either by the making of the award, or by the expiration of the period (if any) limited by the submission for that purpose. In section two is shown how the time in respective instances may be enlarged by the arbitrator, the court, or the parties. Section three declares how the arbitrator's authority may permanently be put an end to, through a revocation of the submission, by the will of a party, or by the operation of law.

SECTION I.

OF THE DURATION OF THE ARBITRATOR'S AUTHORITY WHEN NOT ENLARGED OR REVOKED.

PART II. CH. III. S. 1.

Commencement of the arbitrator's authority.

1. *When the submission prescribes no time within which the award is to be made.*]—Where the submission prescribes no time for the reference to begin, the authority of the arbitrator commences from the time of the agreement to refer being entered into, and he may make his award on the same day on which the submission is executed (*a*). But when there are several parties to a deed of submission, and the consideration to each to execute it is the accession of all the parties to the reference, the authority of the arbitrator does not commence

(*a*) Anon., Latch. 14.

until all have executed it; and even though the submission be several as well as joint, he has no power to decide on a separate matter in difference between two of those who have signed it, when there are others who have not executed it (*b*).

Referee of boat-race.

The jurisdiction of a referee on a boat-race does not attach unless the conditions prescribed on which the start is to take place have been fulfilled (*c*).

Arbitration Act, 1889.

Limit of time for award.

It rarely happens that no time for awarding is fixed, for orders of court referring a matter are drawn up with proper clauses and forms; and submissions out of court are generally deemed to include the provision as to time contained in the Arbitration Act, 1889, set out in the next division.

What is entering on the reference.

The time limited for making the award often does not begin until the arbitrators *shall have entered on the reference*. And they do not enter on the reference by mere acceptance of the appointment, or by giving a peremptory notice for a meeting, nor until they begin judicially to enquire into the case (*d*).

Duration for life, no limit in submission.

In all cases to which the statutes do not apply, if the submission limit no time within which the arbitrator is to make his award, his authority to make it will continue for his life, unless it be revoked. There is no necessity to resort to any implication that the award is to be made within a reasonable time, for it is open to the parties to request the arbitrator to proceed within a reasonable time; and if, after such request, the arbitrator neglect and refuse, such neglect on his part will be a good ground for revoking his authority (*e*). In an old case it was held, that if the submission were to the arbitrator "when his occasions would permit," convenient time must be given him after request, and if no award were then made, the parties might revoke his authority (*f*).

(*b*) Antram *v.* Chace, 15 East, 208.

(*c*) Sadler *v.* Smith, 39 L. J. Q. B. 17; S. C. below, 38 L. J. Q. B. 91; S. C. L. R. 4 Q. B. 214; S. C. on appeal, L. R. 5 Q. B. 40.

(*d*) Baker *v.* Stephens, 8 B. & S. 438, S. C. 36 L. J. Q. B. 236; L. R. 2 Q. B. 523. See cases as to duration of time under the repealed Common Law Procedure Act, 1854: Lord *v.* Lee, 9 B. & S. 269, S. C. 37 L. J. Q. B. 121; L. R. 3 Q. B. 404; Morris *v.* Morris, 6 E. & B. 383, S. C. 25 L. J. Q. B. 261; Lord *v.* Copper Miners' Co., 1 Kay & Johns. 90, S. C. 24 L. J. Ch. 145.

(*e*) Salter *v.* Yeates, 5 Dowl. 291; see report of S. C. 2 M. & W. 67; Curtis *v.* Potts, 3 M. & S. 145; Macdougall *v.* Robertson, 2 Y. & J. 11. See note therein, p. 19.

(*f*) Newgate *v.* Degelder, 2 Keb. 10, 20, 24, S. C. Bac. Ab. Arb. D.

Reference at Nisi Prius.

Though on the reference of a cause at Nisi Prius an arbitrator is in many respects looked upon as substituted for the jury, he is not limited in making his award to the period before the jury process is returnable (*g*); if instead of having to award, he has only to certify for whom and for what amount of damages the verdict is to be entered, he is equally unfettered as to time, and his certificate will be valid, though made when the assizes are over, though the return day of the jury process has passed, and though no order of Nisi Prius has in fact been drawn up (*h*).

Limit on Scotch reference.

By the Scotch law, it is said, if a blank be left in the submission for the day within which the award is to be made, the arbitrator's power is limited to a year from the date of the last subscription of any of the parties to the reference (*i*).

But a submission of this description would probably by the law of England be construed to be a general authority to make the award, as if no time had been mentioned, and would not be vitiated by the omission to fill up the blanks (*k*).

Arbitrator cannot fix a limit.

When the submission limits no time for making the award, the arbitrator, in the absence of an express power to do so, cannot himself fix a limit for making the award, so as to render an award made after that time invalid (*l*).

Award must be within the time limited.

II. *When the submission prescribes a limited time for making the award.*]—When the submission fixes a limit, the award must be made within it, unless further time be subsequently given. How that further time is to be obtained is treated of in the next section.

Time for awarding under the Arbitration Act, 1889.

By the Arbitration Act, 1889 (*m*), s. 2, a submission made out of court shall, unless a contrary intention is expressed therein, be deemed to include the provisions in the first schedule, one of which, (a), is as follows:—

"The arbitrators shall make their award in writing within three months after entering on the reference, or after having been called on to act by notice in writing from any party to

(*g*) Salter *v.* Yeates, 5 Dowl. 291, S. C. 2 M. & W. 67.

(*h*) Salter *v.* Yeates, 5 Dowl. 291, S. C. 2 M. & W. 67; Tomes *v.* Hawkes, 10 A. & E. 32.

(*i*) Taylor *v.* Grieve, Fac. Coll. Nov. 25, 1800, cited in Johnston *v.* Cheape, 5 Dow. 256.

(*k*) See Macdougall *v.* Robertson, 2 Y. & J. note, p. 19.

(*l*) Morphett, In re, 2 D. & L. 967.

(*m*) 52 & 53 Vict. c. 49.

the submission, or on or before any later day to which the arbitrators, by any writing signed by them, may from time to time enlarge the time for making the award."

It is singular that there is no express provision fixing the time within which a single arbitrator has to award, or, indeed, giving him any powers at all.

Limit when award remitted.

Under sect. 10 (2) of the Arbitration Act, "when an award is remitted by the court or a judge, the arbitrators or umpire shall, unless the order otherwise directs, make their award within three months after the date of the order."

There is no reported decision that this time can be enlarged by the court, under sect. 9 of the same Act.

"Within" includes the last day.

If matters are referred to an arbitrator on the 29th of June, and he is to make his award within five calendar months after the matter is referred to him, the 29th of June is excluded in the computation of time, and an award made on the 29th of November is good as being made within the limited period (*n*).

"Until" a certain day.

If he has "until" a day named to make his award, the word "until" may be construed either inclusive or exclusive; and as the construction should be put upon it, ut res magis valeat quam pereat, the arbitrator will have the whole of the day named included, and may make his award at any time during that day (*o*). When the award is to be made ready to be delivered to the parties before a certain day, executing it between the hours of eight and nine of the evening previous, is within due time (*p*).

Months, formerly lunar, not calendar.

On a limitation of the time simply in months, without stating whether they are to be calendar or lunar months, and without anything in the context to show that the parties meant calendar months, the duration of the authority of the arbitrator was in the old time to be computed by lunar months (*q*).

Valuation to be made on a day fixed.

By an agreement for the valuation of crops between an outgoing and an incoming tenant, it was provided that the valuation should be made immediately, but should be revised and examined by the valuers on the 1st day of August then

(*n*) Higham *v.* Jessop, In re, 9 Dowl. 203.

(*o*) Kerr *v.* Jeston, 1 Dowl. N. S. 538; Knox *v.* Simmonds, 3 Bro. Ch. Cases, 358. See Dakins *v.* Wagner, 3 Dowl. 535; R. *v.* Stevens, 5 East, 244.

(*p*) Withers *v.* Drew, Cro. Eliz. 676.

(*q*) Swinford, In re, 6 M. & S. 226. But see 52 & 53 Vict. c. 63, s. 3.

next. The valuers made a valuation forthwith, and on the 2nd day of August re-examined the crop, and reduced the price previously settled. It was held that the time was of the essence of the contract, and that as the revision was not made on the 1st of August it was inoperative (*r*).

Periodical limits.

An arbitrator who is appointed to make a periodical assessment of damages, occasioned by the continued working of a mine, at the expiration of every two months from a particular day, must make his assessment within a reasonable time after the two months have expired; for the limitation of the periods is imperative, and not merely directory (*s*).

Limit under the Lands Clauses Act.

Two arbitrators acting.

In cases of references under the provisions of the Lands Clauses Consolidation Act, 1845, when two arbitrators have been appointed, and neither of them refuses or neglects to act, the award must be made (unless they enlarge the time) "within twenty-one days after the day on which the last of such arbitrators shall have been appointed" (*t*).

One of two acting.

In other cases under the act the limit does not seem so clearly defined. When two arbitrators are appointed, but one refuses, or for seven days neglects to act, the other may proceed ex parte, according to section 30. His award must, it is apprehended, be made within three calendar months by the provisions of section 23, but it is not quite obvious what date is to be fixed as the commencement of the three months, whether the date of his own appointment, or the date of the appointment of the last of the two arbitrators, or, as it may reasonably be construed, the date of the commencement of his power to proceed ex parte, which is practically the date of a fresh appointment as single arbitrator (*u*).

Single arbitrator.

If the parties concur in the appointment of a single arbitrator there is nothing in the act to limit his authority, unless section 23, which says, that "if when a matter is referred to arbitration, the arbitrators or their umpire shall for three months have failed to make their or his award, or if no final award shall be made, the question of such compensation shall be settled by a jury," is to be held as applying to a sole arbi-

(*r*) Marshall *v.* Powell, 9 Q. B. 779.

(*s*) Stephens *v.* Lowe, 9 Bing. 32.

(*t*) 8 & 9 Vict. c. 18, s. 31. See Appendix of Statutes; Skerratt *v.* North Staffordshire Rail. Co., 17 L. J. Ch. 161.

(*u*) See, however, Evans *v.* Lancashire and Yorkshire Rail. Co., 1 E. & B. 754.

trator, though in terms it contemplates only the case of two arbitrators and an umpire (*v*).

Sole arbitrator under s. 68.

The limitation of time in s. 23 of the Lands Clauses Consolidation Act, 1845, applies to arbitrations under s. 68 of the same act; therefore an award is void which is made by an arbitrator more than three months after his appointment as arbitrator by one party (the other party having refused to appoint any arbitrator) (*x*).

Railway Companies Arbitration Act, 1859.

Under the Railway Companies Arbitration Act, 1859 (*y*), the arbitrator or arbitrators are to make their award within such time as the companies may agree on, and failing such agreement, within thirty days after the matters are referred to them. The umpire, unless the companies otherwise agree, may enlarge the time for making his award indefinitely (*z*).

Limitation in local inclosure act.

Under a local inclosure act, which enacted that the award should be made within six years, the Court of Common Pleas treated the limitation as directory merely, and not as imperative, and supported an award made nineteen years after the passing of the act (*a*).

Arbitrator cannot alter award when made.

III. *Authority of the arbitrator determined by making the award.*]—As soon as the award is made the authority of the arbitrator, having once been completely exercised according to the terms of the reference, is at an end. He is not at liberty, after executing the award, to exercise a fresh judgment on the case, or generally to alter the award in any particular. If he does so in fact, the alteration will be merely nugatory, and the award, as originally written, will stand good; his act will be like a mere spoliation by a stranger (*b*). He was so entirely functus officio, that he could not even correct a manifest error in the calculation of figures (*c*); or where the defendant was by the award directed to pay costs, substitute instead the name of the plaintiff, though such amendment were merely to make the expression of his will

(*v*) See the Caledonian Rail. Co. *v.* Lockhart, 3 Macq. 808.

(*x*) Evans *v.* The Lancashire and Yorkshire Rail. Co., 1 E. & B. 754.

(*y*) 22 & 23 Vict. c. 59, ss. 17—22.

(*z*) 22 & 23 Vict. c. 59, s. 23.

(*a*) Doe *d.* Roberts *v.* Mostyn, 12 C. B. 268.

(*b*) Brooke *v.* Mitchell, 6 M. & W. 473; Henfree *v.* Bromley, 6 East, 309; Anon., Jenk. Rep. 129; Trew *v.* Burton, 1 C. & M. 533.

(*c*) Irvine *v.* Elnon, 8 East, 54.

correspond with his original intention (*d*); or make a new award identical with the old one, except that it contained words giving the plaintiff the costs of the reference, such words having been in the arbitrator's original draft, but omitted by accident from the fair copy which he signed as his first award (*e*).

May correct clerical error.

But by the Arbitration Act, 1889, s. 7 (c), in references on "submissions" made out of court, he may correct in his award any "clerical mistake or error arising from any accidental slip or omission."

Award set aside cannot make new one.

Setting the award aside as void does not renew his authority, so as to enable him to make a fresh award. The authority once executed, though ineffectually, is gone for ever.

Power to make several awards.

Sometimes the submission directs or empowers the arbitrator to make one or more awards. Under such a special provision his authority will of course not necessarily be terminated by the making one award, though final as to part. It is not till he has made what he intends as a last and final award within the meaning of the submission, that his power can be considered as executed (*f*).

Award void making new one by statute.

It seems, under a statute, though the award is intended to be final, an arbitrator may sometimes make a second award, if the first be invalid. A railway company was empowered by act of parliament to carry its line by means of a bridge over another railway, without the consent of the owners of the latter railway. In case the engineers could not agree on a plan for the bridge, an arbitrator was to settle the plan. The engineers not agreeing, the arbitrator appointed by the act made an award setting forth a plan for the bridge. This award was resisted by one of the parties interested, as exceeding the authority given by the act. The objection was felt to be of weight, and the award was in consequence abandoned as invalid by the other party, at whose request a second award was made by the arbitrator respecting the same matter. The Court of Chancery, distinguishing this from a reference by private agreement of parties, held that the arbitrator was

(*d*) Ward *v.* Dean, 3 B. & Ad. 234; Hall *v.* Hinds, In re, 2 M & G. 847.

(*e*) Mordue *v.* Palmer, L. R. 6 Ch. 22, reversing judgment below of Bacon, V.-C.

(*f*) Dowse *v.* Coxe, 3 Bing. 20; Stephens *v.* Lowe, 9 Bing. 32; Wrightson *v.* Bywater, 3 M. & W. 199.

not functus officio by making the first award, and that the second was as valid as if the first invalid award had not been made (*g*).

SECTION II.

ENLARGING THE TIME FOR MAKING THE AWARD.

Enlarging the time.

1. *Enlargement of the time by the arbitrator.*]—Having treated of the ordinary duration of the arbitrator's authority, we will now examine how it may be prolonged by enlargement.

We have previously seen that the authority of the arbitrator expires, if he has not made his award within the time limited by the submission. It often happens that circumstances prevent the award being made in time. In order to prevent the expense and trouble already incurred in the reference from being fruitless, the submission generally provides that the arbitrator, either with or without the consent of a judge or the court, or a judge alone, may give an extended period for making the award. The more common and the better practice is to give the arbitrator by himself power to enlarge the time for making it.

No implied power to enlarge.

Unless the submission confer this power upon him, he cannot by any act of his own prevent his authority from expiring with the lapse of the time originally allotted.

Arbitration Act, 1889, Schedule.

This power is now given by all submissions out of court which do not exclude the terms contained in the schedule to the Arbitration Act, 1889 (*h*).

Enlargement should be during original time.

When he has the power, and desires to use it, the arbitrator should take care to make the enlargement during the time primarily fixed for making the award. In one case a suggestion was thrown out by a judge, that an enlargement made immediately after the expiration of the original limit might possibly be valid (*i*); but there was no expression of a positive opinion even there, and there certainly has not been

(*g*) Great North Western Rail. Co. *v.* Clarence Rail. Co., 1 Collyer, Cas. in Chan. V.-C. K. B. 507.

(*h*) 52 & 53 Vict. c. 49, s. 2, sched. I.

(*i*) Reid *v.* Fryatt, 1 M. & S. 1.

any decision supporting such a view. So far from it, the court has refused to enforce an award by attachment, where the arbitrator's endorsement for enlarging the time, in pursuance of a provision that the time should be enlarged as he might require and a judge might think reasonable, was dated on a day subsequent to the expiration of the time originally given for making the award (*k*). The general opinion is that an enlargement by the arbitrator, made after his original time has expired, is wholly inoperative.

Arbitrator not to enlarge beyond three months.

If the arbitrator is to make his award before any day not exceeding three months from the date of the agreement to which he may by writing, &c., enlarge the time, he cannot extend his power beyond the three months (*l*).

Enlargement after period.

A very special submission prescribing the mode of appointing arbitrators, and directing that the last of the awards should be made before the 1st of July, or before some later day to be appointed by the arbitrators, gave the arbitrators power to enlarge the time, *whether such time should have previously expired or not.* Two arbitrators were appointed after the 1st of July; after which the arbitrators enlarged the time, and Sir Edward Sugden, Lord Chancellor of Ireland, held that the enlargement revived their powers (*m*).

Enlarging "until" a certain day.

If the time is enlarged "until" a day named, as the word "until" may be construed either inclusive or exclusive, the arbitrator will generally have the whole of the day named included, and may make his award at any time during that day (*n*).

Defective power to enlarge.

A submission empowered an arbitrator to award on or before a certain day, "or on such further day as he by memorandum in writing under his hand to be endorsed hereon." The court held that notwithstanding the sentence was incomplete by the omission of the words "shall appoint," they could supply the defect, and that the arbitrator had authority to enlarge the time (*o*).

Enlarging after death of a party.

If the submission provide that the death of a party shall not be a revocation, and contain the usual power for enlarging

(*k*) Good *v.* Wilks, cited Tidd's Practice, 827, 9th ed.

(*l*) Denton *v.* Strong, L. R. 10 Q. B. 117.

(*m*) Dimsdale *v.* Robertson, 2 Jones & Latouche, 58.

(*n*) Kerr *v.* Jeston, 1 Dowl. N. S. 538; Knox *v.* Simmonds, 3 Brown, C. C. 358. See Dakins *v.* Wagner, 3 Dowl. 535; R. *v.* Stevens, 5 East, 244.

(*o*) Kirk *v.* Unwin, 6 Ex. 908.

the time, as the arbitrator has express power given him to make his award after the death of either party, so he has incidentally the same power of enlarging the time after that event that he had before (*p*).

When judge's order for enlargement to be made.

When the submission directs that the time may be enlarged as the arbitrator may require, and as a judge or the court may think just and reasonable, if the arbitrator, within the time limited, make an endorsement on the submission that he requires further time, the judge's order ratifying that enlargement may be obtained after the original time has elapsed (*q*). But it must be obtained before the award is executed, or the arbitrators will have no authority to make it (*r*). This provision requiring that a judge's order should be obtained to authenticate the enlargement by the arbitrator has been considered unadvisable, and that the question of enlargement had better be left to the discretion of the arbitrator alone (*s*).

Enlargement by two of three arbitrators.

When a cause is referred to two arbitrators with power to them to appoint a third, the award to be made by a day named or such other day as they or any two of them shall appoint, the first two named cannot make a valid enlargement of the time until the third is appointed, as enlarging the time is an act of judgment, and the parties have a right to have all three in a situation to exercise a judgment on the point (*t*).

How enlargement should be made.

Unless the submission prescribes the mode in which the enlargement is to be made, the arbitrator may, it seems, adopt any mode that expresses his intention of enlarging the time. A verbal appointment made to both parties for a future meeting to be held on a day beyond the limit of the original period, to which neither party objected, was considered a sufficient enlargement to that day, and the award made on that day was sustained as made within due time (*u*).

According to

If the submission direct the manner in which the enlarge-

(*p*) Tyler *v.* Jones, 3 B. & C. 144; Clarke *v.* Crofts, 4 Bing. 143.
(*q*) Reid *v.* Fryatt, 1 M. & S. 1.
(*r*) Mason *v.* Wallis, 10 B. & C. 107.
(*s*) Reid *v.* Fryatt, 1 M. & S. 1.
(*t*) Reade *v.* Dutton, 2 M. & W. 69; Hughes *v.* Garnett, cited 2 M. & W. 69.
(*u*) Burley *v.* Stephens, 1 M. & W. 156.

ment is to be made, that direction should be literally followed.

the submission.

Under the provision deemed to be inserted in submissions out of court by consent under the Arbitration Act, 1889, the enlargement is to be in writing signed by the arbitrators.

Arbitration Act, 1889, Sched. I. (c).

The ordinary provision in an order of Nisi Prius, after directing that the arbitrator shall make and publish his award on or before a certain day therein named, concludes thus, "or on or before any other day to which the said arbitrator shall by any writing under his hand to be endorsed hereon, from time to time enlarge the time for making his said award." In order to comply with this clause the enlargement must be in writing and under his hand, and must be endorsed on the order of reference (*x*). Where the submission empowered the arbitrator thus "to enlarge the time to the 2nd of November, or to such other or ulterior day as the said arbitrator shall ultimately appoint and signify in writing under his hand to be endorsed on the said order of reference," the court held, that no obligation rested on the arbitrator to make any endorsement of the enlargement of the time unless it was extended beyond the 2nd of November, and that an enlargement to the 2nd of November, which was not endorsed on the order of reference, was perfectly good (*y*).

By writing endorsed.

No particular form of enlargement.

No particular form of words is necessary for an endorsement to enlarge the time under the usual power in the submission. If the arbitrator in substance express his opinion that the time should be enlarged, it is sufficient. An endorsement, "I direct that a rule of this court shall be applied for by counsel's hand to enlarge the time for making my award," the Court of Exchequer inclined to think a good execution of the ordinary power given to the arbitrator to enlarge the time, because it amounted to an expression of his opinion that an enlargement was requisite, though it also went on to direct that a rule of court should be applied for, which according to the submission was unnecessary (*z*). No decision was, however, given on the point. It may also be observed, that the endorsement does not direct an enlargement to any day cer-

(*x*) Leggett *v.* Finlay, 6 Bing. 255.

(*y*) Davison *v.* Gauntlett, 3 M. & G. 350, S. C. 1 Dowl. N. S. 198.

(*z*) Hallett *v.* Hallett, 5 M. & W. 25, S. C. 7 Dowl. 389.

tain, as the usual provision in the submission would seem to require.

Enlarging from time to time.

It is not necessary that the submission expressly give the arbitrator power to enlarge *from time to time*, for if it direct the award to be made on a certain day, or on or before any other day to which the arbitrator should enlarge the time, he is not limited to a single enlargement, but may enlarge the time as often as he finds necessary (*a*). So where he cannot enlarge of his own authority, but is at liberty to make an application to the court to enlarge the time, he may in like manner make several applications, and is not functus officio at the expiration of the time granted by the first enlargement (*b*).

Enlargement by umpire not enlarge arbitrator's time.

If an umpire has to award on the matters on which the arbitrators do not agree, and some matters are referred to him in consequence, his enlargement of time will not avail as an enlargement of time by the arbitrators so as to enable them to award on the remaining matters (*c*).

Enlarging under the Lands Clauses Act.

Under the Lands Clauses Consolidation Act, 1845 (*d*), when two arbitrators are appointed pursuant to the act, they have a limited power of enlargement, for the original duration of their power is twenty-one days after the day on which the last of the arbitrators is appointed, and they may enlarge the time (*e*), but not further, it would seem, than three calendar months from such appointment (*f*).

Enlarging time by consent, a new submission.

II. *Enlargement of time by consent of the parties.*]—If the submission contain no power for enlarging the time, or if when there is such a power it have been omitted to be exercised, and the original time have elapsed without an award being made, the authority of the arbitrator may be revived and further time granted by the consent of the parties (*g*). This, if in writing, requires a stamp, even though endorsed on

(*a*) Payne *v.* Deakle, 1 Taunt. 509; Barrett *v.* Parry, 4 Taunt. 657; Leggett *v.* Finlay, 6 Bing. 255.

(*b*) Anon., 2 Chitty, Rep. 45.

(*c*) Lang *v.* Brown, H. L. May 8, 1855.

(*d*) 8 & 9 Vict. c. 18. See Appendix of Statutes. See s. 1, d. 2, of this chapter, p. 140, as to the limit fixed by the statute. Skerratt *v.* North Staffordshire Rail. Co., 17 L. J. Ch. 161.

(*e*) S. 31.

(*f*) S. 23.

(*g*) Benwell *v.* Hinxman, 1 C. M. & R. 935.

the arbitration bond (*h*). Sometimes a rule of court or judge's order is drawn up by consent for enlarging the time (*i*). But in whatever manner the consent be given, it would seem to amount to a new submission. Therefore, where the submission is by a judge's order or order of Nisi Prius, the enlargement of time should be made by an instrument of the same degree, or else there may be no power of enforcing the award by attachment (*k*).

Common Law Procedure Act, 1854.

On a compulsory reference under the Common Law Procedure Act, which act required that there should be a written consent to enlarge a party who attended meetings after the arbitrator's time had expired, was held estopped from alleging that there had been no written consent, and the award was enforced as a statutable award (*l*).

Conduct of parties, consent to enlargement.

The conduct of the parties will often be taken to amount to a consent on their parts to an enlargement of the time, and a consequent continuation of the arbitrator's authority (*m*).

Attending meetings after time expired.

If after the time has expired without enlargement, or where an invalid enlargement has been made, they attend further meetings before him with a full knowledge of the circumstances, and without making any objection on that ground, they will be precluded from saying that the authority of the arbitrator was at an end (*n*). But although attending several times before the arbitrator may waive all objections to the sufficiency of previous enlargements of the time made by him, invalid for want of a judge's order to ratify them as required by the submission, such attendances cannot be construed to imply a consent that the arbitrator may make future enlargements by himself alone, and an enlargement so made subsequent to the last meeting in the reference is entirely void (*o*).

If an award be made under the Lands Clauses Consolida-

(*h*) Stephens *v.* Lowe, 9 Bing. 32; Evans *v.* Thompson, 5 East, 189.

(*i*) Staite *v.* Haddon, 9 Dowl. 995.

(*k*) Hoyle *v.* Jennings, cited in Lawrence *v.* Hodgson, 1 Y. & J. 16; Burley *v.* Stephens, 1 M & W. 156; Bennett *v.* Watson, 29 L. J. Ex. 357; Caledonian Rail. Co. *v.* Lockhart, 3 Macq. 808.

(*l*) Tyerman *v.* Smith, 25 L. J. Q. B. 359, S. C. 6 E. & B. 719.

(*m*) Winteringham *v.* Robertson, 27 L. J. Ex. 301.

(*n*) Hick, In re, 8 Taunt. 694; Hallett *v.* Hallett, 7 Dowl. 389; Leggett *v.* Finlay, 6 Bing. 255; Lawrence *v.* Hodgson, 1 Y. & J. 16; Hawksworth *v.* Brammall, 5 M. & C. 281.

(*o*) Mason *v.* Wallis, 10 B. & C. 107.

tion Act, 1845 (*p*), by consent of parties after the statutable period has expired, the court will not set aside the award, and it would seem to be perfectly valid, for the parties may renounce the statutable limit introduced for their own advantage (*q*).

Bringing forward new matters.

After the case closed on both sides, and the time expired, requesting the arbitrator to take some new matters into his consideration is such a recognition of his authority as continuing, that the consent of the party making it to extend the time may fairly be implied, for it manifestly refers to an award which the arbitrator has still to make (*r*).

Stating day as limit.

If a party write to an umpire, telling him that the 29th of November is the last day on which he can make his award, it seems very doubtful whether it is competent for that party afterwards to object that an award made on the 29th of November is made too late (*s*).

Enlarging time by consent discharge of surety.

When the time has once been suffered to expire without an award having been made, a surety for the performance of the award will be discharged, and his liability will not be revived by the parties agreeing to give the arbitrator further time for making his award. Thus, where the attorney in a cause referred had undertaken to pay the amount of debt and costs which his client should be awarded to pay, and the time had been allowed to expire without enlargement, but was afterwards enlarged by a judge's order drawn up "by consent of the attorneys and agents on both sides," it was held that the undertaking was at an end when the limited time had once passed by, and that the attorney's consenting to the enlargement was only an act in performance of his duty to his client as attorney in the cause, and therefore ought not to be considered as a new personal undertaking to pay the amount (*t*).

Court no common law power to enlarge.

III. *Enlargement of time by the courts of law.*]—Without the consent of the parties, neither the court nor a judge could at common law grant any enlargement when the time had

(*p*) Palmer *v.* The Metropolitan Rail. Co., 31 L. J. Q. B. 259; Bennett *v.* Watson, 29 L. J. Ex. 357, S. C. 5 H. & N. 831.

(*q*) Caledonian Rail. Co. *v.* Lockhart, 3 Macq. 808.

(*r*) R. *v.* Hill, 7 Price, 636.

(*s*) Higham and Jessop, In re, 9 Dowl. 203.

(*t*) Staite *v.* Haddon, 9 Dowl. 995.

lapsed; the authority of the arbitrator was gone, and all the proceedings already taken became ineffectual (*y*).

Arbitration Act, 1889, enlarges time.

To remedy this inconvenience, an act was passed in the time of W. IV. That act was repealed by the Arbitration Act, 1889, which, by s. 9, makes the following provision:—"The time for making an award may from time to time be enlarged by order of the court or a judge, whether the time for making the award has expired or not." A summons is usually taken out for this purpose. By Ord. LXIV., 14 (a), "Where the time for making an award is enlarged, the enlargement shall be deemed to be for one month, unless a different time is specified in the order" (*z*).

Order LXIV. 14 (a), Dec. 1889.

Month.

Court may enlarge after period.

A distinction between enlargement by the arbitrator and enlargement by the court should be noted. The arbitrator must exercise his power of enlarging during the period limited for making his award, but the court is not limited to such period (*a*). Even where the submission gave power to the arbitrator to enlarge the time, "but so as the period to which the time shall be so enlarged shall not exceed the 1st July," a judge on the 29th June enlarged the time to the 1st December, and the court held it good (*b*) under the repealed statute 3 & 4 W. IV. c. 42.

After award.

If an arbitrator has made his award after the time has elapsed, the court may, notwithstanding, after that enlarge the time (*c*). The effect of the order of court is to render valid any step taken from the lapse of the first period until the expiration of the time limited by the order (*d*).

Before any application could be made for an enlargement, the submission in old times had to be made a rule of court (*e*).

(*y*) Halden *v.* Glasscock, 5 B. & C. 390, S. C. 8 D. & R. 151; Teasdale *v.* Atkins, cited Tidd's Pr. 826, 9th ed.

(*z*) See the cases as to enlargement under the statute of W. IV., now repealed. Potter *v.* Newman, 2 C. M. & R. 742; Burley *v.* Stephens, 1 M. & W. 156; Doe *d.* Jones *v.* Powell, 7 Dowl. 539; Denton *v.* Strong, L. R. 9 Q. B. 117; Johnson *v.* Collie, 24 L. J. Q. B. 64; Gaffney *v.* Killen, 12 Ir. C. L. Rep. App. xxv.

(*a*) Hall *v.* Rouse, 4 M. & W. 24, per Parke, B., 26; Parberry *v.* Newnham, 7 M. & W. 378; Leslie *v.* Richardson, 6 C. B. 378; Bowen *v.* Williams, 3 Ex. 93.

(*b*) Parkes *v.* Smith, 15 Q. B. 297.

(*c*) Browne *v.* Collyer, 2 L. M. & P. 470, S. C. 20 L. J. Q. B. 426; Ward *v.* The Secretary at War, 32 L. J. Q. B. 53; May *v.* Harcourt, 13 Q. B. D. 688.

(*d*) Lord *v.* Lee, 9 B. & S. 269, S. C. 37 L. J. Q. B. 121; L. R. 3 Q. B. 404 See Warner *v.* Powell, L. R. 3 Eq. Cas. 261.

(*e*) Lambert *v.* Hutchinson, 2 M. & G. 858; 2 Tidd, 859.

Rule to enlarge not granted ex parte.

A rule or order to enlarge the time will not be granted ex parte, without affording the opposite party opportunity to show cause against it (*f*). Nor will it be granted as of course. Where a long time, such as two or three years, has elapsed since anything has been done in the reference it will be refused (*g*).

Enlargement quantum valeat.

Where the appointment of an umpire was not clearly good, Crompton, J., enlarged the time quantum valeat, leaving the objection to the validity of the appointment open (*h*).

Drawing up rule.

Where it appeared that the cause had been referred by order of Nisi Prius, and that the order had been made a rule of court, it was held sufficient to draw up the rule nisi for the enlargement on reading the affidavits and order of Nisi Prius. It was not necessary for it to be drawn up on reading the rule making the order of reference a rule of court (*i*).

Order with wrong title.

Entitling the order as in a cause in court where the reference is not in a cause, but by agreement, is an immaterial error, and will be rejected as surplusage (*k*).

Enlargement for good cause under Common Law Procedure Act, 1854.

Power was given by the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 15, for any judge for good cause to enlarge the term for making an award. But this is now repealed. The cases on this act are specified in the note (*l*).

Under Public Health Act.

The court has no power of enlarging the umpire's time for making an award under the Public Health Act, 1875 (38 & 39 Vict. c. 55), beyond the period limited by that act (*m*).

Statutes apply to equity courts.

IV. *Enlargement of time by a court of equity.*]—Where a submission by agreement had been made an order in Chancery, it was held that a court of equity had power to enlarge the time under 3 & 4 W. IV. c. 42, s. 39, and the Common Law Procedure Act, 1854 (*n*). The Arbitration Act, 1889, defines "court" as "Her Majesty's High Court of Justice."

(*f*) Clarke *v.* Stocken, 5 Dowl. 32; 3 Scott, 90.

(*g*) Lambert *v.* Hutchinson, 2 M. & G. 858; Andrews *v.* Eaton, 7 Ex. 221.

(*h*) Johnson *v.* Collie, 24 L. J. Q. B. 64.

(*i*) Browne *v.* Collyer, 20 L. J. Q. B. 426.

(*k*) Oldfield *v.* Price, 6 C. B. 539.

(*l*) Burdon, Re, 27 L. J. C. P. 250; Kellett *v.* Local Board of Health of Tranmere, 34 L. J. Q. B. 87; Warburton *v.* Haslingden, 48 L. J. Q. B. D. 451.

(*m*) Mackenzie *v.* Ascot Gas Co., In re, 17 Q. B. D. 114. See, as to umpire's time, Yeadon L. B. *v.* Yeadon W. W. Co., 41 Ch. D. 52.

(*n*) Warner *v.* Powell, L. R. 3 Eq. Cas. 261. See, however, Hall *v.* Ellis, 9 Sim. 530.

PART II. CH. III. S. 2.

Time practically enlarged in equity.

In some instances, where by the misconduct of a party to the submission the arbitrators have been unable to perform their duty within the time limited, as where the seller prevented them from entering upon lands to value them pursuant to a contract for sale at a price to be fixed by arbitration, equity has practically enlarged the time, by directing the arbitrators to make their award notwithstanding the time had expired, and by enforcing a specific performance against him according to their valuation (*o*).

Lands Clauses Act.

A submission to arbitration under the Lands Clauses Consolidation Act, 1845, having been made a rule of Chancery, and the award having been remitted to the umpire, that court held that it had power to enlarge the time for making the award under the Common Law Procedure Act, 1854 (*p*).

SECTION III.

OF REVOKING THE ARBITRATOR'S AUTHORITY.

PART II. CH. III. S. 3.

At common law submission revocable until award made.

1. *Revocation by common law at the will of a party.*]—At common law the authority of the arbitrator might at any time before the award was made have been revoked at the pleasure of any party to the submission (*q*), whether the submission was by agreement in writing (*r*), by bond (*s*), or deed (*t*), by judge's order (*u*), by order of Nisi Prius (*x*), or by rule of court (*y*), and notwithstanding it was made irrevocable by the express words of the submission, for nothing under a legislative power could make that irrevocable which was in its nature revocable, for the arbitrator being constituted and put in the place of the parties by their consent

(*o*) Morse *v.* Merest, 6 Madd. 26. See Dimsdale *v.* Robertson, 2 Jones & Latouche, 58.

(*p*) Dare Valley Rail. Co., In re, L. R. 4 Ch. App. 554.

(*q*) Bac. Ab. Arb. B.; Green *v.* Pole, 6 Bing. 443; Com. Dig. Arb. D. 5.

(*r*) Newgate *v.* Degelder, 2 Keb. 10, 20, 24.

(*s*) Milne *v.* Gratrix, 7 East, 607.

(*t*) Warburton *v.* Storr, 4 B. & C. 103.

(*u*) Aston *v.* George, 2 B. & A. 395; Greenwood *v.* Misdale, 1 M'Lel. & Y. 276.

(*x*) Green *v.* Pole, 6 Bing. 443.

(*y*) Ibid.

to act for them, could no longer act than he had such consent, and an award made subsequent to revocation was a nullity (z).

Arbitrator appointed to act alone.

Even where one arbitrator had been, under sect. 13 of the Common Law Procedure Act, 1854, appointed to act alone in consequence of the failure of the other party to appoint his arbitrator, it was held that the statute did not make the appointment irrevocable, but that the party who had failed to appoint might revoke the statutable power (a).

One of many parties revoking submission as to all.

Either party could revoke the submission, and if there were several plaintiffs or several defendants, any one of them could, it seems, by revoking the authority of the arbitrator, render the submission void as to all, even against the will of his co-plaintiffs or co-defendants (b). This, indeed, has been doubted in works of great authority (c). In equity, where defendants often have different interests, the revocation by one defendant may annul the submission (d).

Arbitration clause not revocable.

It is to be noted that even before the Arbitration Act, a general clause in a partnership deed, that any disputes which might arise should be settled by an arbitrator to be agreed upon, was not revocable at will like an actual reference to a particular arbitrator (e); but where the arbitrators were named their authority was revocable (f). Now the powers of arbitrators under a "submission" cannot, it seems, be revoked without leave of court (g).

Whether revocation of submission under seal need be by deed.

It was not quite clear whether, when the submission was under seal, the revocation must have been under seal also, though the more general opinion seems to be that a revocation under seal was necessary (h).

(z) Bac. Ab. Arb. B.; Hide *v.* Petit, 1 Cas. in Chanc. 185, S. C. 2 Freem. 133; Marsh *v.* Bulteel, 5 B. & A. 507, S. C. 1 D. & R. 106.

(a) Fraser *v.* Ehrensperger, 12 Q. B. D. 310.

(b) Com. Dig. Arb. D. 5; Rolle, Ab. Authority, D. 1, 2, p. 331; Vin. Ab. Authority, H. 1, 2.

(c) Bac. Ab. Arb. B.; West's Symb. Part II. tit. Compromise, s. 42; Wilde *v.* Vinor, 1 Brownl. 62.

(d) Haggett *v.* Welsh, 1 Sim. 134.

(e) Piercy *v.* Young, 14 Ch. D. 200; Christie *v.* Noble, 14 Ch. D. 203, notes; Moffatt *v.* Cornelius, 26 W. R. 914.

(f) Deutsche Springstoff, &c. *v.* Briscoe, 20 Q. B. D. 177.

(g) Smith *v.* Nelson, 59 L. J. Q. B. D. 533, S. C. 25 Q. B. D. 545.

(h) Vynior's case, 8 Coke, Rep. 81 b; Wilde *v.* Vinor, 1 Brownl. 62; R. *v.* Wait, 1 Bing. 121; Fitzherbert, Ab. Arb. 22; West's Symb. Part II. tit. Compromise, s. 42.

There is, however, one decided authority that a parol prohibition to the arbitrator's further proceeding in the reference was a full repeal of the authority conferred on him by the arbitration bond (*i*).

Revoking an order of Nisi Prius.

To revoke a Nisi Prius order of reference, while it was revocable by act of a party, a writing not under seal was sufficient (*k*).

From the marginal note of the case last cited (*l*), it would seem that the courts were of opinion that a revocation signed by the attorney acting for a party was sufficient.

Notice of revocation to arbitrator.

In order, however, to make a revocation by act of party complete, notice of it must be given to the arbitrator, or his authority will not be determined; but when the revocation is by marriage or death, no notice of the revocation is necessary (*m*).

Revocation breach of submission.

The act of revocation, however, we have previously (*n*) seen, is a breach of the submission. The revocation of the submission after it had been made a rule of court was a contempt, and an attachment would issue (*o*), or an action would lie (*p*), against the party revoking.

Submission, when made rule of court after revocation.

A submission under the statute the 9 & 10 W. III. c. 15, could not properly have been made a rule of court after revocation, and if it were, it would have been set aside; for when the submission was gone, there was nothing to make a rule of court; though a submission by judge's order not being dependent on the statute might have been made a rule after revocation to enforce the other terms of the order (*q*).

Action for damages for revocation.

Where the submission was one that could not be made a rule of court, the only remedy was by action for breach of the bond (*r*), covenant (*s*), or agreement (*t*), to refer, for the

(*i*) Barker *v.* Lees, 2 Keb. 64.
(*k*) Doe *d.* Turnbull *v.* Brown, 5 B. & C. 384; R. *v.* Bardell, 5 A. & E. 619.
(*l*) R. *v.* Bardell, 5 A. & E. 619.
(*m*) Marsh *v.* Bulteel, 5 B. & A. 507; Vynior's case, 8 Coke, Rep. 81 b; Com. Dig. Arb. D. 5; Vin. Ab. Authority, E. 3, 4; Blundell *v.* Brettargh, 17 Ves. 232.
(*n*) See P. I. ch. 3, s. 8, p. 106, as to enforcing the submission.
(*o*) Haggett *v.* Welsh, 1 Sim. 134; Green *v.* Pole, 6 Bing. 443; Milne *v.* Gratrix, 7 East, 607.
(*p*) Skee *v.* Coxon, 10 B. & C. 483.
(*q*) Aston *v.* George, 2 B. & A. 395; King *v.* Joseph, 5 Taunt. 452.
(*r*) Noble *v.* Harris, 3 Keb. 745.
(*s*) King *v.* Joseph, 5 Taunt. 452.
(*t*) Newgate *v.* Degelder, 2 Keb. 10, 20, 24; Skee *v.* Coxon, 10 B. & C. 483.

revocation is a breach of the promise to "*perform*" the award, although the usual words "*to stand to and abide by*" the award are omitted (*u*). The costs already incurred in the reference might be recovered as damages. In such an action it was sufficient to allege that the defendant by a certain deed revoked the arbitrator's authority. The pleadings need not have averred any notice to the arbitrator, as that was implied in the word revoke, since the revocation was not complete without notice (*x*).

Justification may be pleaded.

The defendant might plead in answer that he was justified in revoking the submission, and if he could show that he had good grounds for the proceeding, judgment would have been given in his favour. If he had discovered that the arbitrator or the opposite party had grossly misconducted themselves, that would amount to a defence, for it would be hard that he should have had to pay them damages for depriving them of a power which they had abused (*y*). So when the bankruptcy of a party to the submission will prevent the other party from reaping any benefit from the award, supposing it to be made in his favour, that will generally excuse the latter for revoking the authority and incurring no further expense in the reference (*z*). So in action of covenant against a woman and her husband, alleging a covenant of the female defendant, when sole, to abide by and perform an award, and laying as a breach that the female defendant had revoked the authority of the arbitrators by marriage, it is open for the defendants to plead that the marriage took place with the consent of the plaintiff (*a*).

Misconduct of arbitrator or party.

Bankruptcy of opponent.

Marriage by consent.

Court will not restrain arbitrator.

There is, it seems, no instance of the courts of law interfering to restrain an arbitrator from making an award after revocation. Though the award might be a nullity, the courts of law disclaimed the power of preventing him making it (*b*).

No revocation without leave of court, &c.

II. *Revocation by leave of the court.*]—The arbitrary power

(*u*) Warburton *v.* Storr, 4 B. & C. 103; Brown *v.* Tanner, 1 C. & P. 651.

(*x*) Marsh *v.* Bulteel, 5 B. & A. 507; Vynior's case, 8 Rep. 81 b.

(*y*) Brown *v.* Tanner, 1 C. & P. 651; Stewart *v.* Williamson, 2 M. & P. 765.

(*z*) Marsh *v.* Wood, 9 B. & C. 659.

(*a*) Charnley *v.* Winstanley, 5 East, 266.

(*b*) R. *v.* Bardell, 5 A. & E. 619.

PART II. CH. III. S. 3.

3 & 4 W. IV. c. 42, s. 39.

of revocation having been much abused, the legislature provided by the 3 & 4 W. IV. c. 42, s. 39, "that the power and authority of any arbitrator or umpire appointed by or in pursuance of any rule of court or judge's order, or order of Nisi Prius, in any action now brought, or which shall be hereafter brought, or by or in pursuance of any submission to reference containing an agreement that such submission shall be made a rule of any of his Majesty's courts of record, shall not be revocable by any party to such reference without the leave of the court by which such rule or order shall be made, or which shall be mentioned in such submission, or by leave of a judge; and the arbitrator or umpire shall and may and is hereby required to proceed with the reference, notwithstanding any such revocation, and to make such award, although the person making such revocation shall not afterwards attend the reference," &c. (*c*).

Arbitration Act, 1889 (52 & 53 Vict. c. 49), submission irrevocable without leave.

This section is now repealed by the Arbitration Act, 1889, but all that the new act substitutes for its plain enactments is by sect. 1, that a submission on a reference by consent out of court shall be irrevocable, except by leave of the court or a judge, unless a contrary intention is expressed therein. Nothing is directly enacted as to references by consent by order of court being irrevocable: but when the order is made under the powers of sect. 14 as to the cause only and not as to the cause and all matters in difference which cannot be referred under sect. 14, but only under the common law power of the court, it may perhaps be held that the order is sufficient to prevent parties withdrawing their consent (*d*).

Right to revoke formerly unless submission within statute of W. IV.

To deprive a party of his common law power of revocation, the parties must either have consented to a rule of court, judge's order, or order of Nisi Prius in an action, or the submission must have contained an agreement for making it a rule of "one of his Majesty's courts of record:" this latter being a reference to the statute 9 & 10 W. III. c. 15 (*e*).

(*c*) The Irish Act (3 & 4 Vict. c. 103), s. 63, has like provisions.

(*d*) Darlington Wagon, &c. Co. *v.* Harding, (1891) 1 Q. B. 245.

(*e*) R. *v.* Bardell, 5 A. & E. 619, S. C. sub nom. R. *v.* Shillibeer, 5 Dowl. 238; Woodcroft *v.* Jones, In re, 9 Dowl. 538.

Vice-Chancellor Shadwell, long before the Judicature Acts, stated that the provisions respecting arbitration in the act of W. IV. applied only to courts of law (*f*). If this were so, a submission by order of equity made in a suit remained revocable. But a submission by agreement made an order of Chancery under the statute of W. III. seems to have been within the pale of the enactment (*g*).

Not apply to submission by order of equity made in a suit.

As the whole section of the statute of W. IV. was framed to apply to civil actions only, it did not affect the right to revoke, where an indictment and all matters in difference had been referred by order of Nisi Prius (*h*).

Or to indictment.

Where a submission by agreement in writing did not contain a clause for making it a rule of court, the submission remained revocable at the will of either party until the award was made, notwithstanding that the agreement might have been made a rule of court under the 17th section of the Common Law Procedure Act (*i*). A submission was held to have contained a clause that it should be made a rule of court where it stated that the provisions of the Common Law Procedure Act were embodied in it (*j*).

Effect of Common Law Procedure Act, 1854, the 17 & 18 Vict. c. 125.

The statute 3 & 4 W. IV. c. 42, s. 39, did not apply until the submission was complete, and the arbitrators had authority to act unclogged by any condition precedent. For if each of two persons named an arbitrator, but stipulated in their submission that the two arbitrators should select an umpire before they commenced proceedings, the submission seems to have been revocable until the condition precedent of fixing upon an umpire had been performed (*k*).

Arbitrator's authority incomplete.

The application for leave to revoke the submission must have been made before the award was executed (*l*).

Court no power after award made.

It would not be granted ex parte. If it were so granted inadvertently, it seems it would be set aside as a nullity,

Nor on ex parte application.

(*f*) Hall *v.* Ellis, 9 Sim. 530.

(*g*) Warner *v.* Powell, L. R. 3 Eq. Cas. 261.

(*h*) R. *v.* Bardell, 5 A. & E. 619, S. C. sub nom. R. *v.* Shillibeer, 5 Dowl. 238; Woodcroft *v.* Jones, In re, 9 Dowl. 538; R. *v.* Hardey, 14 Q. B. 529.

(*i*) Mills *v.* Bayley, 11 W. R. 598, S. C. 2 H. & C. 36; Drury *v.* Lyne, 38 L. J. Ch. 278; Thompson *v.* Anderson, L. R. 9 Eq. Cas. 523; Rouse *v.* Meier, L. R. 6 C. P. 212, S. C. 45 L. J. C. P. 106.

(*j*) Mitchell *v.* Governor of Ceylon, 21 Q. B. D. 408.

(*k*) Bright *v.* Durnell, 4 Dowl. 756.

(*l*) Phipps *v.* Ingram, 3 Dowl. 669.

for each party, according to the construction put upon the statute, was entitled to be heard before any order for leave to revoke was made either by a judge or by the court (*m*).

When leave to revoke will be granted.

In order to prevent a recurrence of the old evils, it was intimated from the bench that the discretion of the court in allowing a revocation under the Statute of W. IV., would be exercised in the most sparing and cautious manner (*n*).

Matter pending in Chancery.

The inconvenience of having the same matters pending before the two tribunals of Chancery and of the arbitrator at the same time, was held an insufficient ground for revocation, when the inconvenience was caused by the act of the party who applied for leave to revoke, in filing a bill in Chancery respecting the subject of the arbitration, and who did not suggest that there had been any misconduct on the part of the opposite party or of the arbitrator (*o*).

The tenants of two adjoining houses referred an action respecting a party wall, and also a Chancery suit. It was held, that the refusal of the landlord of both the tenants, who was also a party to the Chancery suit, to become a party to the reference was no ground for allowing a revocation (*p*).

Arbitration clause part of contract not revocable.

Where a contract for the purchase of wheat contained a clause that if any disputes arose they should be referred to two corn factors, and a question of law arose, the court refused to allow a revocation, saying that the arbitration clause formed part of the consideration for the contract of the parties which the court could not alter, and was meant to cover questions of law as well as of fact (*q*). We have previously seen that an arbitration clause is not revocable at the will of a party (*r*).

Arbitrator admitting evidence objected to.

An order of reference gave the arbitrator the same power as a judge at Nisi Prius to decide on the admissibility of evidence, and to reserve points of law for the opinion of the court. It was also expressly stipulated by the defendant that he should retain the power of objecting to the admission

(*m*) Clarke *v.* Stocken, 5 Dowl. 32.

(*n*) Scott *v.* Van Sandau, 1 Q. B. 102.

(*o*) Woodcroft *v.* Jones, In re, 9 Dowl. 538.

(*p*) Wilson *v.* Morrell, 15 C. B. 720.

(*q*) Forwood *v.* Watney, 49 L. J. Com. Law, 447.

(*r*) See ante, p. 153.

in evidence before the arbitrator of certain depositions. These being tendered in evidence by the plaintiff, and objected to by the defendant, were received by the arbitrator, who, though inclined to think some of the objections good, refused to decide at once on their validity, but offered to state on his award, not every objection, but every material objection, to their reception. The defendant on this applied for leave to revoke his submission, on the ground that the reception of the evidence would render many additional meetings requisite, and that, although the award might ultimately be set aside, yet, according to the practice, he would probably not recover his costs of the reference. These reasons were, however, held inadequate, and the leave to revoke was refused (*s*).

Where, after a reference, the plaintiff wished to increase the amount of one item in his particulars of demand, and obtained a judge's order to permit such amendment, the Court of Exchequer, thinking the judge's order invalid, allowed the plaintiff to elect, whether he would abandon the reference, or go on with it on his old particulars (*t*).

Judgment recovered after reference.

In one case the court made absolute a rule for revoking the submission, unless the plaintiff would permit the defendant, an executor, to plead a judgment recovered pending the reference by way of a plea puis darrein continuance before the arbitrator, leaving, however, the effect of such a plea to the consideration of the latter (*u*).

Arbitrator mistaking the law.

The Court of Exchequer in one case intimated, that if an arbitrator, to whom an action of debt is referred, received evidence of a claim for damages for breach of a covenant, as recoverable in the action, notwithstanding that the defendant objected that such damages are not claimable as a debt, the defendant might properly apply for leave to revoke, since the award would be conclusive against him that it was a debt (*x*).

Bankruptcy.

If one party become bankrupt, the other might probably obtain leave to revoke the submission (*y*).

Arbitrator examining witness

If an arbitrator behind the back of a party receive evidence against him, the evil is not cured by the arbitrator informing

(*s*) Scott *v.* Van Sandau, 1 Q. B. 102.
(*t*) Morgan *v.* Tarte, 11 Ex. 82.
(*u*) Alder *v.* Park, 5 Dowl. 16.
(*x*) Faviel *v.* Eastern Counties Rail. Co., 2 Ex. 344.
(*y*) Gaffney *v.* Killen, 12 Ir. C. L. Rep. App. xxv.

him of it, and offering to rehear the witness in his presence; but the party may decline to accede to the proposition, and may properly apply to have the arbitration stopped, for he cannot tell what impression what the witness has already said may have made, and cannot feel sure that what he might afterwards say would remove it (*z*).

behind party's back.

Corruption.

Corruption in an arbitrator (*a*), or a discovery that an umpire has improperly been appointed by lot, is a good ground for revoking the submission (*b*).

Umpire appointed by lot.

Arbitrator refusing to act.

If each party appoint an arbitrator, but one arbitrator will not act, and the party appointing him will not appoint another, the other party may apply to revoke the submission (*c*).

Rule discharged if arbitrator will obey direction of court.

Though the court be of opinion that an arbitrator has wrongly rejected admissible evidence, and that therefore the application for leave to revoke was a proper one, it will nevertheless discharge the rule, and permit the reference to go on, if it be satisfied that on hearing the opinion of the court the arbitrator will receive the evidence which he has rejected before, for it is discretionary with the court to grant or refuse the rule (*d*).

Court has discretion.

The matter is one entirely for the discretion of the court. In one case involving very large pecuniary interests, the House of Lords, thinking it right that the arbitrator should be compelled to state a case concerning certain evidence received by him, gave leave to revoke unless the parties agreed that the arbitrator should state a case (*e*). In a subsequent instance, where the arbitrator had by the submission power to decide the question of liability before assessing the damages, he orally decided on the liability in a manner which the defendant thought contrary to law, and rejected certain evidence. The defendant thereupon asked for leave to revoke. The court, treating the decision in the case just above cited (*f*) as an act of discretion and not a decision of

(*z*) Drew *v.* Drew, H. L. March 8, 1855.

(*a*) Drew *v.* Leburn, 2 Macq. 1.

(*b*) The European and American Steam Shipping Co. *v.* Croskey, 29 L. J. C. P. 155, S. C. 8 C. B. N. S. 397.

(*c*) Cooper *v.* Shuttleworth, 25 L. J. Ex. 114.

(*d*) Hart *v.* Duke, 32 L. J. Q. B. 55; Robinson *v.* Davies, 5 Q. B. D. 26.

(*e*) East and West India Docks *v.* Kirk and Randall, 12 App. Ca. 738.

(*f*) James *v.* James, 23 Q. B. D. 12, on appeal from 22 Q. B. D. 669. See Sims *v.* Lenders, 3 Times L. R. 428.

law, refused even to consider the legal questions as they had been left to the arbitrator, and rejected the application for leave to revoke.

Submission by order of county court not revocable without leave.

A submission by order of a judge of a county court is not "revocable by either party, except by consent of the judge" (*g*). From this section it would seem that with such consent either party might revoke it, notwithstanding the other wished the reference to proceed.

The proviso, however, which contains a clause that the judge "may, with the consent of *both* parties aforesaid, revoke the reference," must be noticed. The ordinary construction of the sentences would imply that this clause applied only in case of proceedings after the award was made; but after the award is made there is no longer anything to revoke: the arbitrator's power is gone. If the clause is to be considered as generally applicable, it would seem in some measure to militate from the construction put on the first part of the section.

Submission under the Lands, Railways, and Companies Clauses Acts not revocable.

On a reference under the Lands Clauses Consolidation Act, 1845 (*h*), the Railways Clauses Consolidation Act, 1845 (*i*), and the Companies Clauses Consolidation Act, 1845 (*k*), each party, on the request of the other, shall nominate and appoint an arbitrator in the manner prescribed in the several acts; and after any such appointment shall have been made, neither party shall have power to revoke the same without the consent of the other.

Railway Companies Arbitration Act, 1859.

Under the Railway Companies Arbitration Act, 1859, one company having appointed an arbitrator cannot revoke the appointment without the previous consent in writing of the other companies under their common seal (*l*).

Arbitrator appointed by Local Government Board.

Under the repealed act (3 & 4 W. IV. c. 42), the court could not, it seems, give leave to revoke the appointment of an arbitrator appointed by the Local Government Board (*m*).

Order of equity revocable.

III. *Revocation in equity at the will of a party.*]—A submission by order of equity was as revocable as a submission

(*g*) 51 & 52 Vict. c. 43, s. 104. See Appendix of Statutes.
(*h*) 8 & 9 Vict. c. 18, s. 25.
(*i*) 8 & 9 Vict. c. 20, s. 126.
(*k*) 8 & 9 Vict. c. 16, s. 128.
(*l*) 22 & 23 Vict. c. 59, s. 11.
(*m*) Wakefield Corporation *v.* Wakefield Guardians, 4 Times L. R. 561.

in an action at common law, and the same consequences generally followed (*n*).

Submission sometimes subsisting in equity after revocation.

When the submission was revoked without just and reasonable grounds, although the authority of the arbitrators was gone at law, yet a court of equity has in certain cases considered the agreement containing the submission as in some measure subsisting, and refused its assistance to the party who had so improperly revoked (*o*). The Court of Chancery refused an injunction to prevent a creditor from selling lands which had been conveyed to him as a security for his debt, on the terms that the amount of the debt was to be settled by arbitration, and that the lands were not to be sold until two months after the award, the arbitrators having, in fact, made their award, though after the debtor who was the applicant to the court had revoked their authority (*p*). Under a like persistence of the arbitrators in making an award despite of a revocation, the same court declined to grant an injunction to prohibit the purchaser from taking possession of a wharf which was agreed to be sold at a price to be fixed by the arbitrators (*q*).

Submission made rule not revocable in Ireland.

The following case cannot, it is apprehended, be considered to have been good law in England. On a motion before the Irish Court of Chancery to set aside an award pursuant to a submission made an order of Chancery, under the Irish stat. 10 W. III. c. 14 (*r*), on the ground that the party moving had revoked the arbitrator's authority before the award was executed, the court refused the motion, and confirmed the award, on the ground that after the submission was made an order of court, the party had no longer any power to revoke (*s*).

Bankruptcy no revocation.

IV. *Bankruptcy no revocation.*]—The bankruptcy of a party, subsequent to a reference, will not of itself operate as a revo-

(*n*) Haggett *v.* Welsh, 1 Sim. 134; Hide *v.* Petit, 1 Cas. in Chanc. 185, S. C. 2 Freem. 133.

(*o*) Pope *v.* Lord Duncannon, 9 Sim. 177; Hall *v.* Ellis, 9 Sim. 530; Warner *v.* Powell, L. R. 3 Eq. C. 261.

(*p*) Harcourt *v.* Ramsbottom, 1 Jac. & W. 505.

(*q*) Pope *v.* Lord Duncannon, 9 Sim. 177.

(*r*) This statute is identical with the English Act, 9 & 10 W. III. c. 15.

(*s*) O'Sullivan *v.* Hutchins, cited in Bignold *v.* Springfield, 7 C. & F. 85.

cation of the submission, and the trustee in bankruptcy has no power to revoke it (*t*).

It was in one case decided that the bankruptcy of one party justified his opponent in revoking the submission (*u*). And it probably would now be considered by the court or a judge as a good ground for allowing a revocation (*x*).

Arbitrator as stakeholder.

In an old case, where the arbitrator stood in the situation of a stakeholder, the court refused to set aside the award, leaving the party to raise the question in a more solemn manner; and on the case coming on again in another form, held, that as the authority of the arbitrator was there coupled with an interest, it was not in that instance, at least, revoked by the bankruptcy (*y*). The court has enforced an award against a bankrupt by attachment, notwithstanding his affidavit that the bankruptcy rendered it impossible for him to perform the award, by depriving him of the property ordered to be delivered up (*z*).

Award against bankrupt enforced.

Whether insolvency a revocation.

The case of insolvency does not seem to differ in principle from that of bankruptcy. Where a cause had been referred by a judge's order, and the plaintiff had been discharged under the Insolvent Debtors Act before the award was made, the Court of Exchequer refused an application on the part of the assignee to set aside the award on the ground of the insolvency operating as a revocation. The court refused to decide the question on such a motion, or to give any opinion on the effect of the insolvency (*a*).

Marriage of female party a revocation.

v. *Revocation by marriage of female party.*]—The marriage of a woman who is party to a submission before the award is made, is generally a countermand of the arbitrator's authority, for marriage was a civil death of all her rights (*b*), and it

(*t*) Edwards, Ex parte, 3 Mor. Bank. 179; Andrews *v.* Palmer, 4 B. & A. 250; Hemsworth *v.* Brian, 1 C. B. 131; Snook *v.* Hellyer, 2 Chitt. 43.

(*u*) Marsh *v.* Wood, 9 B. & C. 659.

(*x*) See Gaffney *v.* Killen, 12 Ir. C. L. Rep. App. xxv.

(*y*) Taylor *v.* Shuttleworth, 8 Dowl. 281; Tayler *v.* Marling, 2 M. & G. 55; Snook *v.* Hellyer, 2 Chitt. 43.

(*z*) Hemsworth *v.* Brian, 1 C. B. 131; R. *v.* Hemsworth, 3 C. B. 745; Haswell *v.* Thorogood, 7 B. & C. 705.

(*a*) Hobbs *v.* Ferrars, 8 Dowl. 779, S. C. 4 Jur. 825.

(*b*) Charnley *v.* Winstanley, 5 East, 266; Bac. Ab. Arb. B. Baron & Feme, E.; Com. Dig. Arb. D. 5; M'Can *v.* O'Ferrall, 8 C. & F. 30; Andrews *v.* Palmer, 4 B. & A. 250; Saccum *v.* Norton, 2 Keb. 865, 877; 3 Keb. 9.

needs not notice to the arbitrator to make the revocation complete (*c*). If there be others joined with her as co-plaintiffs and co-defendants in the reference, her marriage avoids the submission as to all of them (*d*). But as it is a voluntary act on her part, it is a breach of her agreement to abide by and perform the award, and renders her and her husband liable to an action (*e*).

Married Women's Property Act.

Perhaps these propositions may have to be modified in certain cases by the Married Women's Property Act, 1882 (*f*).

Change in character of arbitrator.

VI. *Revocation by the refusal to act, or death of the arbitrator.*]—This ground of defeating the submission will be materially diminished by the provisions of the Arbitration Act, 1889, noticed below. A change in the character of the arbitrators does not of itself effect a termination of their authority. Where arbitrators were made by order of Chancery commissioners to determine the controversy between the parties, they still retained the authority given them by the submission (*g*).

Arbitrator's refusal to proceed.

It was decided in equity, by Lord Chancellor Eldon, that if arbitrators refused to proceed with a suit referred to them, the suit might be prosecuted as if no reference had been made; and in giving judgment, Lord Eldon put it on the same footing as a case where one of the arbitrators had died (*h*).

Revocation by disagreement when there is an umpire.

When there were two arbitrators, and also an umpire, who was to decide in case of their disagreement, and no time was limited for making the award, the authority of the arbitrators at common law was terminated by their disagreement, and that of the umpire commenced (*i*).

Death of arbitrator formerly a revocation.

Formerly the death of the arbitrator which of necessity terminated his powers, defeated the submission, and opened the whole matter (*k*). The latter result could, however, be prevented

(*c*) Com. Dig. Arb. D. 5; White v. Gifford, Rolle, Ab. Auth. E. 4, p. 331; Vin. Ab. Authority, 1, 3.

(*d*) Com. Dig. Arb. D. 5; White v. Gifford, Rolle, Ab. Auth. E. 4, p. 331; Bac. Ab. Baron & Feme, E.

(*e*) Charnley v. Winstanley, 5 East, 266. See also Lambert v. Hutchinson, 2 M. & G. 858, where the point might have been raised.

(*f*) 45 & 46 Vict. c. 75.

(*g*) Hill v. Hill, Vin. Ab. Auth. I. 2.

(*h*) Crawshay v. Collins, 3 Swanst. 90.

(*i*) Tunno v. Bird, In re, 5 B. & Ad. 488. See P. II. ch. 4, s. 4, d. 4, commencement of the umpire's authority.

(*k*) Crawshay v. Collins, 3

by the introduction of proper clauses into the submission, providing for the appointment of a new arbitrator in case of the decease of the first (*l*).

Death or refusal of one of several arbitrators.

If there were more than one arbitrator, the death of any one would, it is presumed, terminate the power of all, unless the submission expressly provided that the survivors might act alone (*m*). Possibly the refusal of one of several arbitrators to proceed with the reference might have had the same effect, for the authority of arbitrators, being derived from private individuals, is different from that possessed by persons holding a public trust, and performing a public duty, and must be executed by all (*n*).

Arbitration Act, 1889. Appointing new arbitrators on death, refusal, or incapacity.

But by the Arbitration Act, 1889 (52 & 53 Vict. c. 49), in case of the death, refusal to act, or incapacity, of a single arbitrator, the court or a judge may appoint a new one if the parties do not [s. 5], and by s. 6 of the same act, where one of two arbitrators fails for the like causes, unless the party appointing him appoints a fresh arbitrator, the remaining arbitrator may be appointed to act alone.

Death, &c., of arbitrator under the Lands and Railways Clauses Consolidation Acts.

By the clauses respecting arbitrations under the Lands Clauses Consolidation Act, 1845 (*o*), and the Railways Clauses Consolidation Act, 1845 (*p*), provision is made that "if when a single arbitrator shall have been appointed, such arbitrator shall die or become incapable to act before he shall have made his award, the matters referred to him shall be determined under the provisions of this or the special act, in the same manner as if such arbitrator had not been appointed."

When the parties have each appointed an arbitrator under either of the above statutes (*q*), if either arbitrator die or become incapable, the party who appointed him may appoint

Swanst. 90; Cheslyn *v.* Dalby, 2 Y. & C. 170; Hooper *v.* Abrahams, 4 Moore, 3.

(*l*) See form of such clause in Jarman & Bythewood's Convey. vol. i. pp. 533, 619.

(*m*) Crawshay *v.* Collins, 3 Swanst. 90.

(*n*) R. *v.* Whitaker, 9 B. & C. 648; Grindley *v.* Barker, 1 B. & P. 229; R. *v.* Hobbes, Noy, 47. See Vin. Ab. Auth. B.; Doe *d.* Nicholson *v.* Middleton, 3 B. & B. 214.

(*o*) 8 & 9 Vict. c. 18, s. 29. See Appendix of Statutes.

(*p*) 8 & 9 Vict. c. 20, s. 130. See Appendix of Statutes.

(*q*) 8 & 9 Vict. c. 18, ss. 26, 30, and 8 & 9 Vict. c. 20, ss. 127, 131. See Appendix of Statutes.

another in his place, and if he fail to do so within seven days after notice in writing, the remaining arbitrator may proceed ex parte; so if either arbitrator refuse, or for seven days neglect to act, the remaining arbitrator may proceed ex parte, and make an award (*r*).

Under the Companies Clauses Consolidation Act.

Under the Companies Clauses Consolidation Act the provisions are similar, except that in all the four events of death, incapacity, refusal, or neglect to act, the party has the option of appointing a new arbitrator within seven days after notice in writing (*s*).

Railway Companies Arbitration Act, 1859.

Under the Railway Companies Arbitration Act, 1859 (22 & 23 Vict. c. 59), the companies making the appointments are to supply vacancies in the arbitrators; if they do not, the Board of Trade may make the appointment.

Arbitration Act, 1889.

VII. *Revocation by the death of a party.*]—By the Arbitration Act, 1889, s. 1, a submission is stated to be generally irrevocable except by leave of the court. This probably only means "not revocable by any party," as in the statute of Will. IV. (*t*). If so, the new Act does not alter the effect of the death of a party. Generally, if either of two parties to a submission died before the award was made, the power of the arbitrator under the old law was wholly gone (*u*).

Death of a party a revocation.

A man who agrees to a reference may know that he is capable of giving explanations which his heir or personal representative cannot give. He knows that if his opponent be examined as a witness, he may be examined also. He may therefore agree to bind himself to an arbitration, but not to bind those who are to succeed him (*x*). That this principle is founded on wisdom is proved from its having been adopted into the laws of England, Scotland (*y*), Spain (*z*), and into the

(*r*) See P. II. ch. 4, s. 3, d. 3, as to proceedings by remaining arbitrator.

(*s*) 8 & 9 Vict. c. 16, s. 129. See Appendix of Statutes. See P. II. ch. 4, s. 3, d. 3, as to proceedings by remaining arbitrator.

(*t*) See Smith *v.* Nelson, 25 Q. B., per Lord Esher, M. R., at p. 550.

(*u*) Tyler *v.* Jones, 3 B. & C. 144.

(*x*) The President, &c. of Orphan Board *v.* Van Reenen, 1 Knapp, Pr. Council Rep. 83.

(*y*) Erskine's Institutes, Book IV. tit. 3, sec. 16, 12th ed.; Caledonian Rail. Co. *v.* Lockhart, 3 Macq. 808.

(*z*) Johnson's Spanish Law, p. 295.

civil law (*a*). The law of France, indeed, is not in exact accordance with the above, for it seems an arbitration in France is not stopped by the death of one of the parties, if his heir be of full age (*b*).

Whether death of one of several parties a revocation.

An exception to the universality of the rule, that death is a revocation, occurs where there are several parties on the same side. For it is very questionable, as a general proposition of law, whether the death of one of them avoids an after-made award (*c*). Where an action would not abate by reason of the death of one party, it seems probable that a reference of that action is not vacated by such death, but that the power of the arbitrator remains to bind the survivors, though not the representatives of the deceased (*d*).

Though verdict taken, death a revocation.

But the analogy of an action will not hold in every respect, for though the death of a single plaintiff or defendant after verdict will not abate an action, yet it has been often decided that taking a verdict on a submission at Nisi Prius does not prevent the death happening after it revoking it altogether (*e*), for the finding of the jury is a mere formal entry (*f*). This was held to be the effect of a death when the plaintiff died in the morning, and the award was executed in the evening of the same day (*g*). A distinction was taken in an older case, that death was a revocation when the submission at Nisi Prius embraced other matters than those to which the verdict could apply, but not when the cause only was referred (*h*). That distinction, however, was expressly overruled both in the Queen's Bench and Common Pleas (*i*).

Not when arbitrator to state a special case.

A distinction is taken as to the effect of death as a revocation when the referee has to state a case instead of make an award. Where a cause was by order of Nisi Prius referred to a barrister, who was to state a special case, and the case was stated and delivered after the death of the defendant,

(*a*) Dig. lib. 4, tit. 8, I. 27; Domat, lib. 1, tit. 14, s. 1, pt. 6.

(*b*) Code de Proc. Civ. p. 11, liv. 3, tit. Unique, s. 1013.

(*c*) Hare and Milne, In re, 6 Bing. N. C. 158.

(*d*) Edmunds *v.* Cox, 2 Chitt. 432.

(*e*) Rhodes *v.* Haigh, 2 B. & C. 345; Cooper *v.* Johnson, 2 B. & A. 394.

(*f*) Toussaint *v.* Hartop, 1 Moore, 287; 7 Taunt. 571; Prentice *v.* Reed, 1 Taunt. 151.

(*g*) Potts *v.* Ward, 1 Marsh. 366.

(*h*) Bower *v.* Taylor, cited in Rhodes *v.* Haigh, 2 B. & C. 346, S. C. cited 7 Taunt. 574.

(*i*) Cooper *v.* Johnson, 2 B. & A. 394; Rhodes *v.* Haigh, 2 B. & C. 345; Toussaint *v.* Hartop, 7 Taunt. 571.

the court refused to set it aside, for it was said if it had been the case of a special verdict, and one of the parties had died before the verdict was prepared, that would have made no difference; that the referee was a person put in the place of the judge to settle the points for the opinion of the court; and that if the referee had not been substituted, the judge might have proceeded to settle the case after the death of the parties (*k*).

Not by Scotch law when arbiter to fix price of estate.

When an arbiter is appointed by vendor and purchaser to fix on the price of an estate sold, by the law of Scotland the arbiter is empowered to proceed, notwithstanding the death of either party (*l*).

Parties with several interests, death of one.

When one submission includes several parties on the same side, who have each of them separate interests, the death of one avoids the submission only as to him. Thus, where the owners of a ship, and the several freighters, who had distinct interests in the cargo, submitted some differences which had arisen to arbitration, it was holden, that the death of one of the freighters before the award was made affected it only as to him, and was no revocation as to the others (*m*).

Death of infant revocation as to guardian.

In one instance the court practically treated the death of an infant as a revocation of a submission, so far as it affected parties who were his guardians and trustees. They had joined in a reference affecting lands, of which the infant was tenant for life. He died pending the reference. An award made against them after his death was, on application to the court, set aside so far as it related to them (*n*).

No relief in equity on revocation by death.

Nor can equity give any assistance, though a party deceased has covenanted for himself, his heirs, and executors, to convey lands at a price to be fixed by arbitration, and the arbitrators have executed their award, valid in every respect except that the covenantee died before it was made; for in order to ground an application for a specific performance, the terms of the contract must, unless otherwise provided, be ascertained by the arbitrator in the lifetime of the parties (*o*).

Clause to pre-

To avoid the inconvenience which resulted from this rule

(*k*) James *v.* Crane, 3 D. & L. 661.

(*l*) Caledonian Rail. Co. *v.* Lockhart, 3 Macq. 808; Lord Selkirk *v.* Nasmith, Morr. 627.

(*m*) Reported 2 Archb. Practice, 1323, 13th ed.; 1605, 14th ed.

(*n*) Bristow *v.* Binns, 3 D. & R. 184.

(*o*) Blundell *v.* Brettargh, 17 Ves. 232.

of law, of death being a revocation, it was suggested by Lord Eldon that the contract might be framed so as to prevent its operation (*p*); and it was recommended by Lord Tenterden (*q*) that the parties should insert a clause in their submission providing that the death of either or any of them should not revoke the authority of the arbitrator, and that the award, in case of a death, should be delivered to the personal representative. Clauses to this effect have been generally adopted since, as they have been decided to be perfectly valid and efficacious to keep alive the authority of the arbitrator (*r*).

To prevent death being a revocation.

The usual clause runs thus: "That the award is to be delivered to the parties, or either of them, or if either of them should be dead before the making of the award, to their respective personal representatives requiring the same." From these words the law will imply a stipulation that the arbitrator's authority is not to be determined by a death, without there being any express provision to that effect (*s*).

Usual form of the clause.

The clause in question amounts to an agreement that the personal representative shall pay any sum of money found due from the deceased either in his lifetime or after his death. The personal representatives, indeed, cannot be compelled to appear before the arbitrator, nor can the award be enforced by attachment against them; but the assets of the deceased are bound by this agreement as by any other simple contract (*t*); and the executors will be bound to contribute to the costs of the reference and award which have been paid by a surviving party to the solicitor jointly employed by him and the deceased to conduct the reference on their behalf (*u*).

Effect of the clause.

In an action of tort referred to arbitration, before verdict, where the plaintiff died, and the award was made afterwards, it was held that this clause had no effect, and that the award was a nullity, as the right of action for the tort was determined by the death (*x*).

No effect in tort.

(*p*) Blundell *v.* Brettargh, 17 Ves. 232.

(*q*) Cooper *v.* Johnson, 2 B. & A. 394; Prior *v.* Hembrow, 8 M. & W. 873.

(*r*) M'Dougal *v.* Robertson, 4 Bing. 435; Dowse *v.* Coxe, 3 Bing. 20, S. C. 10 Moore, 272.

(*s*) Clarke *v.* Crofts, 4 Bing. 143; Lewis *v.* Winter, W. W. & D. 47.

(*t*) Lewin *v.* Holbrook, 2 Dowl. N. S. 991; Tyler *v.* Jones, 3 B. & C. 144; Dowse *v.* Coxe, 3 Bing. 20.

(*u*) Prior *v.* Hembrow, 8 M. & W. 873.

(*x*) Bowker *v.* Evans, 15 Q. B D. 565.

Enforcing award against survivors.

As against the surviving parties the award in an action of contract may generally be enforced by attachment. If, however, on the motion thus to enforce it, it can be made to appear to the court that the party called upon to perform the award has incurred any danger or lost any benefit by reason of the personal representative of the deceased party not having been brought before the arbitrators, in such case terms and conditions would probably be imposed by the court calculated to remove such danger or inconvenience; or the party would be left to his remedy by action on the award. But where the award is made in favour of the side of the deceased no such difficulty seems likely to occur (*y*).

Death no revocation under the Lands, Railways, and Companies Clauses Acts.

It is provided in the Lands Clauses Consolidation Act, 1845 (*z*), the Railways Clauses Consolidation Act, 1845 (*a*), and the Companies Clauses Consolidation Act, 1845 (*b*), with respect to references under those acts, that after the appointment of an arbitrator by either party, the death of either party shall not operate as a revocation.

(*y*) Hare *v.* Milne, In re, 6 Bing. N. C. 158. See Wrightson *v.* Bywater, 3 M. & W. 199.

(*z*) 8 & 9 Vict. c. 18, s. 25. See Appendix of Statutes.

(*a*) 8 & 9 Vict. c. 20, s. 126. See Appendix of Statutes.

(*b*) 8 & 9 Vict. c. 16, s. 128. See Appendix of Statutes.

CHAPTER IV.

THE POWER AND DUTY OF THE ARBITRATOR BEFORE MAKING THE AWARD.

Scope and contents of the fourth chapter.

AN endeavour has been made to comprise in this chapter a consideration of the chief things an arbitrator either may do, or must do, in the fulfilment of his office, up to the time of making his award.

The first section treats largely of the powers to be exercised, and of the duties to be performed, by the arbitrator in the ordinary course of a reference, and also includes some provisions respecting the attendance of parties and witnesses before him.

The second section, after showing the arbitrator's want of power to delegate his authority to another, discusses how far he may take, and adopt as his own, a scientific opinion on matters of fact, or a legal opinion as to a point of law.

In the third section are laid down rules for the conduct of the case, when there are several arbitrators jointly called upon to act, instead of one only.

The fourth section concludes the chapter with a dissertation on the mode of appointment, and on the powers and duties of an umpire.

SECTION I.

OF PROCEEDINGS IN THE REFERENCE.

1. *Serving the submission on the arbitrator.*]—When a cause is referred at Nisi Prius, the solicitor of one of the parties

Procuring and serving order of reference.

should procure the order of reference from the proper officer of the court (*a*), and serve it on the arbitrator without any great delay, for the original time limited for making the award is often very short; and if it expire before the submission is served on the arbitrator, the reference would be entirely defeated (*b*), unless the court or a judge on special motion should think fit, in the exercise of their discretion under the statute (*c*), to enlarge the time and thus to remedy the neglect. The submission in general should be left with the arbitrator, as it is the document which authorises his proceedings and defines his powers. He usually requires it, also, for the purpose of from time to time making the necessary indorsements on it. It is advisable, therefore, to take a copy of it before it is served.

Power of arbitrator to say how reference to be conducted.

II. *Power of the arbitrator to regulate the proceedings in the reference.*]—The mode in which the reference is to be conducted used to depend entirely upon the arbitrator. The courts will not often review his discretion, provided he acts within his authority according to the principles of justice, and behaves fairly to each party (*d*). It usually lies entirely with the arbitrator to appoint the time and place of meeting for proceeding in the reference, and it is the duty of the parties to attend to his appointment (*e*). In general, soon after the submission is made, the party who wishes to go on with the reference will call upon the arbitrator, deliver to him the submission, and request him to appoint a meeting. It is usual to try to arrange some day by agreement that is convenient for all parties; but if such an arrangement cannot be made and it be necessary for the arbitrator to make the appointment, he generally gives to the party applying for it a written appointment, specifying the time and place at which the parties and their witnesses are to appear (*f*). The arbitrator ought not to fix on too early a day, considering that he must give the parties time to get up their proofs

To fix time and place of meeting.

(*a*) Arch. Prac. 1324, 13th ed.; 1606, 14th ed.

(*b*) Doe *d.* Fisher *v.* Saunders, 3 B. & Ad. 783.

(*c*) 52 & 53 Vict. c. 49, s. 9.

(*d*) Tillam *v.* Copp, 3 C. B. 211; Hewlett *v.* Laycock, 2 C. & P. 574; Haigh *v.* Haigh, 31 L. J. Ch. 420, S. C. 3 De G. F. & J. 157.

(*e*) Fetherstone *v.* Cooper, 9 Ves. 67.

(*f*) For forms of appointment see Appendix of Forms, p. 752.

and collect their witnesses; nor, when either party is anxious to press on the case, ought he on light grounds to appoint a distant day, for delay in the decision often causes serious inconvenience to the party entitled to recover, and may amount even to practical injustice.

Serving appointment on opponent.

The party obtaining the written appointment should serve a copy of it on his opponent without delay, or at least within a reasonable time before the day of meeting.

Power of arbitrator to rescind appointment.

The arbitrator may revoke the appointment he has given if he shall think fit. If from any cause either party find that he will not be able, or that it will be very inconvenient for him to attend at the specified time, he should give timely notice of it both to his opponent and to the arbitrator; and the latter will in his discretion either insist on his attendance or put off the meeting and appoint another day (*g*).

The exercise of his discretion when reviewed by the court.

But the discretionary power of the arbitrator in the whole conduct of the case, though large, never was absolute (except perhaps in the case where a government board was made an arbitrator by statute) (*h*), and his decision would have been reviewed by the courts and his award set aside if it were made to appear that in the course which he had pursued he had acted, though with the best intentions, unfairly to either party (*i*).

Notice of attendance by counsel.

It is the duty of a party who intends to employ counsel in the reference to give notice of his intention to his opponent previous to the meeting, in order that the latter may, if he please, provide himself with the like assistance. On an occasion where no such notice had been given, and one side appeared by counsel, and the other side complained of the want of notice, and begged for a postponement in consequence with a view to instruct counsel on his part, and the arbitrator refused to put off the meeting, the court held, that in refusing the request he had not performed his duty of acting fairly between the parties, and consequently annulled the award (*k*).

Ordinary course of a reference.

Generally, the inquiry before an arbitrator is assimilated as near as may be to the proceedings on a trial in the courts.

(*g*) See Eastham *v.* Tyler, 2 Bail Court Rep. 136.

(*h*) The Newry and Enniskillen Rail. Co. *v.* The Ulster Rail. Co., 2 Jur. N. S. 936, S. C. 8 De G. M. & G. 487.

(*i*) Haigh *v.* Haigh, 31 L. J. Ch. 420, S. C. 3 De G. F. & J. 157.

(*k*) Whatley *v.* Morland, 2 Dowl. 249.

In the ordinary course, at the appointed time and place, the parties appear with their witnesses to support their respective cases. They are usually attended or represented by their solicitors or counsel, who conduct the proceedings on behalf of their respective clients.

Refusing to hear counsel.

It has been decided in the Court of Common Pleas, that it is competent to arbitrators under the Friendly Societies Act to decline to hear counsel if they think fit, and it seems that all arbitrators have the like discretion, though in many cases they would be wrong if they refused the party the privilege of appearing by counsel (*l*).

Refusing to allow stranger to be present.

In an earlier case in the same court, an arbitrator in a farming case, who refused to allow a stranger skilled in agriculture to remain in the room to assist the defendant's attorney in his conduct of the case, was held not to have exceeded the discretion vested in him by law (*m*). But circumstances may arise in which, for the ends of justice, a peculiar course should be adopted, and, it has been said, may even justify the arbitrator in excluding the parties and their solicitors from the hearing, and in examining the witnesses himself in their own houses (*n*). But it is apprehended the circumstances must be very extraordinary to authorise a proceeding at first sight so irregular.

Excluding son of party and shorthand writer.

And more recently, when an arbitrator had excluded from some of the meetings the son of one of the parties who was conversant with the accounts of the partnership which were in dispute, and also a shorthand writer, the attendance of both of whom the party wished to have, the Lords Justices set aside the award, saying that the party's interest might have been unfairly prejudiced, no reasons being shown to justify the exclusion (*o*).

Arbitrator calling in an attorney.

Where a cause was referred to a mining agent, objection having been made by the defendant to a legal arbitrator, and the mining agent called in an attorney to sit with him, and the defendant protested in vain against it and retired, the

(*l*) Macqueen *v.* The Nottingham Caledonian Society, 9 C. B. N. S. 793; Collier *v.* Hicks, 2 B. & Ad. 663.

(*m*) Tillam *v.* Copp, 3 C. B. 211.

(*n*) Hewlett *v.* Laycock, 2 C. & P. 574. See Matson *v.* Trower, 1 Ry. & M. 17.

(*o*) Haigh *v.* Haigh, 31 L. J. Ch. 420, S. C. 3 De G. F. & J. 157.

award made ex parte was set aside, the court considering the course pursued by the arbitrator objectionable (*p*).

Employing accountant.

An arbitrator authorised to employ any person *not objected to by any of the parties* as an accountant to assist him, after the last meeting and without notice to any of the parties employed an accountant: the proceeding was held irregular and vitiating the award (*q*).

Examining sick person.

An arbitrator may properly and conveniently take the examination of a sick or infirm person at that person's own residence (*r*).

Ordinary course of procedure on reference.

On the reference of a cause at Nisi Prius, it is a common and convenient practice for the plaintiff's counsel to open his case very succinctly indeed, or to make no opening at all, and to proceed at once to sustain his case by proof, reserving his speech till the reply. The arbitrator is not unfrequently acquainted beforehand with the general case which each party proposes to set up, as it is a common practice, especially if the arbitrator request it, for the parties to leave their briefs with him beforehand. When the plaintiff's evidence is finished, the defendant, when he has a case of his own to prove, states the nature of his defence with like brevity, and produces the oral and documentary proof in support of it; after which he makes his address, summing up his own case, and commenting on that of the plaintiff. If the defendant have no evidence to offer he at once, at the close of the plaintiff's evidence, makes his speech in opposition to the plaintiff's claim. The plaintiff then has the reply (or rather his turn to speak, as he has made no previous address), and he then sets forth his own case fully, and attacks his opponents with such observations on the facts, and such arguments as to the points of law, as seem to him calculated to have weight with the arbitrator; and thus the case is closed on both sides.

Whether particulars of plaintiff's demand before arbitrator.

The particulars of the plaintiff's demand under the old practice were not necessarily before the arbitrator, therefore if the plaintiff had not brought them before him, and the defendant sought to restrict the plaintiff's claim to their amount, the defendant should himself have produced them (*s*).

(*p*) Proctor *v.* Williamson, 29 L. J. C. P. 157, S. C. 8 C. B. N. S. 386.

(*q*) Tidswell, In re, 33 Beav. 213.

(*r*) Tillam *v.* Copp, 3 C. B. 211.

(*s*) Kenrick *v.* Phillips, 9 Dowl. 308.

Arbitrator accepting hospitality from a party.

It is very improper in an arbitrator to accept hospitality from one of the parties; and if the invitation be given with the intent or have the effect of inducing the arbitrator to act unfairly, the court will set aside the award (*t*).

Arbitrator must perform condition precedent.

Before taking any step in the reference, it is advisable for the arbitrator to look carefully to the terms of the submission, to see if it contain any provision which makes the doing of any act a condition precedent to his entering upon the arbitration. As, for instance, if the agreement of reference direct that the arbitrator is to take a view of the premises, the subject of the dispute, a certain time before the proceeding with the reference, he should take such view within the prescribed period, or it might afterwards be urged against the validity of the award, that he had not acted in pursuance of the powers entrusted to him (*u*).

Declaration under the Lands and Railways Clauses Acts, condition precedent.

Under the Lands Clauses Consolidation Act, 1845 (*v*), and the Railways Clauses Consolidation Act, 1845 (*x*), before any arbitrator or umpire shall enter into the consideration of the matters referred to him, under the provisions of those acts, he is to make and subscribe, in the presence of a justice, a solemn declaration in the form provided in the statutes, that he will decide honestly and to the best of his ability. An umpire who was appointed on the 17th, and made his declaration on the 27th of the same month, before he entered on the matter referred, was held to have made it in due time (*y*).

Declaration may be made before any justice.

The declaration may be made before a justice of the peace of any county. The interpretation clause, s. 3, does not limit the jurisdiction to take it to a justice of the peace of the county in which the matter in dispute arose (*z*).

Railway Companies Arbitration Act, 1859.

Under the Railway Companies Arbitration Act, 1859, "except where and as the companies otherwise agree, the arbitrator, the arbitrators, and the umpire respectively may proceed in the business of the reference in such manner as he and they respectively shall think fit" (*a*).

(*t*) Hopper, In re, 8 B. & S. 100, S. C. 36 L. J. Q. B. 97, S. C. L. R. 2 Q. B. 367; Moseley *v.* Simpson, L. R. 16 Eq. 226.

(*u*) Spence *v.* Eastern Counties Rail. Co., 7 Dowl. 697.

(*v*) 8 & 9 Vict. c. 18, s. 33. See Appendix of Statutes.

(*x*) 8 & 9 Vict. c. 20, s. 134. See Appendix of Statutes.

(*y*) Bradshaw *v.* E. & W. India Docks, &c. Rail. Co., 12 Q. B. 562; Levick *v.* Epsom and Leatherhead Rail. Co., 1 L. T. N. S. 60.

(*z*) Davies *v.* The South Staffordshire Rail. Co., 21 L. J. M. C. 21.

(*a*) 22 & 23 Vict. c. 59, s. 19.

Compulsory references.

The master or other arbitrator, on a compulsory reference under the Common Law Procedure Act, 1854, had, it seems, the same powers in general as arbitrators on references by consent (*b*).

Arbitration Act, 1889. Conduct of references under order of court.

By the Arbitration Act, 1889, s. 15, in references by order of court the arbitrator is deemed to be an officer of the court, and "shall have such authority and shall conduct the reference in such manner as may be prescribed by rules of court, and subject thereto, as the court or a judge may direct." This provision does not apply to arbitrations under references out of court. The rules of court are as follows:—

Place of trial.

Order XXXVI. r. 48, R. S. C. (1883), "Where any cause or matter, or any question in any cause or matter, is referred to a referee, he may, subject to the order of the court or a judge, hold the trial at or adjourn it to any place which he may deem most convenient, and have any inspection or view, either by himself or with his assessors (if any), which he may deem expedient for the better disposal of the controversy before him. He shall, unless otherwise directed by the court or a judge, proceed with the trial de die in diem, in a similar manner as in actions tried with a jury." This latter provision is directory only (*c*). And where the arbitrator is appointed "otherwise than by order of the court," the provisions as to sitting de die in diem do not apply (*d*).

View.

Trial de die in diem.

Evidence.

R. 49. "Subject to any order to be made by the court or judge ordering the same, evidence shall be taken at any trial before a referee, and the attendance of witnesses may be enforced by subpœna, and every such trial shall be conducted in the same manner, as nearly as circumstances will admit, as trials are conducted before a judge."

Attendance of witnesses.

Discovery.

R. 50. "Subject to any such order as last aforesaid, the referee shall have the same authority with respect to discovery and production of documents, and in the conduct of any reference or trial, and the same power to direct that judgment be entered for any or either party, as a judge of the High Court."

Conduct of reference.

Judgment.

The Queen's Bench Divisional Court refused to hear an

(*b*) Hogg *v.* Burgess, 3 H. & N. 293, S. C. 27 L. J. Ex. 318; Holloway *v.* Francis, 9 C. B. N. S. 559.

(*c*) Robinson *v.* Robinson, 35 L. T. N. S. 837.

(*d*) Order XXXVI. r. 55 (c), Dec. 1889.

appeal from the refusal of a referee to postpone the hearing, and said the applicant might apply to a judge at chambers (*e*).

No power to commit.

R. 51. "Nothing in these rules contained shall authorize any referee to commit any person to prison or to enforce any order by attachment or otherwise."

R. 52 gives power to the referee to state a special case.

Official referee.

R. 52 (a). "Rules 49 to 52 of Order XXXVI. shall apply where any cause or matter or any question or issue of fact is referred to an official referee."

Arbitrator under an order to have powers of official referee.

R. 55 (c). "The provisions of rules 48 to 55 of Order XXXVI. and of rule 55 (b) (*f*) shall apply, where any cause or matter, or any question or issue of fact therein, is referred to an officer of the court or to a special referee or arbitrator. Provided that where the arbitrator is appointed otherwise than by an order of the court, the provisions of rule 48, as to sittings de die in diem, shall not apply."

Sittings of official referee.

The hours for the official referees to sit are to be from ten till four p.m. on every day during the sittings (*g*), except Saturday, when they sit from ten till one p.m. (Ord. LXIII. r. 16 (1883).)

When witness bound to attend.

III. *Enforcing the attendance of witnesses.*]—When a cause was referred by judge's order, or order of Nisi Prius, or rule of court, a witness was always bound to attend before the arbitrator (*h*), though before the modern statute the courts had no authority to make a specific order on the witness, enforcing his attendance (*i*). On references by other submissions, the attendance of the witness was purely voluntary (*k*).

Compulsory provision by 3 & 4 W. IV. c. 42, s. 40.

The defects in the law on this subject were remedied as to the courts of law by the provisions of the act 3 & 4 W. IV. c. 42, s. 40 (*l*). But this act has been repealed, and the

(*e*) Richard *v.* Talbot, 38 W. R. 478.

(*f*) Rule 55 (b) gives official referee power over costs.

(*g*) The sittings begin and end on the following days: — The Michaelmas Sittings on 24th October to 21st December; Hilary Sittings, 11th January to Wednesday before Easter; Easter Sittings, on Tuesday after Easter week to Friday before Whit-Sunday; Trinity Sittings, Tuesday after Whitsun week to 12th Aug. Order LXIII. r. 1; and Order in Council, Dec. 12, 1883.

(*h*) Webb *v.* Taylor, 1 D. & L. 676. See Taylor on Evidence, 858.

(*i*) Wansell *v.* Southwood, 4 M. & R. 359; Hall *v.* Ellis, 9 Sim. 530.

(*k*) Webb *v.* Taylor, 1 D. & L. 676.

(*l*) The Irish Act (3 & 4 Vict. c. 105), s. 64, has provisions like to those of the statute of W. IV.

enactments now in force are sections 8 and 18 of the Arbitration Act (52 & 53 Vict. c. 49), which are in the following words:—

References by Consent out of Court.

Witness summoned by subpœna.

Sect. 8. "Any party to a submission may sue out a writ of subpœna ad testificandum, or a writ of subpœna duces tecum, but no person shall be compelled under any such writ to produce any document which he could not be compelled to produce on the trial of an action."

General.

Power to compel attendance of witness within United Kingdom.

Sect. 18.—(1.) "The court or a judge may order that a writ of subpœna ad testificandum or of subpœna duces tecum shall issue to compel the attendance before an official or special referee, or before any arbitrator or umpire, of a witness wherever he may be within the United Kingdom.

Habeas corpus.

"(2.) The court or a judge may also order that a writ of habeas corpus ad testificandum shall issue to bring up a prisoner for examination before an official or special referee, or before any arbitrator or umpire."

Subpœna.

By Order XXXVI. r. 49 (1883) (set out *ante*, p. 177), the attendance of witnesses may be enforced by subpœna.

Rule absolute in first instance.

As the court, under the old statute of W. IV., in granting an order for the attendance of witnesses, acted in a ministerial rather than in a judicial capacity, the rule was absolute in the first instance, when the order of reference had been made a rule of court (*m*).

Serving the rule or order.

When the judge's order or rule of court for the attendance of the witness had been obtained, a copy of it, and also of the appointment, should, under the old law, have been served upon the witness a reasonable time before the day fixed for the attendance, the originals being at the same time shown to him, and a sum sufficient for his expenses and loss of time being paid or tendered to him at the same time. If the witness did not attend pursuant to the rule or order, he would have been guilty of a contempt of court, and liable to an attachment (*n*).

(*m*) Guarantee Society and Levy, In re, 1 D. & L. 907.

(*n*) Archb. Pract. 1328, 13th ed. See the cases as to bringing up

PART II. CH. IV. S. 1.

But the present practice of issuing subpœnas is more convenient (*o*).

Authority of court over parties.

Over the parties, as distinguished from witnesses, the court in general possesses authority independently of any statute, by virtue of the parties' own agreement in the submission to produce all documents (*p*), either expressed or deemed to be included therein by the Arbitration Act, 1889, s. 2.

Discovery.

On a reference of an action in Chancery in 1882, by a judge's order, it was held that under the R. S. C. 1875, Order XXXI. r. 12, the court had no jurisdiction to grant an order for an affidavit as to documents, but that the whole jurisdiction as to discovery was transferred to the arbitrator (*q*).

Statute 16 & 17 Vict. c. 30, s. 9.

The statute 16 & 17 Vict. c. 30, s. 9, empowers a secretary of state or any judge to issue a warrant "for bringing up any prisoner or person confined in any gaol, prison, or place under any sentence or commitment for trial or otherwise (except under process in any civil action, suit, or proceeding), before any court, judge, justice, or other judicature to be examined as a witness in any cause or matter, civil or criminal, depending or to be inquired of, or to be determined in, before such court, judge, justice, or judicature." This provision, if liberally construed, may be held to apply to the domestic forum of an arbitrator, especially where he is appointed pursuant to any statute.

Statute 17 & 18 Vict. c. 34.

The statute 17 & 18 Vict. c. 34, under which the attendance of a witness from Scotland or Ireland may be compelled in an action at Westminster, did not authorize an order being made to bring a person from Ireland to appear as a witness before a master, upon a compulsory reference under the Common Law Procedure Act, 1854 (*r*), nor where an action and all matters in difference were referred by consent (*s*).

Bankers' books.

Copies of bankers' books are evidence of the books before arbitrators, and may be verified by affidavit (*t*).

witnesses under the repealed statutes:—Graham *v.* Glover, 25 L. J. Q. B. 10, S. C. 4 E. & B. 591; Marsden *v.* Overbury, 18 C. B. 34, S. C. 25 L. J. C. P. 200; Hall *v.* Ellis, 9 Sim. 530; Clarbrough *v.* Toothill, 17 Ch. D. 787; Curtis *v.* Bligh, 3 Jur. 1152; Woodcroft and Jones, In re, 9 Dowl. 538; Ricketts, In re, 3 N. R. 281, S. C. 9 L. T. N. S. 405.

(*o*) See Rooney *v.* Whiteley, W. N. (1883) 225.

(*p*) Arbuckle *v.* Price, 4 Dowl. 174.

(*q*) Penrice *v.* Williams, 23 Ch. D. 353.

(*r*) O'Flannagan *v.* Geoghegan, 16 C. B. N. S. 636.

(*s*) Hall *v.* Brand, 12 Q. B. D. 39.

(*t*) Stat. 42 & 43 Vict. c. 11.

County court judge.

A county court judge has authority to issue subpœnas to compel the attendance of witnesses before an arbitrator appointed by order of the county court and consent of parties (*u*). So he may commit to prison a party who refuses to produce documents according to the terms of the order of reference (*x*).

Referee's power to order production of documents.

Under the old law an official or special referee had no power to order the production of documents (*y*), but now by Order XXXVI. r. 50, set out *ante*, p. 177, he has the same power as to discovery and production of documents as a judge.

Commission.

A commission to take evidence abroad will sometimes be issued in aid of a statutory arbitration (*z*).

Inspecting company's books.

A dissentient member of an old company which is being wound up for the purpose of reconstruction under the Companies Clauses Consolidation Act, 1862, has no right to inspect the books of the old company for the purpose of determining whether to accept the price offered or to go on with the arbitration respecting the value of his interest (*a*).

Parties, solicitors, and witnesses privileged from arrest.

IV. *Parties attending the arbitrator privileged from arrest.*] —The power of compelling the attendance of witnesses gives to the proceedings of an arbitrator, even though no action be pending, a judicial character, and protects the parties, the solicitors, and the witnesses appearing before him, from arrest, eundo, morando, et redeundo, in the same manner as on a trial at law (*b*). But there is no protection in cases not within the statute, where the witness could not be compelled to attend. A voluntary attendance, however, when the

(*u*) Ackary, In re, 3 Ch. D. 125.

(*x*) Richards *v.* Cullern, 7 Q. B. D. 623.

(*y*) Dauvillier *v.* Myers, 17 Ch. D. 346; Rowcliffe *v.* Leigh, 4 Ch. D. 661.

(*z*) Mysore West Gold Mining Co., In re, 37 W. R. 794. See cases on the effect of the repealed statute, 17 & 18 Vict. c. 125 (Common Law Procedure Act, 1854):—Morris *v.* Morris, 6 E. & B. 383, S. C. 25 L. J. Q. B. 261; Mills *v.* Bowyer's Society, 3 Kay & J. 66; Aitkin's Arbitration, 3 Jur. N. S. 1296; Robson *v.* Lees, 30 L. J. Ex. 235, S. C. 6 H. & N. 258; Ricketts, In re, 3 N. R. 56, S. C. 9 L. T. N. S. 405; Thomson *v.* Anderson, L. R. 9 Eq. Cas. 523; Insull *v.* Moogen, 27 L. J. C. P. 75, S. C. 3 C. B. N. S. 359. See Hogg *v.* Burgess, 3 H. & N. 293, S. C. 27 L. J. Ex. 318.

(*a*) Glamorganshire Banking Co., Morgan's Case, 28 Ch. D. 620.

(*b*) Webb *v.* Taylor, 1 D. & L. 676; Spence *v.* Stuart, 3 East, 89; Randal *v.* Gurney, 3 B. & A. 252, S. C. 1 Chitt. Rep. 679; Ricketts *v.* Gurney, 7 Price, 699, S. C. 1 Chitt. Rep. 682; Moore *v.* Booth, 3 Ves. 350.

attendance might be enforced, does not deprive him of his privilege (*c*).

How far privileged during adjournments.

The protection extends during the adjournment of an arbitration from one period to another of the same day, or when the adjournment is from day to day, but not when many days are to elapse before the next meeting (*d*).

The arbitrator, however, has no power to discharge a witness or party arrested in his presence (*e*).

When examination on oath requisite.

v. *Examination of the witnesses on oath.*]—Most orders of reference require that the witnesses shall give their evidence on oath. When such is the case, the arbitrator is not at liberty to receive testimony given without that sanction, except by consent of the parties (*f*). By not persisting at the time of examination in requiring that the witness should be sworn, a party will be taken to have assented to the omission of the oath. Even where the defendant objected that a witness tendered by the plaintiff could not be examined, as he had not been sworn before a judge, but the objection being overruled by the arbitrator, afterwards called witnesses in answer who gave their testimony unsworn, he was taken not only to have waived any right to object, but to have acquiesced in the course pursued (*g*).

When discretionary.

If the submission run, that the arbitrator "shall be at liberty, if he shall think fit, to examine the parties and their respective witnesses on oath," it is left to the option of the arbitrator whether he will examine them on oath or not, although one of the parties require the witnesses to be sworn (*h*).

Effect of Arbitration Act, 1889.

Swearing witnesses.

One of the provisions of Schedule 1 of the Arbitration Act, 1889, which are deemed to be included in submissions by consent, is, that the parties and those claiming under them shall submit to be examined on oath, and that the witnesses shall be examined on oath if the arbitrators think fit. And by sect. 7 of that act, the arbitrators or umpire acting under a submis-

(*c*) Webb *v.* Taylor, 1 D. & L. 676.

(*d*) Spencer *v.* Newton, 6 A. & E. 623; Temple, Ex parte, 2 V. & B. 395; Russell, Ex parte, 1 Rose, 278.

(*e*) See Taylor on Evidence, 1132, 8th ed.

(*f*) Ridoat *v.* Pye, 1 B. & P. 91; Biggs *v.* Hansell, 16 C. B. 562.

(*g*) Allen *v.* Francis, 9 Jur. 691, S. C. 4 D. & L. 607, n.; Smith *v.* Sparrow, 16 L. J. Q. B. 139, S. C. 4 D. & L. 604.

(*h*) Smith *v.* Goff, 3 D. & L. 47.

sion out of court have power, unless a contrary intention appear, to administer an oath to parties and witnesses.

When the submission was silent on the point, an arbitrator could not insist on the witnesses being sworn before the stat. 14 & 15 Vict. c. 99, s. 16, empowered him to administer an oath to them (*i*).

Old practice swearing the witnesses.

As before the modern statutes (*k*) the arbitrator had no power to administer an oath (*l*), it was usual, when a cause was referred at Nisi Prius, and the witnesses were in court, to have them sworn in court. In other cases, when the submission contained a clause for making it a rule of court, or when the reference was by a rule of court or judge's order, the witnesses were sworn before a judge at chambers or in court at Westminster (*m*).

Before the court or a judge.

Not before commissioner for taking affidavits.

Witnesses who were to give vivâ voce evidence before an arbitrator could not be sworn before a commissioner for taking affidavits, even where the submission by judge's order provided for their being sworn before a judge or *before a commissioner duly authorized* (*n*).

Arbitrator, &c. may administer oath.

The statute, the 14 & 15 Vict. c. 99, s. 16, provides that "every court, judge, officer, commissioner, arbitrator, or other person now or hereafter, having by law or by consent of parties authority to hear, receive, and examine evidence, is hereby empowered to administer an oath to all such witnesses as are legally called before them respectively."

The usual course now is, to have the witnesses sworn before the arbitrator at the meeting at which they attend to give their evidence.

Arbitration Act, 1889. False evidence perjury.

By the Arbitration Act, 1889 (*o*), s. 22, "Any person who wilfully and corruptly gives false evidence before any referee, arbitrator, or umpire, shall be guilty of perjury as if the evidence had been given in open court, and may be dealt with, prosecuted, and punished accordingly."

Swearing witnesses

By the enactments of the Lands Clauses Consolidation Act,

(*i*) Caledonian Rail. Co. *v.* Lockhart, 3 Macq. 808.

(*k*) 3 & 4 W. IV. c. 42, s. 41; 14 & 15 Vict. c. 99, s. 16.

(*l*) Street *v.* Rigby, 6 Ves. 815; Wellington *v.* M'Intosh, 2 Atk. 569; Halfhide *v.* Fenning, 2 Bro. C. C. 336.

(*m*) Archbold's Practice, vol. ii. p. 1227, 7th ed., p. 1611, 14th ed.

(*n*) R. *v.* Hanks, 3 C. & P. 419; R. *v.* Norman, 1 Wils. 7; Hodsoll *v.* Wise, 4 M. & W. 536, S. C. sub nomine Hodson *v.* Wilde, 7 Dowl. 15; James *v.* Attwood, 5 Bing. N. C. 628.

(*o*) 52 & 53 Vict. c. 49.

under the Lands, Railways, and Companies Clauses Acts.

1845 (*p*), the Railway Clauses Consolidation Act, 1845 (*q*), the Railway Companies Arbitration Act, 1859 (*r*), and the Companies Clauses Consolidation Act, 1845 (*s*), arbitrators or umpires appointed under those statutes "may examine the parties or their witnesses on oath, and administer the oaths necessary for that purpose." And they should examine them on oath unless the solemnity is dispensed with (*t*).

Form.

No particular form of words is necessary to make the oath good in law (*u*).

Evidence by affidavits, when admissible.

In the case of an ordinary reference, if the submission provided "so that the witnesses be examined on oath," the award would be set aside if affidavits were read (*x*). It may here properly be noticed, that when a cause or other matter was referred by rule of court to the master, he was authorized to receive affidavits only, and not vivâ voce evidence, unless the court specially empowered him so to do (*y*).

Arbitrator under County Courts Act.

Previous to the statute 14 & 15 Vict. c. 99, s. 16, an arbitrator appointed under s. 77 of the County Courts Act, 9 & 10 Vict. c. 95, had no authority to administer an oath to a witness. If he did, and the witness swore falsely before him, the latter could not be punished for perjury (*z*).

Attempt to mislead arbitrator.

It may here be noticed that persons are liable to punishment for attempting to deceive an arbitrator in other ways than by perjury. The Court of Crown Cases Reserved held that manufacturing false evidence with intent to mislead a judicial tribunal which might be called into existence was an indictable misdemeanour at common law. Thus, when a man fraudulently tampered with samples of grain, taken according to the custom of the trade for the usual arbitration in case of dispute, with intent to make the quality appear different, he was held to be guilty of a misdemeanour, even though no arbitration took place (*a*).

(*p*) 8 & 9 Vict. c. 18, s. 32. See Appendix of Statutes.
(*q*) 8 & 9 Vict. c. 20, s. 133. See Appendix of Statutes.
(*r*) 22 & 23 Vict. c. 59, s. 18. See Appendix of Statutes.
(*s*) 8 & 9 Vict. c. 16, s. 132. See Appendix of Statutes.
(*t*) Wakefield *v.* Llanelly Rail., &c. Co., 34 Beav. 245.
(*u*) See the forms of oaths and affirmations in the Appendix of Forms.
(*x*) Banks *v.* Banks, 1 Gale, 46.
(*y*) Noy *v.* Reynolds, 4 N. & M. 483.
(*z*) R. *v.* Hallett, 20 L. J. M. C. 197.
(*a*) Re Vreones, (1891) 1 Q. B. 360; 7 Times L. R. 223.

VI. *Duty of the arbitrator to hear the evidence.*]—The arbitrator should hear all the evidence material to the question which the parties choose to lay before him as on a trial before a jury. It has been said that he may exercise some discretion as to the quantity of evidence he will hear (*b*); but declining to receive evidence on any matter is, under ordinary circumstances, a delicate step to take, for the refusal to receive proof where proof is necessary is fatal to the award (*c*).

Arbitrator should hear all the evidence.

In order that the above statement may not give rise to any misconception, it may here be proper to call attention to the wide distinction in principle between refusing to hear evidence on any particular matter, and rejecting a piece of evidence deemed by the arbitrator inadmissible, for we shall see further on, that the exercise of the arbitrator's judgment in receiving or rejecting evidence according to his opinion as to its admissibility is not open to review (*d*).

In order to make out a case entitling the party to impeach the award, the witnesses must be distinctly tendered to the arbitrator for hearing. It is not enough to put an abstract proposition to an arbitrator, and upon his answer to decline to give evidence or prefer a claim. The party should tender a specific case and specific evidence (*e*).

Evidence must be tendered.

Further on it will be shown how the direction of the court may be obtained to set the arbitrator right on a point of law during the reference (*f*).

How arbitrator may be set right.

If an arbitrator, to whom an action for not repairing a house has been referred, make his award on a view of the premises without calling the parties before him, the court will set aside the award; for, though the premises may almost tell their own tale, yet there may be other facts which ought to be inquired into, such as payments by the party, or excuses for not repairing (*g*).

Awarding without hearing evidence.

Still less can an award stand where the arbitrator hears one side only (*h*). A coachmaker to whom it was referred to determine whether a phaeton had been built in accordance

Hearing one side only.

(*b*) Nickalls *v.* Warren, 6 Q. B. 615; per Lord Denman, C. J., 618.
(*c*) Johnstone *v.* Cheape, 5 Dow, 247.
(*d*) See P. II. ch. 4, s. 1, d. 11.
(*e*) Craven *v.* Craven, 7 Taunt. 644; Grazebrook *v.* Davis, 5 B. & C. 535.
(*f*) See P. II. ch. 4, s. 1, dd. 15 and 16, p. 206.
(*g*) Anon., 2 Chitt. Rep. 44.
(*h*) Braddick *v.* Thompson, 8 East, 344.

with a contract, after inspection of the phaeton refused to examine the witnesses tendered by the plaintiff, though he heard the defendant's witnesses. He was held bound to have received the testimony of the plaintiff's witnesses, however little he might have thought that their evidence would make him alter the opinion which he had formed on the inspection (*i*).

Even when the refusal to hear one side is not wilful, the award will be bad. For where the arbitrator thought it necessary before decision to have the admission of the parties in writing that they had nothing further to offer, and that they desired a decision on the case as it stood, and was led to believe that a letter to that effect, signed by all the parties, was in the hands of the clerk to the submission (the reference being on a Scotch submission), and stated on the face of the award that he had considered that letter, and it afterwards appeared that one of the parties had made no such admission, and had signed no such letter, and had material evidence still to produce, and on that account applied to the court to have the award set aside; it was held by the House of Lords (reversing the decision of the Court of Session) that the award ought not to stand, and Lord Eldon said, "By the great principles of eternal justice, which is prior to all these acts of sederunt, regulations, and proceedings of court, it is impossible that an award can stand where the arbitrator hears one party and refuses to hear the other" (*k*).

When arbitrator may refuse to hear evidence.

But when the submission recited that the arbitrator had been appointed on account of his skill and knowledge of the subject, and one of the parties brought before him a statement of certain facts which he alleged to be material, and offered to support it by proof, the House of Lords held the arbitrator justified in refusing to receive it, if, taking all the matters alleged to be facts into consideration, yet having his own local knowledge to guide him, and all the circumstances in his view, he felt that such facts would have no effect upon his determination (*l*).

When peculiarly skilled in the matter.

In a later case, when it was referred to surveyors to settle the amount of rent and the other terms of a lease of a coal

(*i*) Phipps *v.* Ingram, 3 Dowl. 669.

(*k*) Sharpe *v.* Bickerdye, 3 Dow, 102.

(*l*) Johnstone *v.* Cheape, 5 Dow, 247.

mine, one objection to the award was that the arbitrators examined no witnesses. Lord Chancellor Cranworth said, "I do not agree in the suggestion that it was incumbent on the arbitrators to examine witnesses. I do not think that is the meaning, when a matter is referred to surveyors and people of skill to settle what the value of the property to be bought or let is. Necessarily, they are entrusted from their experience and their observation to form a judgment which the parties referring to them agree shall be satisfactory; therefore I do not think there was anything of importance in their not examining witnesses, provided, bonâ fide, they meant to say, 'We know sufficient of the subject to decide properly without examining witnesses'" (*m*).

Deciding on samples.

An arbitrator experienced in cloth was held justified in deciding upon inspection of samples only (*n*).

Usage to award on value of repairs, on inspection without evidence.

A usage for arbitrators appointed to determine, as between outgoing and incoming tenants of a farm, the value of the away-going crop, and the deductions for want of repair of the farm-buildings and fences, to make their award on an inspection of the crops and premises, without notice to the parties and without evidence, may be good, but no usage can justify the arbitrator in hearing one party and his witnesses only in the absence of, and without notice to, the other party (*o*).

Statutory arbitrator's absolute discretion.

According to Turner, L.J., the award of a government board, such as the railway commissioners, made arbitrators by statute, cannot be set aside by the courts for hearing witnesses behind the backs of the parties, on the ground that they have an absolute discretion, and are only responsible to parliament for its exercise (*p*).

Discretionary with arbitrator to view premises.

On a reference of a claim for builder's work done to a house, it is within the discretion of the arbitrator to determine whether he will comply with the request of one of the parties that he should view the premises (*q*).

(*m*) Eads *v.* Williams, 24 L. J. Ch. 531; Caledonian Rail. Co. *v.* Lockhart, 3 Macq. 808; Bottomley *v.* Amber, 38 L. T. N. S. 545. See P. II. ch. 4, s. 2, d. 2.

(*n*) Wright *v.* Howson, 4 Times L. R. 386.

(*o*) Oswald *v.* Lord Grey, 24 L. J. Q. B. 69.

(*p*) The Newry and Enniskillen Rail. Co. *v.* The Ulster Rail. Co., 2 Jur. N. S. 936, S. C. 8 De G. M. & G. 487.

(*q*) Munday *v.* Black, 9 C. B. N. S. 557, S. C. 30 L. J. C. P. 193.

Rejecting evidence of want of assets.

On a general reference by an executor respecting differences between his testator and a third person, an arbitrator is not justified in rejecting evidence offered by the executor to show that he has no assets to meet the demand upon his testator's estate (*r*).

Misleading party by award before case closed.

The arbitrator should be careful not to mislead the parties into a supposition that the case is still open, and then unexpectedly to make his award. For, if the arbitrator, after promising to hear some witnesses, make his award without calling them, or giving notice that he shall not examine them (*s*); or if, after declaring that he can take no further proceedings in the reference till some books of account have been looked into and examined, he make his award without giving notice to the parties that he has found the inspection of the books unnecessary (*t*), the award will be set aside.

Closing case too hastily.

If, though there has been some needless delay, an arbitrator do not give the party who has caused it proper opportunity to go into his case, but make his award too hastily, without giving the party due notice of his intention to do so, the court will set the award aside (*u*). Where a party desired the arbitrator to defer making his award until he should satisfy him as to some things which the arbitrator took to be against him; as this was within two or three days before the time for making the award was out, the arbitrator refused his request, and made his award; yet, as it seemed there was a just ground for the plaintiff's desire to be heard, though it did not appear that the plaintiff was ready to be heard, within the time, the court set aside the award (*x*).

Party asking to be heard.

So, while the matters were still open, and the one party asked to be heard and the umpire refused and made his award, it was set aside (*y*).

Party asking for time.

If a party be surprised by an unexpected case set up by his opponent, and ask for time to inquire into the matter, it

(*r*) Riddell *v.* Sutton, 5 Bing. 200.

(*s*) Earle *v.* Stocker, 2 Vern. 251.

(*t*) Pepper *v.* Gorham, 4 Moore, 148.

(*u*) Doddington *v.* Hudson, 1 Bing. 384; Bedington *v.* Southall, 4 Price, 232; Gladwin *v.* Chilcote, 9 Dowl. 550; Haigh *v.* Haigh, 31 L. J. Ch. 420, S. C. 3 De G. F. & J. 157; Fryer *v.* Shaw, 27 L. J. Ex. 320.

(*x*) Spettigue *v.* Carpenter, 2 P. W. 361.

(*y*) Maunder, In re, 49 L. T. 535.

is proper for the arbitrator to comply with his request, and to give reasonable opportunity for investigating the matter (*z*).

Refusing to re-open case.

When the case is closed, it is in the discretion of the arbitrator whether he will re-open it and receive further evidence. And where it was agreed that a certain meeting should be the last, and that all the evidence on both sides should be produced, and the defendant afterwards applied to the arbitrator for another hearing, alleging that he was in possession of fresh evidence to rebut the effect of certain accounts put in evidence by the plaintiff at the last meeting, and the arbitrator refused the hearing, and made his award without any more evidence, the court declined to interfere, saying that the arbitrator must use his own discretion whether he would grant another meeting or not (*a*).

Refusing to wait for absent witness.

Where an arbitrator refused to wait for the return of an alleged material witness, absent on a voyage to China, and made his award, the court declined to interfere with the exercise of his discretion (*b*).

Arbitrator should take notes of the evidence.

As a general practice, the arbitrator should carefully take notes in writing of everything material stated by the witnesses, in order that he may be enabled to do full justice between the parties, by going over the whole collectively and deliberately, by accurately comparing what a witness says at first with what he admits on cross-examination, and what one witness states with what a second witness deposes to. Even when the case is so short that the arbitrator can safely trust to carrying all the evidence in his head, it is advisable that there should be written minutes of the evidence, in case any ulterior proceeding be taken on the award, and the arbitrator be required to give information respecting the proceedings before him (*c*).

Examining parties as witnesses.

Formerly nice questions were raised as to the extent of the power of the arbitrator to examine the parties to the cause, and the proper mode of such examination (*d*), but these have

(*z*) Solomon *v.* Solomon, 28 L. J. Ex. 129.

(*a*) Ringer *v.* Joyce, 1 Marsh, 404. See Hall *v.* Anderton, In re, 8 Dowl. 326; Larchin *v.* Ellis, 11 W. R. 281; Hemming *v.* Parker, 14 W. R. 328.

(*b*) Ginder *v.* Curtis, 14 C. B. N. S. 723.

(*c*) Croom *v.* Gore, 1 H. & N. 14, S. C. 25 L. J. Ex. 267.

(*d*) Lloyd *v.* Archbowle, 2 Taunt. 323; Smith *v.* Sparrow, 16 L. J. Q. B. 139; Scales *v.* East London Waterworks, 1 Hodges, 91; Wells *v.* Benskin, 9 M. & W. 45; Morgan *v.* Morgan, 1 Dowl. 611; Keene *v.* Deeble, 3 B. & C. 491;

PART II. CH. IV. S. 1.

lost their interest since the change in the law of evidence which allows parties generally to be examined as witnesses in their own behalf.

Examining parties under the Lands, Railways, and Companies Clauses Acts.

By the special provisions of the Land Clauses Consolidation Act, 1845 (*e*), the Railways Clauses Consolidation Act, 1845 (*f*), and the Companies Clauses Consolidation Act, 1845 (*g*), the arbitrators or umpire, on references under those acts, have power to examine the parties on oath, and may administer the oath for that purpose.

Calling for documents.

VII. *Power of the arbitrator to call for documents.*]—A provision is generally inserted in orders of reference that the parties shall produce before the arbitrator all books, papers, deeds, and writings, relating to the matters in difference between them, as the arbitrator shall require Compliance with the arbitrator's demand for production will be enforced by attachment (*h*). A submission usually contains, or is deemed to contain, a similar clause (*i*).

Arbitrator calling for accounts to decide what are matters in difference.

If on a general reference the arbitrator call for certain books of account, it is no answer for the party who is ordered to produce them to say that they relate to accounts long since settled, and not now matters in dispute; for the arbitrator is for this purpose to determine what are the matters in dispute (*h*).

Power under the Lands, Railways, and Companies Clauses Acts.

In references under the Lands Clauses Consolidation Act, 1845 (*k*), the Railways Clauses Consolidation Act, 1845 (*l*), the Railway Companies Arbitration Act, 1859 (*m*), and the Companies Clauses Consolidation Act, 1845 (*n*), the arbitrators, or the umpire, are empowered to call for the production of any documents in the possession or power of either party, which he or they may think necessary for determining the question in dispute.

Warne *v.* Bryant, 3 B. & C. 590; Morgan *v.* Williams, 2 Dowl. 123.

(*e*) 8 & 9 Vict. c. 18, s. 32. See Appendix of Statutes.

(*f*) 8 & 9 Vict. c. 20, s. 133. See Appendix of Statutes.

(*g*) 8 & 9 Vict. c. 16, s. 132. See Appendix of Statutes.

(*h*) Arbuckle *v.* Price, 4 Dowl. 174.

(*i*) 52 & 53 Vict. c. 49, Sched. I.

(*k*) 8 & 9 Vict. c. 18, s. 32. See Appendix of Statutes.

(*l*) 8 & 9 Vict. c. 20, s. 133. See Appendix of Statutes.

(*m*) 22 & 23 Vict. c. 59. See Appendix of Statutes.

(*n*) 8 & 9 Vict. c. 16, s. 132. See Appendix of Statutes.

VIII. *Duty of the arbitrator to receive no evidence unless both parties are present.*]—An arbitrator can hardly be too scrupulous in guarding against the possibility of being charged with not dealing equally with both parties. Neither side can be allowed to use any means of influencing his mind which are not known to, and capable of being met and resisted by, the other. As much as possible the arbitrator should decline to receive private communications from either litigant respecting the subject-matter of the reference. It is a prudent course to make a rule of handing over to the opponent all written statements sent to him by a party, and to take care that no kind of communication concerning the points under discussion be made to him, without giving information of it to the other side (*o*).

Arbitrator should not receive private statement from a party.

Except in the few cases where exceptions are unavoidable, as where the arbitrator is justified in proceeding ex parte, both sides must be heard, and each in the presence of the other. However immaterial the arbitrator may deem a point to be, he should be very careful not to examine a party or a witness upon it, except in the presence of the opponent. If he err in this respect he exposes himself to the gravest censure, and the smallest irregularity is often fatal to the award (*p*).

Should examine witness in presence of both parties.

Irregular examination avoids award.

Where some witnesses attended before the arbitrator to give evidence on behalf of the defendant, and he, notwithstanding the parties, pursuant to his recommendation, had agreed to produce no more evidence, received the testimony of these witnesses, the parties and solicitors on both sides being absent, Lord Eldon, C., set aside the award, on the ground that the evidence had been improperly admitted, although the arbitrator swore that the evidence thus received had had no effect on his award (*q*); the learned judge being of opinion that no court should permit an arbitrator to decide so delicate a matter as whether a witness examined in the absence of one of the parties had an influence on him or not (*r*).

(*o*) Harvey *v.* Shelton, 7 Beav. 455, S. C. 13 L. J. Ch. 466.

(*p*) Harvey *v.* Shelton, 7 Beav. 455, S. C. 13 L. J. Ch. 466; Hick, In re, 8 Taunt. 694; Drew *v.* Leburn, 2 Macq. 1; Tidswell, In re, 33 Beav. 213.

(*q*) Walker *v.* Frobisher, 6 Ves. 70.

(*r*) Fetherstone *v.* Cooper, 9 Ves. 67.

Held in C. P. only when party in fault.

But this rule has not always been strictly adhered to, for in two instances it has been held by the Court of Common Pleas, that if the arbitrator re-examined a witness after the case on both sides was closed, and the plaintiff's attorney gone away, that circumstance would not induce the court to set aside the award, although the arbitrator admitted his judgment had been influenced by the answer, unless it appeared that the second examination of the witness was brought about by the management of the opposite party (*s*).

Held in Q. B., though party not in fault.

In a more recent case, however, the Court of Queen's Bench stated that the two cases in the Common Pleas were not satisfactory to them, and that they would rather abide by the broad principle laid down by Lord Eldon in *Walker* v. *Frobisher* (*t*), and reiterated in *Fetherstone* v. *Cooper* (*u*).

In that case, one party had brought an action for obstructing the waterway in front of their houses, which faced on to the River Thames. The obstruction complained of consisted of a floating pier composed of barges. The other party indicted the former for a nuisance, alleging that an embankment in front of the house was an encroachment on the river. Both the action and indictment were, by different orders of reference, referred to the same arbitrator, with power to order the removal of obstructions, and to regulate the waterway. After the arbitrator had heard the case, and stated that he wanted nothing further from either party, he sent for the deputy water-bailiff, who had been examined as a witness, and questioned him as to the means of giving convenient access to the shore, supposing the embankment removed. No notice of this meeting was given to either side, but a special pleader was present at it, who had acted as an advocate for one of the parties in a former stage of the reference. One of the other party coming accidentally into the room, asked permission to remain also, but this the arbitrator refused, saying that he had the special pleader there to give him some information, by which, however, his opinion would not be biassed.

The court said that, though there was no imputation on the motives of the arbitrator, the irregularity of his conduct was

(*s*) Atkinson *v.* Abraham, 1 B. & P. 175; Bignall *v.* Gale, 2 M. & G. 830. See also Crossley *v.* Clay, 5 C. B. 581.

(*t*) 6 Ves. 70.

(*u*) 9 Ves. 67.

fatal to the validity of the award; that they could draw no line, but must abide by the general principle, that where by possibility the arbitrator's mind may have been biassed, the objection is fatal; and that they must oppose all attempts to explain, by the bearing of particular parcels of the evidence, whether the inquiry had, or by any probability might have had, an effect on the decision; and as there was only one subject-matter, they set aside the award, both upon the indictment, as well as upon the action (*x*).

On a later occasion, when the cases in the Common Pleas above referred to (*y*) were relied on in the Queen's Bench, Lord Denman, C. J., again intimated that that court did not accede to their authority, and that they had in preference adopted the rule laid down by Lord Eldon at the commencement of his career (*z*).

Referring back award for irregular examination of witnesses.

At the present day, if no personal misconduct, or evil intention, or gross disregard of proper rules, be imputable to the arbitrator, the courts will often refer back the award to him notwithstanding he may have been guilty of some irregularities in the examination of the witnesses (*a*).

Examining witness when both parties absent.

Though both the parties are absent, and are thus in a measure on an equality, the course of examining a witness in private cannot, under ordinary circumstances, be justified (*b*).

Examining one party in private bad on public grounds.

The Court of Chancery, also, has exhibited its adherence to the rule laid down by Lord Eldon (*c*). For where the arbitrator summoned one of the parties before him to explain an apparent error in the accounts, without giving any notice of the meeting to the other side, even though the meeting took place in the presence of an accountant employed by both sides, the Master of the Rolls held that this was such a deviation from the course of justice, that the award could not be supported, although it did not appear that the party excluded had in fact been injured; and that the absent party was not precluded from objecting to this irregularity, by reason of

(*x*) Dobson *v.* Groves, 6 Q. B. 637.
(*y*) Bignall *v.* Gale, 2 M. & G. 830; Atkinson *v.* Abraham, 1 B. & P. 175.
(*z*) Plews *v.* Middleton, 6 Q. B. 845.
(*a*) Anning *v.* Hartley, 27 L. J. Ex. 145. See Tidswell, In re, 33 Beav. 213.
(*b*) Plews *v.* Middleton, 6 Q. B. 845.
(*c*) Fetherstone *v.* Cooper, 9 Ves. 67.

his having himself been guilty of the impropriety of privately communicating with the arbitrator; because it was not a question of mere private consideration between two adverse parties, but a matter concerning the due administration of justice (*d*).

In a modern case in the House of Lords, Lord Cranworth, L. C., said that he agreed with Lord Eldon, that the principles of universal justice required that the person who is to be prejudiced by the evidence ought to be present to hear it taken; and that an arbitrator entirely misconceived his duty who took upon himself to hear evidence behind the back of the party interested in controverting it (*e*).

No exception in case of merchant arbitrator.

This course of conduct, of examining one party, or the witnesses of one party, or receiving evidence from one party, in the absence of the other, is often adopted by mercantile arbitrators. But the courts, in the above instance, and in many others, have strongly repudiated the idea that a different course is allowable, in this respect, in the case of mercantile referees; and although the lawful usage of merchants may be imported into the contract of reference, they have said that the practice of receiving evidence which the party affected has no opportunity of meeting is not a lawful usage (*f*).

Inquiry whether party admits or disputes items.

Notwithstanding the necessity of avoiding in general anything like ex parte proceedings, it was decided by the House of Lords, in one case, to be no objection to the award, that the arbitrator had, in the absence of one of the parties, called in the other, and asked him whether he admitted or disputed certain items in an account, and had merely taken his answer to that question (*g*).

Private statements to accountant.

If on a reference it is arranged that the accounts should be referred to an accountant, and that either party is to be at liberty to examine the books in his presence, it does not seem objectionable for either party, when attending separately before the accountant, to give explanations respecting the items; for the accountant is not the judge, but only an assistant of the arbitrator on the occasion (*h*).

(*d*) Harvey *v.* Shelton, 13 L. J. Ch. 466, S. C. 7 Beav. 455.

(*e*) Drew *v.* Drew, H. L. March 8, 1855, S. C. Paterson's Appeals, 443.

(*f*) Matson *v.* Trower, 1 Ry. & Moo. 17; Harvey *v.* Shelton, 7 Beav. 455, S. C. 13 L. J. Ch. 466; Brook *v.* Delcomyn, 16 C. B. N. S. 403, S. C. 33 L. J. C. P. 246.

(*g*) Anderson *v.* Wallace, 3 C. & F. 26.

(*h*) Harvey *v.* Shelton, 7 Beav. 455.

But where an accountant was by the submission to be employed to examine and report to the arbitrator, on the books, accounts, and works, and the accountant received explanations from one party as to items in the accounts in the absence of the other, Lord Justice Turner said that that was a course of proceeding which the Court of Chancery could not possibly sanction. He also reprehended the accountant for assuming the authority of excluding from a meeting before him the son of one of the parties whom the father wished to attend (*i*).

Party's agent consenting.

If the plaintiff's agent for conducting the reference assent to the defendant calling on the arbitrator alone, and producing his books before him, the plaintiff cannot object to the award on the ground of the private meeting between the defendant and the arbitrator (*k*).

Private meeting, nothing done in the reference.

Though we have seen that in general serious objections may be made to the proceedings, if a meeting takes place of which one of the parties has no notice, yet if at a meeting so held nothing is done except to discuss the question of adjournment, and the meeting is in fact adjourned without the subjects of the reference being entered upon, the court, it seems, will not set aside the award on the mere ground of the party having had no notice of such a meeting being held (*l*).

Parties may waive irregularity.

IX. *Waiving objection to irregular conduct of the arbitrator.*] —Though the arbitrator may have been guilty of some irregularity in the course of the reference, it will not vitiate the award, if the conduct of the parties be such as shows that they waive any objection on account of it; but the waiver must be clearly made out (*m*); and the party must be shown to have full knowledge of the defect which he is said to waive (*n*).

Improper enlargement of time.

If by the terms of the submission the arbitrators are to appoint an umpire previous to entering on a consideration of the matters referred, and they enlarge the time for making

(*i*) Haigh *v.* Haigh, 31 L. J. Ch. 420, S. C. 3 De G. F. & J. 157.

(*k*) Hamilton *v.* Bankin, 3 De G. & S. 782.

(*l*) Morphett, In re, 2 D. & L. 967.

(*m*) Salkeld, In re, 12 A. & E. 767; Jenkins, In re, 1 Dowl. N. S. 276; Drew *v.* Leburn, 2 Macq. 1.

(*n*) Darnley, Earl *v.* London, Chatham and Dover Rail. Co., L. R. 2 H. L. Cas. 43.

the award before they appoint an umpire, and the parties, with knowledge of these facts, attend a meeting before the arbitrators, they will be taken to have waived the objection as to the irregular enlargement of the time (*o*).

Improper appointment of umpire.

Even if the arbitrators, without any authority, appoint an umpire, and he be guilty of the irregularity of examining the parties separately, his decision cannot be impeached by them, if they attend before him and make no objection (*p*).

Private examination of witnesses.

So also it was held, that where the arbitrators excluded the parties and their solicitors, and examined witnesses privately, if either party intended to take advantage of it, he ought to have given notice at the time that he intended to rely on it as an objection (*q*); and if a party attend meetings after knowing that the arbitrator has examined witnesses behind his back, and without objecting, he has waived the irregularity (*r*).

Irregular meeting.

So if at a meeting improperly convened, and in the absence of both parties, the arbitrators receive evidence, which they strike out on its being objected to at the next meeting, a party will not be permitted to invalidate the award on the ground of the reception of evidence in an irregular manner, if afterwards he has gone on with the case, examining and cross-examining the witness (*s*).

Rehearing.

Rehearing the case before all three arbitrators cures the irregularity of the proceedings before two only, the third arbitrator having been by mistake at first appointed as umpire, and considered an umpire (*t*).

Attending meetings after irregularity not necessarily a waiver.

Where a party objected to evidence received in his absence and to exclusion from certain meetings of persons whom he reasonably wished to attend on his behalf, his not receding from the reference, and allowing the remaining business to be transacted ex parte, was not treated as an acquiescence in the irregularities, it being clear on the evidence that he had no intention of waiving the objection (*u*).

Attending

A party who appears before an arbitrator and protests

(*o*) Hick, In re, 8 Taunt. 694.
(*p*) Matson *v.* Trower, 1 Ry. & Moo. 17.
(*q*) Hewlett *v.* Laycock, 2 C. & P. 574.
(*r*) Drew *v.* Drew, H. L. March 8, 1855.
(*s*) Kingwell *v.* Elliot, 7 Dowl. 423.
(*t*) Moseley *v.* Simpson, L. R. 16 Eq. 226.
(*u*) Haigh *v.* Haigh, 31 L. J. Ch. 420, S. C. 3 De G. F. & J. 157.

against his having any authority, and has his protest overruled, does not, by cross-examining his adversary's witnesses, and calling witnesses on his own behalf, preclude himself from afterwards objecting that the award is void (*x*).

meetings under protest.

An objection to an award, on the ground of irregular and improper conduct on the part of the arbitrators in examining witnesses ex parte, was held by the Court of Common Pleas to have been waived by the injured party knowing of their conduct for three weeks before the award is made, without taking any objection; for he has no right to lie by and take his chance of the award, and then, finding that made against him, move to set it aside on the ground of the irregularity (*y*).

Waiver by lying by without objecting.

The Court of Queen's Bench, however, took this distinction, that where an irregularity took place at a meeting of all the parties, and was passed over, no objection could afterwards be made, but that where witnesses were examined behind the back of one of the parties who wished to be present, as the opportunity of setting right what was irregular was past, he would not be taken to have waived his right to complain merely because, with the knowledge of the circumstance, he had not protested before the award was made (*z*).

The result of the above cases seems to show, that if the arbitrator find that he has inadvertently been betrayed into an irregularity, which, though fatal in principle, yet in fact does not affect the merits of the case, he may generally prevent any ill consequences by giving the parties full information of the particular step, and proposing to adopt such a course as may seem fit to remedy any possible inconvenience. It will rarely happen that the parties will not either expressly or impliedly agree to waive any objection that might otherwise be taken.

Arbitrator's course to cure an irregularity.

x. *When arbitrator empowered to proceed ex parte.*]—Every arbitrator is authorised, by the nature of his office, to pro-

Power to proceed ex parte for cause, implied.

(*x*) Davies *v.* Price, 6 L. T. N. S. 713; affirmed in error, 34 L. J. Q. B. 8, S. C. 11 L. T. N. S. 203; Ringland *v.* Lowndes, 17 C. B. N. S. 514, S. C. 33 L. J. C. P. 337; in error, overruling the same case below, 15 C. B. N. S. 173, S. C. 33 L. J. C. P. 25; Sheonath *v.* Ramnath, 35 L. J. N. S. P. C. 1.

(*y*) Bignall *v.* Gale, 2 M. & G. 830.

(*z*) Dobson *v.* Groves, 6 Q. B. 637.

ceed ex parte for good cause. It is unnecessary, though not unusual, to give him the power in express terms in the submission. No application to the court is necessary to warrant his so proceeding, but the arbitrator is to judge for himself of the discretion of exercising his power (*a*).

It ought, however, to be a very strong case to justify him proceeding ex parte, as going on with the reference in the absence of one of the parties is so substantial an inconvenience, and so much prevents the doing justice between them (*b*).

Party neglecting to attend.

Still, if one of the parties, after having been duly summoned, neglect to attend before the arbitrator, and the latter be of opinion, from the circumstances which are brought before his notice, that the party absents himself with a view to prevent justice and defeat the object of the reference, it is the arbitrator's duty to give due notice to the absenting party, that he intends, at a specified time and place, to proceed with the reference, whether the party shall attend or not. If this notice fail to enforce his attendance, and he do not allege some excuse satisfactory to the arbitrator, the latter not only may but ought to proceed ex parte (*c*).

Party attempting to revoke.

When a party has ineffectually attempted to revoke the submission, and refused to attend a meeting on the ground that the arbitrator has no authority, it has long been decided that the arbitrator may proceed ex parte at once (*d*).

Notice of intention to proceed ex parte.

In general the arbitrator is not justified in proceeding ex parte without giving the party absenting himself due notice. The notice may be given verbally or in writing. It should express the arbitrator's intention clearly, or the award may be set aside (*e*). An ordinary appointment for a meeting, with the addition of the word "peremptory" marked on it, is sufficient (*f*). If the arbitrator decline to proceed on the first failure to attend a peremptory appointment, and give another appointment, he is not authorised in proceeding ex

Peremptory notice for each meeting.

(*a*) Wood *v.* Leake, 12 Ves. 412; Hetley *v.* Hetley, Kyd on Awards, 100.

(*b*) Gladwin *v.* Chilcote, 9 Dowl. 550.

(*c*) Waller *v.* King, 9 Mod. 63; Wood *v.* Leake, 12 Ves. 412; Hall *v.* Anderton, In re, 8 Dowl. 326.

(*d*) Harcourt *v.* Ramsbottom, 1 J. & W. 512.

(*e*) Gladwin *v.* Chilcote, 9 Dowl. 550; Scott *v.* Van Sandau, 6 Q. B. 237.

(*f*) Gladwin *v.* Chilcote, 9 Dowl. 550; Doddington *v.* Hudson, 1 Bing. 384.

parte at the second meeting, unless the appointment for it also be marked peremptory, or contain a similar intimation of his intention (*g*).

Meeting to go into the reference.

Later cases seem to show that less strict notice may be sufficient. In an action against a tenant for dilapidations, the arbitrator appointed a meeting for a view, and "to go into the reference." The defendant attended the view, but withdrew without saying anything. The arbitrator thereupon proceeded ex parte, and made his award. The court refused to set aside the award made (*h*).

Whether notice requisite when authority denied.

If a party say, "I will not attend, because you, the arbitrator, are receiving illegal evidence, and no award which you can make will be good," the arbitrator may go on with the reference in his absence; and it seems it is not necessary to give the recusant any notice of the subsequent meetings. But, though it may not always be necessary, it certainly is advisable that notice of every meeting should be given to the party who absents himself, so that he may have the opportunity of changing his mind, and of being present if he please (*i*).

Railway Companies Arbitration Act, 1859.

By the Railway Companies Arbitration Act, 1859, s. 20, "The arbitrator and the arbitrators and the umpire respectively may proceed in the absence of all or any of the companies in every case, in which, after giving notice in that behalf to the companies respectively, the arbitrator or the arbitrators or the umpire shall think fit so to proceed" (*k*).

Arbitrator bound by rules of evidence.

XI. *Duty of the arbitrator in deciding points of evidence.*]— Questions relating to the admissibility of evidence continually arise in the course of the proceedings in the reference, and call for the arbitrator's decision. In determining these, he is not at liberty to follow any arbitrary principle of his own, but is bound by the same rules of evidence as govern the superior courts (*l*).

(*g*) Gladwin *v.* Chilcote, 9 Dowl. 550.

(*h*) Tryer *v.* Shaw, 27 L. J. Ex. 320. See Angus *v.* Smythies, 2 F. & F. 381; Hewitt *v.* Portsmouth Waterworks Co., 10 W. R. 780.

(*i*) Scott *v.* Van Sandau, 6 Q. B. 237; Harcourt *v.* Ramsbottom, 1 J. & W. 512; Bignall *v.* Gale, 2 M. & G. 830; Kyle, In re, 2 Jur. 760.

(*k*) 22 & 23 Vict. c. 59. See Appendix of Statutes.

(*l*) Attorney-General *v.* Davison, 1 M'Lel. & Y. 160.

His decision not open to review.

If, intending to decide rightly, he come to a wrong decision as to the competency of a witness, the admissibility of documentary or oral testimony, or the relevancy and propriety of allowing proof of particular facts, it is now settled law, that the court will not review his decision, or set aside the award for the mistake (*m*); though in one case Lord Eldon intimated an opinion, that if an arbitrator refused to hear evidence of the contents of a letter proved to be lost, that would form a good objection to an application for carrying the award into execution (*n*).

On the general principle that the parties are bound by the decision of the arbitrator whom they have chosen, the Court of Queen's Bench refused to direct an arbitrator to receive the evidence of a party, whom the arbitrator had refused to examine on the ground of his want of religious belief, such party having admitted that he did not believe in a Deity, or in a future state of rewards and punishments (*o*).

Refusing to hear evidence on a matter referred.

If, however, the arbitrator refuse to hear evidence on some of the matters within scope of the reference, under a mistaken impression that they are not within it, this will not be treated as a mistake of evidence, but as an omission to decide on all the matters submitted, and the award will be set aside (*p*).

Receiving evidence of damages in debt.

But when nothing but the claims in an action of debt were referred, receiving evidence of damages for a breach of covenant claimed as a debt, and as recoverable in the action, would not avoid the award (*q*).

If point doubtful, evidence to be received.

If it be a doubtful point whether the matter is within the reference or not, it is better to receive the evidence, and in the award to decide the doubtful matter separately from the rest. For if there be an omission to decide it, and it ought to have been decided, the award is generally incurable; and if it be not within the arbitrator's power, and he has decided

(*m*) Hagger *v.* Baker, 14 M. & W. 9; Eastern Counties Rail. Co. *v.* Robertson, 6 M. & G. 38; Armstrong *v.* Marshall, 4 Dowl. 593; Perriman *v.* Steggall, 9 Bing. 679; Wilson *v.* King, 2 C. & M. 689, S. C. 2 Dowl. 638, n. a; Campbell *v.* Twemlow, 1 Price, 81; Musselbrook *v.* Dunkin, 9 Bing. 605; Slowman *v.* Wiggins, 6 C. B. 276.

(*n*) Anderson *v.* Darcy, 18 Ves. 447.

(*o*) Bradlaugh *v.* Du Rin, W. N. (1870) 9.

(*p*) Samuel *v.* Cooper, 2 A. & E. 752; Brophy *v.* Holmes, 2 Moll. 1.

(*q*) Faviell *v.* Eastern Counties Rail. Co., 2 Ex. 344. See P. II. ch. 5, s. 8, d. 1.

it, it is only an excess, which, though bad in itself, if clearly separable, leaves the rest of the award perfectly valid.

Receiving evidence of adultery, though not pleaded.

Where the defendant pleaded non-assumpsit to an action for the board and lodging of his wife, and the arbitrator admitted evidence of the wife's adultery, and decided against the plaintiff, it was objected to the award that the arbitrator was not authorised to inquire into the fact of adultery unless it were pleaded; but the court refused to set aside the award, for, assuming the objection good in law, it was only that an inadmissible witness had been called (*r*).

New evidence after accounts closed.

After an accountant employed under the arbitrators had made his report to them respecting the accounts, and it was agreed that he should close the accounts, one of the parties having found some new documents respecting the accounts which had been closed, tendered them in evidence to the arbitrators at the last meeting in the reference. The arbitrators, after looking at them to see their general nature, refused to protract the arbitration in order to sift those papers, and, declining to receive them, made their award. Coleridge, J., held that this was merely a rejection of evidence by the arbitrators, and afforded no ground for impeaching the award (*s*).

Knowingly receiving inadmissible evidence.

Even when the arbitrator received the plaintiff's own books in evidence for himself, stating that he knew they were not strictly admissible on a trial at Nisi Prius, yet that he had authority to receive them, as the same strictness was not required on an arbitration, the court held this did not amount to misconduct in the arbitrator so as to authorise them to set aside the award, but treated it at the most merely as a mistake of the law of evidence (*t*).

Receiving evidence of collateral matter.

The arbitrator is authorised to inquire into matters not submitted to him, if that inquiry be necessary to enable him to decide rightly upon the questions before him, and even if he receive evidence on matters not properly affecting the points upon which he has to decide, the objection only amounts to the reception of improper evidence, and is no such excess of authority as to induce the court to set aside the award (*u*).

(*r*) Symes *v.* Goodfellow, 2 Bing. N. C. 532.

(*s*) Marsh, In re, 16 L. J. Q. B. 330.

(*t*) Hagger *v.* Baker, 14 M. & W. 9.

(*u*) Eastern Counties Rail. Co. *v.* Robertson, 1 D. & L. 498, S. C. 6 M. & G. 38.

Arbitrator to take notice of stamps on documents.

The arbitrator or referee, even though the parties do not take the objection, is bound by the Customs and Inland Revenue Act, 1881 (*x*), to take notice of any omission or insufficiency in the stamping of any document produced before him. He is also to require payment of the necessary penalties before receiving it in evidence.

Power to apply to court for directions.

Sometimes the order of reference provides "that the arbitrator shall be at liberty to apply to the court for directions on any points that may arise pending the reference as he may think necessary."

If a question arise as to the admissibility of evidence, and the arbitrator desire the direction of the court upon it, it seems to be a proper course to state the point in the shape of a certificate or case, setting out all the necessary facts for the opinion of the court. This will be considered on the argument before the court in the same manner as an objection to evidence at Nisi Prius (*y*).

Arbitration between counties and boroughs.

Arbitrators appointed under the Local Government Act, 1888, to arbitrate in certain matters between counties and boroughs, and other local authorities, have power in general to submit a special case for the opinion of the superior court (*z*).

Party retaining power of objecting to evidence.

When a party knows the nature of the evidence to be adduced against him, and, though willing that the matters in difference should be determined by arbitration, does not choose to be concluded by the arbitrator's decision on the admissibility of certain evidence, he may provide against it by introducing a clause into the submission, retaining to himself the same power of objecting to the evidence as on a trial at Nisi Prius. If the arbitrator admit evidence to which the party has objected, under this provision he may move the court to set aside the award on the ground of the admission being improper (*a*).

Power to amend.

XII. *Duty of the arbitrator when empowered to amend.*]—A power of amending the pleadings and proceedings is often vested in the arbitrator. Where an arbitrator had all the

(*x*) 44 Vict. c. 12, s. 44, applying 33 & 34 Vict. c. 97, s. 16.
(*y*) Attorney-General *v.* Davison, 1 M'Lel. & Y. 160.
(*z*) 51 & 52 Vict. c. 41, s. 62 (3).
(*a*) Scott *v.* Van Sandau, 1 Q. B. 102.

powers of amending the record as a judge at Nisi Prius, he might amend a plea by altering an immaterial error in a local description (*b*). But he cannot strike out a substantial claim referred to him (*c*).

Court no power to compel arbitrator to award.

XIII. *Power of the arbitrator to make or decline to make an award.*]—Though the arbitrator has taken on himself the burthen of the reference, and held several meetings, but not closed the case, he may decline to go on any further with the arbitration, and the courts had no jurisdiction over him to compel him to proceed (*d*); nor could they order him to make his award according to a particular principle (*e*). By the Arbitration Act, 1889, s. 15, in all cases of reference by order of court, the official or special referee or arbitrator is to be deemed an officer of the court. This may affect his position. In one case, where, however, it was not necessary to decide the point, Kay, J., seemed to think that an official referee, on a reference for trial, who had directed accounts to be taken before himself, and had afterwards refused to proceed, might be ordered to do so as being an "officer of the court" under this section (*f*). By the civil law it seems that an arbitrator might be compelled to make an award (*g*).

Arbitration Act, 1889.

Referee officer of the court.

County court judge.

A county court judge could not decline to act as arbitrator in a matter referred to him under the 17 & 18 Vict. c. 125, s. 3, while that provision was in force as to such judges (*h*).

Injunction to restrain arbitrator.

The courts will, as a general practice, reject any application made to them with a view to hinder the arbitrator making an award (*i*). But if he be guilty of corruption an injunction will be granted in equity to restrain his proceeding with the reference (*k*). In like manner he will be prevented by the Chancery Division from acting as arbitrator, if he becomes unfit or incompetent, if it is after the reference discovered that he has a large personal interest in the matter submitted, if by

(*b*) Nalder *v.* Batts, 1 D. & L. 700.
(*c*) Wilson *v.* Conde d'Eu Ry. Co., 51 J. P. 230.
(*d*) Lewin *v.* Holbrook, 11 M. & W. 110, S. C. 2 Dowl. N. S. 991; Crawshay *v.* Collins, 1 Swanst. 40; Coothe *v.* Jackson, 6 Ves. 17; Darbey *v.* Whitaker, 4 Drew. 134.
(*e*) Houghton *v.* Bankart, 3 De G. F. & J. 16.
(*f*) Palmer *v.* Hardwick, W. N. (1890) 161.
(*g*) 2 Story, Eq. Jur. 710, 12th ed.
(*h*) Cummins *v.* Birket, 27 L. J. Ex. 216.
(*i*) R. *v.* Bardell, 5 A. & E. 61.
(*k*) Malmesbury Rail. Co. *v.* Budd, 2 Ch. D. 113.

reason of discreditable conduct in connection with the matter referred he renders himself, during the reference, indebted to one of the parties (*l*).

Proceedings in arbitration restrained by injunction.

Parties, however, sometimes conduct themselves in such a manner as to induce the Court of Chancery to restrain them from proceeding in a reference (*m*). When, in pursuance of an agreement to purchase a patent right of the defendant which contained a clause that certain differences should be referred to arbitration, the plaintiff paid the sum agreed on, and afterwards filed a bill in Chancery to recover back the purchase-money, and to compel the defendant to accept a re-assignment of the patent, on the ground of the agreement being vitiated by fraudulent conduct on the part of the defendant, the Lord Chancellor (Eldon), on motion, granted an injunction to restrain the proceedings in the reference, on the principle that the arbitration was a part execution of the agreement which was struck at by the bill (*n*).

So where an agreement between two railway companies contained provisions which were primâ facie void as against the shareholders of one of the contracting companies as being ultra vires, Wood, V.-C., on an interlocutory application by the shareholders of the latter company, restrained both companies from proceeding with a reference to assess damages alleged to have been sustained by the other company through breach of the provisions (*o*).

Where the question was whether a notice of dissolution of partnership was valid, and the plaintiff commenced a suit to restrain the defendant from advertising the dissolution and to declare the notice void, Bacon, V.-C., restrained the defendant from proceeding by arbitration, he having appointed an arbitrator under the provision of the partnership deed, by which disputes were to be settled by arbitration (*p*).

When not.

But the court has no general jurisdiction to grant an injunction to restrain a person from taking proceedings out of court for an arbitration in the name of a person who had given him no authority to use it; though the court in which

(*l*) Beddow *v.* Beddow, 9 Ch. D. 89.

(*m*) Pickering *v.* Cape Town Rail. Co., L. R. 1 Eq. 84.

(*n*) Mylne *v.* Dickinson, Coop. 195.

(*o*) Maunsel *v.* Midland Great Western of Ireland Rail. Co., 1 Hem. & M. 130.

(*p*) Witt *v.* Corcoran, L. R. 8 Ch. 476, note.

an action is brought without authority may stay proceedings (*q*). An injunction will not be granted to restrain a party from proceeding to a reference when there is so much irregularity that the award would be invalid, and the other party could not be injured (*r*).

Arbitrator should clearly close the case.

XIV. *Closing the case.*]—After having heard all the evidence which the parties choose to lay before him, and ascertained that they have no more to offer, the arbitrator, in order to prevent any misconception, should distinctly inform the parties that he considers the case closed on both sides, and that he shall proceed to make his award (*s*). Still, notwithstanding the case has been formally closed on both sides, it is perfectly competent for the arbitrator, if he shall think fit, to permit or to require the production of further evidence, either parol or documentary (*t*).

Reopening case.

Requiring matters in difference to be stated in writing.

If on a reference "of all matters in difference" many questions be discussed, it is a prudent course for the arbitrator, before the close of the case, to request the parties to put down in writing the matters on which they respectively require him to adjudicate. For provided he decide on the matters set out in the written statements, the award will be considered good and final, and he will not be open to the risk of having the award set aside because he has omitted to decide on some minor point which had, in fact, been raised before him, though not treated as of any real importance (*u*).

Making interlocutory award.

The arbitrator is sometimes empowered, before making his final award, to regulate by interlocutory awards the intermediate enjoyment, or to give directions respecting the intermediate management of some subject of dispute, as for instance, the mode in which a stream of water, in which the parties claim opposing rights, is to be used, pending the reference. These, from their very nature, are intended to have a temporary effect only (*v*).

(*q*) London & Blackwall Rail. Co. *v.* Cross, 31 Ch. D. 354.

(*r*) Farrar *v.* Cooper, 44 Ch. D. 323, S. C. 59 L. J. Ch. D. 506.

(*s*) Pepper *v.* Gorham, 4 Moore, 148; Earle *v.* Stocker, 2 Vern. 251; Peterson *v.* Ayre, 23 L. J. C. P. 129.

(*t*) Bignall *v.* Gale, 2 M. & G. 30.

(*u*) Angus *v.* Redford, 2 Dowl. N. S. 735, S. C. 11 M. & W. 69.

(*v*) Wrightson *v.* Bywater, 3 M. & W. 199; Manser *v.* Heaver, 3 B. & Ad. 295.

The mode in which the final award is to be made is fully stated in the next chapter.

On rule for leave to revoke arbitrator may be set right in law.

XV. *When arbitrator about to award wrongly.*]—When an arbitrator has, in the opinion of a party, wrongly admitted or rejected evidence, or is about to award contrary to law, the party may, before the award is made, apply for leave to revoke the submission. If the arbitrator be wrong, it does not follow that the leave will be granted to revoke, for the parties are bound generally to accept his view of the law (*x*). The court has a discretionary power, and will exercise it, but only in particular circumstances (*y*), and when it has reason to believe that the arbitrator will attend to its direction, it will in some cases set him right in his law and discharge the rule (*z*). The subject has been considered more fully, p. 160.

XVI. *Stating a case pending the reference.*]—Another course may sometimes be adopted with effect. Where a point of law fit to be decided by the court arises in the course of an arbitration, the arbitrator may state a case, or the parties may come to the court while the arbitration is pending, and apply for an order for the statement of a case. For the Arbitration Act, 1889 (*a*), s. 19, provides that "any referee, arbitrator, or umpire may, at any stage of the proceedings under a reference, and shall, if so directed by the court or a judge, state in the form of a special case for the opinion of the court any question of law arising in the course of the reference." The arbitrator would have to adjourn the reference, if, in the exercise of the discretion of the court, the order were made, and in making his award he would have to adopt and act upon the decision of the court (*b*).

Case stated pending reference under the Arbitration Act, 1889.

When a case was stated pending a reference under the old practice, error would not lie on the judgment of the court, for it was not a final judgment (*c*). See, however, p. 320 as to appeal.

(*x*) James *v.* James, 23 Q. B. D. 12.

(*y*) East and West India Docks Co. *v.* Kirk and Randall, 12 App. Ca. 728.

(*z*) Hart *v.* Duke, 32 L. J. Q. B. 55; Robinson *v.* Davies, 5 Q. B. D. 26.

(*a*) 52 & 53 Vict. c. 49.

(*b*) Baguley *v.* Markwick, 10 C. B. N. S. 61, S. C. 30 L. J. C. P. 342. See Master *v.* Hamilton, 3 Jur. N. S. 722.

(*c*) Courtauld *v.* Legh, 38 L. J. Ex. 124, S. C. L. R. 4 Ex. 187.

PART II. CH. IV. S. 1.

Under the Rules of Court.

By Order XXXVI. rr. 52 (1883) and 55 (c), Dec. 1889, a referee or arbitrator in any cause or matter may, "before the conclusion of any trial before him, or by his report under the reference made to him, submit any question arising therein for the decision of the court, or state any facts specially, with power to the court to draw inferences therefrom, and in any such case the order to be made on such submission or statement shall be entered as the court may direct, and the court shall have power to require any explanation or reasons from the referee, and to remit the cause or matter, or any part thereof, for re-trial or further consideration to the same or any other referee; or the court may decide the question referred to any referee on the evidence taken before him, either with or without additional evidence, as the court may direct."

SECTION II.

OF THE ARBITRATOR'S DELEGATING HIS AUTHORITY.

PART II. CH. IV. S. 2.

Arbitrator may not delegate his authority.

1. *Power of the arbitrator to adopt the opinion of another.*]— By a general principle of law, one who has an authority from another to do an act for him must execute it himself, and cannot transfer it to a third person, this maxim being expressed "delegatus non potest delegare"; for this being a confidence and trust reposed in the party, cannot be assigned to a stranger, of whose ability and integrity he for whom the act is to be done can form no opinion (*d*). The particular authority conferred on an arbitrator forms no exception to this general rule, for it is but a naked power. He must, therefore, perform his duties in person; he may neither delegate them to another, nor elect others to act with him, unless the submission expressly authorise such a course (*e*).

A delegation of authority *in the award* is reserved for consideration in the following chapter.

(*d*) Bac. Ab. Authority, D.

(*e*) Lingood *v.* Eade, 2 Atk. 501; West, Symb. P. II. Compromise, s. 41; Eastern Counties Rail. Co. *v.* Eastern Union Rail. Co., 3 De Gex, J. & S. 610.

Arbitrator may adopt opinion of another.

But though an arbitrator may not delegate his authority, that is, agree beforehand to be bound by what another may decide, the cases are numerous to show that an arbitrator may submit a material question affecting the merits of the case to another, and after hearing his opinion adopt it as his own, upon the credit which he gives to the judgment and skill of the person to whom he refers.

Thus, where the arbitrators had joined with the umpire in the umpirage, the court held the umpirage good as a decision of the umpire alone, and stated that he was at liberty to take what advice, or opinion, or assessors he chose (*f*).

Men of science.

Lord Wensleydale, in a case in the House of Lords, stated that the arbitrator may consult men of science in every department where it becomes necessary (*g*).

Valuer.

So where it was objected to the award that the arbitrator had not exercised his own judgment respecting the valuation of some timber, but had referred it to another, Lord Alvanley, M.R., said, "That alone is not sufficient to prove the award bad, for a man may make use of the judgment of another upon whom he can depend, and the valuation of that person is his if he chose to adopt it" (*h*). And on an appeal, Lord Chancellor Eldon, affirming the decree of the court below dismissing the bill to enforce the award, said that he did not mean to determine that referring the valuation of the timber to another was a sufficient ground for refusing a specific performance (*i*).

Builder.

Where two land surveyors, to whom it was referred to fix the price of an estate, not being accustomed to value houses, called in two builders to value the mansion-house on the estate for them, Vice-Chancellor Leach thought there was no objection to such a course, as they had not agreed beforehand to be bound by the builders' valuation, but received their opinion merely as evidence, and giving credit to their testimony, adopted it as their own (*k*).

It was laid down by Lord Lyndhurst, in a later case, that an arbitrator has power, without any special provision, to call in a valuer to assist him: though he seemed to think that

(*f*) Soulsby *v.* Hodgson, 3 Burr. 1474.

(*g*) Caledonian Rail. Co. *v.* Lockhart, 3 Macq. 808.

(*h*) Emery *v.* Wase, 5 Ves. 846.

(*i*) Emery *v.* Wase, 8 Ves. 504, a.

(*k*) Hopcraft *v.* Hickman, 2 S. & S. 130.

when a special provision was made in the submission, his power in that respect ceased to be a general one arising from the necessity of the case, and was to be governed by the terms of that provision (*l*). In the same case, under an authority to arbitrators to call in a competent person to assist them in the valuation of the stock and property of a partnership, it was held by the House of Lords to be no objection to the award that they availed themselves of the assistance of such person in deciding on the partnership accounts, for that the arbitrators by adopting in terms the opinions of such person did not constitute him an umpire, but made his opinions their own, and that their award could not be impeached on that account (*m*).

If the parties agree during the reference, with the arbitrator's assent, that the award shall be made as to part upon a valuer's report, the award adopting the report is good (*n*).

Power to call in a valuer.

It was the practice of the Masters of the Common Pleas, on a compulsory reference to them of a builder's bill, to send down a surveyor to report on the work. The court approved of the practice, stating, however, that the surveyor's report was only to be received as evidence, and that the masters must also hear the evidence of the parties (*o*).

Calling in solicitor to sit with arbitrator.

If an arbitrator be appointed on account of his special qualifications, a legal arbitrator being objected to, he may not, if either party object, call in a solicitor to sit with and advise him (*p*). If he is authorized to call in an accountant not objected to by either party, he must give the parties an opportunity of objecting (*q*).

Arbitrator should not adopt opinion he believes wrong.

On a reference to surveyors to settle the terms of a lease of a mine (where it was not necessary to examine witnesses), it was held no objection to the award that one of the surveyors did not go down into the mine, but founded his valuation on the report of a person whom he had sent down into it, and upon his own knowledge of the neighbourhood. To enable the surveyors to form a correct judgment, it was said by Lord

(*l*) Anderson *v.* Wallace, 3 C. & F. 26.
(*m*) Ibid.
(*n*) Sharp *v.* Nowell, 6 C. B. 253.
(*o*) Gray *v.* Wilson, 35 L. J. N. S. C. P. 123.
(*p*) Proctor *v.* Williamson, 29 L. J. C. P. 157, S. C. 8 C. B. N. S. 386.
(*q*) Tidswell, In re, 33 Beav. 213.

PART II. CH. IV. S. 2.

Chancellor Cranworth to be very proper for them to consult a person of skill and competent experience in those matters, and take his estimate of the value (namely, 400*l.* an acre) as an item for determining their ultimate opinion. But as one of the surveyors stated that he did not think the mine worth 200*l.* an acre, but concurred in the award because he thought it was no use differing, the Lord Chancellor held the award bad, on the ground that the latter surveyor had not exercised a judicial discretion upon the case, as he had not adopted A.'s opinion, but had merely subscribed to what he thought wrong because another person thought it right (*r*).

Taking opinion on matter of fact.

II. *Duty of the arbitrator in taking an opinion as to a matter of fact.*]—An important question here arises, whether when arbitrators require the assistance of a valuer or person of skill, they are at liberty, without the knowledge of the parties, to apply privately to one on whom they can rely, and to adopt as their own and act on the opinion which he may give them as to the particular case (*s*). It is to be observed, that in *Emery* v. *Wase* (*t*), there was no irregularity in the mode of obtaining the valuer's assistance, for there were no regular proceedings, such as meetings and examination of witnesses, as in ordinary arbitrations, nor was any objection made on the ground that the arbitrator had taken the valuer's opinion respecting the timber without the knowledge of the parties. In *Hopcraft* v. *Hickman* (*u*), it appears that the agents of the parties knew of the builders being employed to value the mansion-house, and made no objection to it. And in *Anderson* v. *Wallace* (*x*), though the arbitrators conferred with a person of experience, after the case of both parties was closed and without their knowledge, they were held warranted in doing so by the express terms of the submission.

But in a modern case (*y*), in the House of Lords, Lord Wensleydale, on an objection being taken that an arbitrator acted ultra vires in employing an agent to survey and report,

(*r*) Eads *v.* Williams, 24 L. J. Ch. 531. See the previous section, d. 6. See also Whitmore *v.* Smith, 5 H. & N. 824, S. C. 29 L. J. Ex. 402; in error, 7 H. & N. 509, S. C. 31 L. J. Ex. 107.

(*s*) See the previous section, d. 6.

(*t*) 5 Ves. 846; 8 Ves. 504, a. See ante, p. 208.

(*u*) 2 S. & S. 130.

(*x*) 3 C. & F. 26.

(*y*) Caledonian Rail. Co. *v.* Lockhart, 3 Macq. 808.

speaking of the arbitrator's power, said, "He has power to call in a valuer to assist him, unless restricted by the terms of the submission. That was decided in the case of *Anderson* v. *Wallace*" (z).

It is to be observed that in *Hopcraft* v. *Hickman* (a), the valuer's opinion is treated as evidence; and in *Anderson* v. *Wallace* (b), Lord Brougham stated that the proper and more regular course, and one which a professional arbitrator would have followed, would have been to have examined, as a witness, the person of whose experience, pursuant to the provision of the submission, the arbitrators were empowered to avail themselves.

No case, however, has yet decided that in instances in which it is permitted to an arbitrator to ask the opinion of another on a matter of law or fact, the award is bad, because he has done so without the knowledge of the parties.

Taking opinion on point of law.

III. *Duty of the arbitrator in taking an opinion on a point of law.*]—The above remarks apply only to the opinions of persons of skill and science respecting matters of fact; but it may often happen that an arbitrator may wish to consult a legal friend or adviser in deciding a question of law,—for instance, respecting the admissibility of evidence, or the construction of a contract or other document. He cannot in this case pursue the course suggested above, of calling his adviser as a witness, since evidence is not admissible on a point of law.

Arbitrator may consult counsel as to framing award.

It was said by Lord Denman, C.J., on one occasion, that it is quite a legitimate course for an arbitrator to consult a legal friend as to the mode of framing his award (c). Unprofessional arbitrators, it is well known, often employ a solicitor to prepare it for them. The circumstance of the award being prepared even by the solicitor of the defendant in the cause referred, although indelicate, was held by Lord Eldon to be no ground for setting the award aside (d).

Arbitrator taking counsel's

The following cases seem to show that the propositions broadly stated in some of the cases recently cited, that an

(z) 3 C. & F. 26.
(a) 2 S. & S. 130.
(b) 3 C. & F. 26.
(c) Dobson *v.* Groves, 6 Q. B. 637.
(d) Featherstone *v.* Cooper, 9 Ves. 67.

opinion on a case.

arbitrator may take and adopt as his own the opinion of another, will authorise an arbitrator to take the advice of counsel or other professional adviser on points of law affecting not only the form but the substance of the award.

Where case stated incorrectly.

One of three arbitrators had taken the opinion of counsel on a case which he had drawn up, stating the circumstances respecting which the arbitrators differed. A motion was made in the Court of Common Pleas to set the award aside on the ground that the arbitrator had taken the opinion of counsel upon an *incorrect* statement of facts against the consent of one of the parties to the reference, and had acted on that opinion; the court said, if the facts had been so the award would have been impeachable upon ground so clear and manifest, that it was sufficient barely to state the proposition. But as the affidavit of that arbitrator stated in answer that he had made up his own opinion on the point in dispute before he took the opinion of counsel, and that such opinion was taken for no other purpose than to guide his determination whether to accede or not to the request of a fellow-arbitrator, that the facts relating to the disputed points should be set out on the award, having intended, in case such opinion differed from his own, to accede to that request, and to state the facts on the award, and that the case submitted by him to counsel contained a fair and true statement of the circumstances, the court held the objection satisfactorily removed (*e*).

In another instance, where two out of three arbitrators stated a case, and took the opinion of counsel on it, the Master of the Rolls (Sir Thomas Plumer) held that fact not to amount to any evidence of corruption or improper practice, so as to render the award void; but, on the contrary, to show a conscientious desire to adjudicate fairly, although the opinion was taken without the knowledge of the third arbitrator, and although it was alleged that one important fact was erroneously stated; it appearing that there was no concealment, and that the case with the opinion was shown to the dissentient arbitrator before the award was made, that the statement alleged to be erroneous was correct according to the evidence before the arbitrators, and that the party had had ample

(*e*) Hare, In re, 6 Bing. N. C. 158.

opportunity of setting forth in evidence the true state of the facts (*f*).

How arbitrator should take legal opinion.

Where one of three arbitrators bonâ fide but privately obtained the opinion of counsel, which he showed to and discussed with the other arbitrators before the award was made, it was held that the award could not be impugned, especially as the arbitrators were "aimiables compositeurs" under the Canadian law. The Privy Council added, however, that it would be prudent and discreet for arbitrators, when they desire to put themselves upon the best possible footing of information as to matters of law, to ask all the parties to be present when they communicate with any gentleman they may see upon that subject (*g*).

Arbitrator may delegate the performance of a ministerial act.

IV. *Power of the arbitrator to delegate a ministerial act.*]—A distinction has been taken between a judicial and a ministerial act, and it seems clear that an arbitrator may delegate to another the performance of acts of a ministerial character only (*h*). It is not always easy to ascertain what acts are included under the head of ministerial acts. The measurement of the number of acres in a field or the surface of a lake has been so considered (*i*). Probably the functions of an accountant who is employed merely to make up the accounts of a firm would be held to be ministerial only (*k*).

Taxing costs.

The taxing the costs of the arbitration is a ministerial act, and where the submission could be made a rule of court, it was usually left to the master to determine the amount. When the arbitrator had to settle the amount of the costs in arbitrations under the Lands Clauses Consolidation Acts, he was performing a ministerial function, but one which he could not delegate to the master till the Statute of 1869 was passed (*l*).

(*f*) Goodman *v.* Sayers, 2 J. & W. 249.

(*g*) Rolland *v.* Cassidy, 13 App. Cas. 770.

(*h*) Thorp *v.* Cole, 2 C. M. & R. 367, S. C. 4 Dowl. 437.

(*i*) Ibid.

(*k*) Harvey *v.* Shelton, 7 Bea. 455. See post.

(*l*) Sharpe *v.* Metropolitan District Rail. Co., 4 Q. B. D. 645; in H. L. 5 App. Cas. 425.

SECTION III.

OF THE DUTY OF JOINT ARBITRATORS.

Court cannot compel appointment.

1. *Appointment of joint arbitrators.*]—A very usual clause in agreements of all kinds is, that if any differences shall arise they shall be referred to the decision of two arbitrators, one to be appointed by each party, with power, sometimes, to the two arbitrators to appoint a third arbitrator. Shortly after the passing of the Arbitration Act, 1889, a Queen's Bench Divisional Court confirmed an order of a Master directing one of the parties, who refused, to appoint an arbitrator pursuant to the agreement. But the Court of Appeal set aside the order, saying that the new Act gave the court no power to make it, and that as such an order had never been made before the courts had no power to make it now (*m*).

Appointing includes notifying.

We have already seen that appointing includes nominating the person as arbitrator, and notifying that nomination to the other side (*n*).

Appointment of umpire by arbitrators.

II. *Power of two arbitrators to appoint umpire.*]—The appointment of an umpire, when in writing, should generally be signed by both arbitrators together. When one signs an appointment alone and then sends the document for signature to the other, it is invalid, and the award of the umpire will be a nullity (*o*); unless, indeed, the two arbitrators have met and agreed on the person to be umpire, and the signing is the mere record of their previous judicial decision (*p*).

Two arbitrators may appoint umpire.

By the Arbitration Act, 1889, when the submission is one made by consent out of court, and a contrary intention does not appear, "the two arbitrators may appoint an umpire at any time within the period during which they have power to make an award" (*q*); if they fail to execute the power after being called upon to do so, the court or a judge may appoint (*r*).

Judge appointing.

(*m*) Smith *v.* Nelson, 25 Q. B. D. 545, S. C. 59 L. J. Q. B. D. 533.

(*n*) See ante, P. I. ch. 3, s. 1, d. 2, p. 43.

(*o*) Lord *v.* Lord, 26 L. J. Q. B. 34, S. C. 5 E. & B. 404.

(*p*) Hopper, In re, 8 B. & S. 100, S. C. 36 L. J. Q. B. 97, S. C. L. R. 2 Q. B. 367.

(*q*) 52 & 53 Vict. c. 49, s. 2, and 1st sched. (b).

(*r*) 52 & 53 Vict. c. 49, s. 5 (c).

Third surveyor.

It was held that the court had power, under the Common Law Procedure Act, 1854, s. 12, to appoint an umpire or third surveyor to act with the surveyors appointed by the "building" owner and the "adjoining" owner, under s. 85 of the Metropolitan Building Act, 1855, where a difference had arisen between the parties respecting a party wall, and such surveyors had refused to appoint a third surveyor to act with them; and that the fact of there being a pending action between such "building" and "adjoining" owners with respect to ancient lights on the party wall did not preclude the court from exercising the power (*s*).

Joint arbitrators not agents of respective parties.

III. *Disadvantages of reference to several arbitrators.*]—The arbitrators selected by each side ought not to consider themselves the agents or advocates of the party who appoints them. When once nominated, they ought to perform the duty of deciding impartially between the parties, and they will be looked upon as acting corruptly if they act as agents or take instructions from either side (*t*).

Two arbitrators appointing a third.

In order to ensure a decision in case of difference of opinion, the submission frequently goes on to prescribe that the two arbitrators shall name a third, and that an award made by any two, if they cannot all agree, shall be sufficient.

It is in general much better to refer the matters to a single arbitrator at once, for notwithstanding the objectionable nature of such a course, the arbitrators named by the parties often seem to think that they are to represent their respective nominors, and act rather as advocates than judges, while the third arbitrator frequently supposes that he is an umpire, and that his active interference is not to commence until the others have differed finally. On one occasion, where the course of conduct of the three was such as has been adverted to, Coleridge, J., strongly condemned references of this sort; saying, that in his opinion they were "senseless and mischievous, founded on a totally wrong principle, expensive in their operations, and constantly ending in failure and disappointment" (*u*).

(*s*) McBryde, Ex parte, 46 L. J. Ch. 153.

(*t*) Fetherstone *v.* Cooper, 9 Ves. 67; Watson *v.* Duke of Northumberland, 11 Ves. 153; Calcraft *v.* Roebuck, 1 Ves. jun. 226; Maule *v.* Maule, 4 Dow. 363.

(*u*) Templeman and Reed, In re, 9 Dowl. 962; Marsh, In re, 16 L. J. Q. B. 330.

Submission ambiguous.

Sometimes the framing of the submission is so ambiguous that it is difficult for the court to decide on the respective duties of each arbitrator. Thus, where a cause was referred to two arbitrators and such third person as they should nominate as their umpire, and the parties agreed to perform the award to be made by the two and their umpire, the court refused to enforce by attachment performance of an award made by the two arbitrators alone, considering it a doubtful point whether the award was not intended to be the joint act of the three (*x*).

The above remarks, and the rules contained in the following divisions of this section for the guidance of joint arbitrators, show clearly the additional liability to failure, when several arbitrators are appointed instead of one only.

Each arbitrator must act.

IV. *Duty of all the arbitrators to act.*]—On a reference to several arbitrators together, when there is no clause providing for an award made by less than all being valid, each of them must act personally in performance of the duties of his office, as if he were sole arbitrator; for, as the office is joint, if one refuse or omit to act, the others can make no valid award (*y*). For though in cases of persons appointed to fulfil public duties the decision of a majority is generally sufficient, the cases are numerous to show that the law puts a different construction on authorities of a private nature, like that of arbitrators, and generally requires that all who are intrusted with such powers must concur in order to their valid execution (*z*).

Waiving objection to not acting.

But if two arbitrators are to appoint a third to act with them, and they mistakenly appoint a person as umpire, and the two alone hold the reference and make the award, a party who has attended the meetings without objecting to the case being heard by the two only, cannot afterwards impeach the award as invalid for want of the concurrence of the third arbitrator (*a*).

(*x*) Heatherington *v.* Robinson, 7 Dowl. 192. See Winteringham *v.* Robertson, 27 L. J. Ex. 301.

(*y*) Little *v.* Newton, 2 M. & G. 351; Stalworth *v.* Inns, 2 D. & L. 421. See P. II. ch. 3, s. 3, d. 6, as to effect of refusal to act as a revocation.

(*z*) Grindley *v.* Barker, 1 B. & P. 229; Vin. Ab. Authority, B.; R. *v.* Whitaker, 9 B. & C. 648; Crawshay *v.* Collins, 3 Swanst. 90.

(*a*) Marsh, In re, 16 L. J. Q. B. 330.

Arbitrators may not delegate to each other,

The arbitrators may not delegate their authority even to each other. Two merchants, arbitrators, may not delegate to the third arbitrator, though he be a barrister, the decision of a point of law arising out of the case. Where the rest of the award had been determined on, but a point of law had been left to the barrister to decide, and he made and executed his award alone, according to the previous arrangement, and the result of his decision on the question of law, and the award was afterwards executed by another of the arbitrators (an award made by two only being good), the court set it aside, on the ground that there was no principle of law authorizing the two merchants to delegate their power of judging, and that it was impossible to say, but that if the barrister had expressed his opinion on the point of law to the others before the award was made, some arguments might not have been raised by them, which would have produced a different result from that at which the barrister had arrived alone (*b*).

or to third person.

If the arbitrators agree together beforehand, without authority from the parties, to be bound by the opinion of a third person, and make their award on his opinion without exercising any judgment of their own, the award may be set aside on motion (*c*).

But may adopt opinion of each other.

But if each of the arbitrators exercise his own independent judgment on the matters referred, it is no objection to the award that on discussion one gives way to the other, for where two differ in opinion, one or both must give way, otherwise they never can agree (*d*).

All the arbitrators must act together.

As they must all act, so they must all act together. They must each be present at every meeting; and the witnesses and the parties must be examined in the presence of them all; for the parties are entitled to have recourse to the arguments, experience, and judgment of each arbitrator at every stage of the proceedings brought to bear on the minds of his fellow-judges, so that by conference they shall mutually assist each other in arriving together at a just decision (*e*). And

(*b*) Little *v.* Newton, 9 Dowl. 437.

(*c*) Whitmore *v.* Smith, 5 H. & N. 824, S. C. 29 L. J. Ex. 402; in error, 31 L. J. Ex. 107, S. C. 7 H. & N. 509.

(*d*) Eardley *v.* Steer, 4 Dowl. 423.

(*e*) Plews *v.* Middleton, 6 Q. B. 845; Little *v.* Newton, 9 Dowl. 437, S. C. 2 M. & G. 351; Stalworth *v.* Inns, 2 D. & L. 428; Lord *v.* Lord, 5 E. & B. 404, S. C. 26 L. J. Q. B. 34; Beck *v.* Jackson, 1 C. B. N. S. 695.

especially should they all put their minds together after the evidence is all given before they proceed to award (*f*). So necessary is it that the arbitrators should act jointly, that where referees in the case of a joint arbitration agreed to carry on their inquiries apart, and to examine the witnesses separately, and if they concurred in the result to decide accordingly, it was laid down by the court that such a course of proceeding would not be sanctioned in any instance, but that an award made on facts so ascertained would be set aside as procured by "undue means," since such a mode of examination was a departure, not merely from established courses of procedure, but from natural justice (*g*).

Separate examination of witnesses irregular.

Refusal to act.

On a reference under the Lands Clauses Consolidation Act, after one meeting the company's arbitrator failed to attend a meeting agreed upon on the plea of business: this was held not to be such a refusal to act as to justify the other arbitrator proceeding ex parte. But Knight Bruce, V.-C., said that if it were made out that the absence of the company's arbitrator had been procured by the collusion of the company, the latter would have been bound by anything that took place before the other arbitrator just as much as if both arbitrators had been present (*h*).

Absence of arbitrator procured by party.

Arbitrators should execute the award all together.

If two arbitrators meet and agree on the terms of an award, though they afterwards, when it is drawn up, fix their respective signatures to it at different times and different places, the Court of Common Pleas seemed inclined to doubt whether they would hold an award void for the objection that the execution ought to have been by both together (*i*). But in a later case the Court of Exchequer were strongly of opinion that the award should have been reduced into writing by the common consent of the arbitrators, and jointly executed by them; on the principle that the law required that every judicial act done by several should be completed in the presence of each other, and that in the case of arbitrators it was possible that at the last moment one might change his opinion. The court added a hope, that having had this

(*f*) Morgan *v.* Bolt, Q. B. 19 Jan. 1863; 1 N. R. 271.

(*g*) Plews *v.* Middleton, 6 Q. B. 845. See Peterson *v.* Ayre, 23 L. J. C. P. 129.

(*h*) Hawley *v.* North Staffordshire Rail. Co., 12 Jur. 389, S. C. 2 De Gex & S. 33.

(*i*) Little *v.* Newton, 9 Dowl. 437.

intimation from the court, arbitrators would in future take care that the execution of the award should be joint (*k*). And the Court of Queen's Bench have more recently decided that an award signed by the two arbitrators at different places and times is void (*l*). A similar opinion has been expressed by L. C. Cranworth (*m*).

Appointment of umpire condition precedent.

It is often made a condition precedent that before the two arbitrators proceed with the reference they shall appoint an umpire. When such is the case the proceedings may be invalid, unless the umpire is so appointed.

Under the Lands, Railways, and Companies Clauses Acts.

In references under the Lands Clauses Consolidation Act, 1845, the Railways Clauses Consolidation Act, 1845, the Railway Companies Arbitration Act, 1859, and the Companies Clauses Consolidation Act, 1845, the appointment of an umpire must be made before entering upon the matters referred. In treating of the appointment of an umpire this point is more fully examined (*n*).

Two choosing third to act with them.

v. *Duty of the arbitrators when award by less than all valid.*] —If two arbitrators only are appointed by the submission, and they are to choose a third to act with them, and an award made by any two is to be valid, they must choose their colleague before they take any step in the reference, in order that the parties may have the benefit of the judgment of all three on the whole of the matters. They have no business to treat the third arbitrator as an umpire to be called in in case of difference except by consent of the parties (*o*).

Enlarging time before appointing third arbitrator.

If the award is to be made on or before a certain day, or such other day as the said arbitrators, or any two of them, shall appoint, it is necessary for the two to appoint a third before they make any enlargement of the time, or the enlargement will be void (*p*).

Two may act if third refuse.

Under such a submission it will be sufficient for any two of them to act jointly, though the third from obstinacy, or the

(*k*) Stalworth *v.* Inns, 2 D. & L. 428, S. C. 13 M. & W. 466. See Wright *v.* Graham, 3 Ex. 131; Anning *v.* Hartley, 27 L. J. Ex. 145.

(*l*) Wade *v.* Dowling, 4 E. & B. 44.

(*m*) Eads *v.* Williams, 24 L. J. Ch. 531.

(*n*) P. II. ch. 4, s. 4, d. 2, p. 229.

(*o*) Peterson *v.* Ayre, 23 L. J. C. P. 129.

(*p*) Reade *v.* Dutton, 2 M. & W. 69; Hughes *v.* Garnett, cited 2 M. & W. 69.

desire of a party, or business, or any other cause, absent himself from the meetings, provided he have full notice and opportunity of being present at them if he please, and be not kept away by any practice of the other arbitrators or of the parties (*q*). When there is no positive refusal to act, two cannot make a good award without first taking the opinion of the third. If after discussion he refuse to concur with them in the award, they may then execute it, and it will be binding (*r*).

Consulting third arbitrator where no refusal.

But in order to justify such a course, the following cases show that there should first be a full discussion and a final refusal to agree.

A proposed award was shown at a meeting of the three arbitrators, to which one of them objected, and he, after a discussion, declared that if the other two would not alter their view they must make the award by themselves, and he would not join in it. Had the two, on this state of the facts, made the award, the court intimated an opinion that it would have been valid. But the arbitrators not treating this refusal as final, got into further communications, for afterwards a draft different from that of the proposed award was sent by the other two by mistake to the arbitrator, who disagreed, and he returned it to them with comments, and objections. The two subsequently made an award corresponding with that originally proposed, without again submitting it to the third arbitrator. The court set aside the award on the ground that the two, after receiving the objections, were bound to take them into consideration, and consult with the other arbitrator upon them, and at least to hear what he had to say in support of them before they finally determined (*s*).

So when the two originally named arbitrators, having differed about some items, agreed each to furnish the third with a written statement of what he thought the award should be, and another award was made by the third and the

(*q*) Goodman *v.* Sayers, 2 J. & W. 242; Dalling *v.* Matchett, Willes, 215, S. C. Barnes, 57; Morphett, In re, 2 D. & L. 967; Young *v.* Bulman, 13 C. B. 623; Moseley *v.* Simpson, L. R. 16 Eq. 226.

(*r*) White *v.* Sharp, 12 M. & W. 712; Sallows *v.* Girling, Cro. Jac. 277; Berry *v.* Perry, 3 Bulst. 62; Thomas *v.* Harrop, 1 S. & S. 524.

(*s*) Perring *v.* Keymer, In re, 3 A. & E. 245.

one whose views he adopted, without any further meeting of all three, the court set the award aside because the three never consulted together upon it; adding, that it by no means followed, from the difference of the original arbitrators, that the reasonings and arguments of the third might not have produced unanimity, and that the one whose views were rejected was entitled to the opportunity of discussing the award with the other two, though had a meeting been arranged and he had refused to attend, this refusal would have justified the two who agreed in treating the difference as final, and in making their award (*t*).

Lands Clauses Act, death, &c., of one of two arbitrators.

When the parties have each appointed an arbitrator on a reference respecting the compensation to be paid for lands taken under a special act of parliament for the purposes of a public undertaking sanctioned by the act, or injuriously affected by the works done under it, the Lands Clauses Consolidation Act, 1845, enacts, in section 26, that, "if before the matters so referred shall be determined, any arbitrator appointed by either party die, or become incapable, the party by whom such arbitrator was appointed may nominate and appoint, in writing, some other person to act in his place, and if for the space of seven days after notice in writing from the other party for that purpose he fail to do so, the remaining or other arbitrator may proceed ex parte; and every arbitrator so to be substituted as aforesaid shall have the same powers and authorities as were vested in the former arbitrator at the time of such his death or disability as aforesaid." Section 30 provides, that "If, where more than one arbitrator shall have been appointed, either of the arbitrators refuse or for seven days neglect to act, the other arbitrator may proceed ex parte, and the decision of such other arbitrator shall be as effectual as if he had been the single arbitrator appointed by both parties."

Railways Clauses Act.

Clauses almost verbatim with the above are to be found in sections 127, 131 of the Railways Clauses Consolidation Act, 1845 (*u*).

Companies Clauses Act.

In the Companies Clauses Consolidation Act, 1845, s. 129, a similar enactment occurs. The clause is as follows:—"If before the matters so referred shall be determined, any arbi-

(*t*) Templeman and Reed, In re, 9 Dowl. 962.

(*u*) 8 & 9 Vict. c. 20. See Appendix of Statutes.

trator appointed by either party die, or become incapable, or refuse, or for seven days neglect to act as arbitrator, the party by whom such arbitrator was appointed may nominate and appoint, in writing, some other person to act in his place, and if for the space of seven days after notice in writing, from the other party for that purpose, he fail to do so, the remaining or other arbitrator may proceed ex parte; and every arbitrator so to be substituted as aforesaid shall have the same powers and authorities as were vested in the former arbitrator at the time of such his death, refusal, or disability as aforesaid."

Railway Companies Arbitration Act, 1859.

Under the Railway Companies Arbitration Act, 1859, the company on failure of one appointment of an arbitrator is to make a new appointment. If for fourteen days after request in writing such company does not appoint, the Board of Trade may appoint an arbitrator (*x*).

What a refusal of the arbitrator to act.

Two arbitrators appointed under the Lands Clauses Consolidation Act held a meeting in the reference, at the close of which meeting it was agreed that they should proceed next day with the case. Early the following morning, before the time of the meeting, one of the arbitrators wrote to the solicitor of the railway company who had appointed him, stating that he could not attend on account of important business; he also expressed his desire that the meeting should go on without him, and that he should be furnished with notes of the evidence taken. He did not attend, and the meeting was held without him. Vice-Chancellor Knight Bruce held that this was not such a refusal to act as to justify the other arbitrator in proceeding alone (*y*).

(*x*) 22 & 23 Vict. c. 59, ss. 9, 10.

(*y*) Hawley *v.* North Staffordshire Rail. Co., 2 De Gex & S. 33. See P. II. ch. 4, s. 4, d. 5. As to what is a neglect to act, see Willoughby *v.* Willoughby, 9 Q. B. 923, and post.

SECTION IV.

OF THE UMPIRE.

1. *By whom an umpire is to be appointed.*]—Where two arbitrators are appointed, the submission often provides that in case of their not agreeing in an award, the matters shall be decided by a third person, who is styled an umpire (*z*). Office of umpire.

The umpire is sometimes named in the submission; but more generally the submission merely provides that he shall be appointed by the arbitrators (*a*). Appointed by submission or arbitrators.

Formerly, though they could not agree, the arbitrators had no power to appoint an umpire, unless authorized to do so by the submission. But in cases of references out of court by the Arbitration Act, 1889, Schedule I. (b), the two arbitrators may appoint an umpire unless a contrary intention appear (*b*). Arbitrators, statutory power to appoint.

Sect. 5 of the Arbitration Act, 1889 (*c*), after alluding to a single arbitrator, proceeds—

(c) "Where the parties or two arbitrators are at liberty to appoint an umpire or third arbitrator and do not appoint him; Notice where umpire not appointed.

(d) Where an appointed umpire or third arbitrator refuses to act, or is incapable of acting, or dies, and the submission does not show that it was intended that the vacancy should not be supplied, and the parties or arbitrators do not supply the vacancy;

Any party may serve the other parties or the arbitrators, as the case may be, with a written notice to appoint an arbitrator, umpire, or third arbitrator.

If the appointment is not made within seven clear days after the service of the notice, the court or a judge may on application by the party who gave the notice, appoint an arbitrator, umpire, or third arbitrator, who shall have the like powers to act in the reference and make an award as if he had been appointed by consent of all parties." Court or judge may appoint.

The "court" in this act means her Majesty's High Court of Justice, and "judge" means a judge of that court (*d*).

(*z*) Com. Dig. Arb. F.; Rolle, Ab. Arb. pp. 7, 8.

(*a*) Anon. Jenk. 3d cent. case 61, p. 129.

(*b*) See P. II. ch. 4, s. 3, d. 2, p. 214.

(*c*) 52 & 53 Vict. c. 49.

(*d*) Sect. 27.

Power of court.

The powers conferred on "the court or a judge" apply to references under order of court as well as by consent out of court (*e*). The Court of Appeal have all the powers conferred by the act on the court or a judge under the provisions relating to references under order of court (*f*).

Act applies to arbitration, not valuation.

To give the court jurisdiction there must be an arbitration and not a mere valuation. For where, by agreement in writing, A. agreed to buy of B. brewery premises and the plant, &c. at a valuation to be made by certain valuers or their umpire, the umpire to be chosen before entering on the valuation, and the valuers could not agree upon an umpire, it was held on the similar provision in sect. 12 of the Common Law Procedure Act, that the court had no power to appoint an umpire, as this was not an arbitration within the act, since there had been no difference between the parties as to the price before the agreement to settle it by a valuation (*g*).

But if there be any matter in dispute, though not really a material one, the act applies (*h*), or if the submission contemplates a judicial inquiry, and the hearing of witnesses and parties, it is an arbitration within the act, though there have been no actual difference (*i*).

If the submission be to the award of A. and B., and D. being umpire, the words shall receive a liberal construction, and be held according to the common construction of the word umpire, to mean that D. is to decide as umpire in case A. and B. cannot agree in their award as arbitrators (*k*).

Appointment to decide between arbitrators.

It is improper for the arbitrators, under the ordinary provision empowering them to appoint an umpire, to appoint a person to be an umpire between *themselves*, instead of between the *parties*, for the meaning of the provision in the submission is, that the arbitrators should make an award on all the matters in difference, and if they cannot agree on all, that the umpire should decide on all (*l*).

(*e*) Sect. 16.
(*f*) Sect. 17.
(*g*) See Boss *v.* Helsham, L. R. 2 Eq. 72, S. C. 4 H. & C. 642; Collins *v.* Collins, 28 L. J. Ch. 184, S. C. 26 Beavan, 306.
(*h*) Evans *v.* Caddish, 18 W. R. 723, Stuart, V.-C.
(*i*) Hopper, In re, 8 B. & S. 100, S. C. 36 L. J. Q. B. 97, L. R. 2 Q. B. 367.
(*k*) Com. Dig. Ab. Arb. F.; Rolle, Ab. Arb. p. 4.
(*l*) Tollit *v.* Saunders, 9 Price, 612.

But where the submission was of all differences to the award of A. and B., and in case of their differing in opinion, to any umpire to be appointed by them, and it then went on to say, "and whatever the arbitrators or umpire shall determine in the premises by an award or awards, interim or final, to be pronounced by them," shall be binding on the parties, the House of Lords held that the arbitrators might make an award on some matters, and refer others on which they disagreed to the umpire (*m*).

Umpire to decide on matters on which arbitrators disagree.

On a reference under the Lands Clauses Consolidation Act, 1845 (*n*), it is provided by s. 27, that "where more than one arbitrator shall have been appointed, such arbitrators shall, before they enter upon the matters referred to them, nominate and appoint by writing under their hands an umpire, to decide on any such matters on which they shall differ, or which shall be referred to him under the provisions of this or the special act; and if such umpire shall die, or become incapable to act, they shall forthwith, after such death or incapacity, appoint another umpire in his place, and the decision of every such umpire on the matters so referred to him shall be final." The 28th section enacts that "if in either of the cases aforesaid the said arbitrators shall refuse, or shall, for seven days after request of either party to such arbitration, neglect to appoint an umpire, the Board of Trade, in any case in which a railway company shall be one party to the arbitration, and two justices in any other case, shall, on the application of either party to such arbitration, appoint an umpire, and the decision of such umpire on the matters on which the arbitrators shall differ, or which shall be referred to him under this or the special act, shall be final." Though, by s. 27, the two arbitrators cannot enter on the matters referred to them till they have appointed an umpire, it is to be noticed that where one arbitrator refuses to act or to concur in appointing an umpire the other arbitrator may, under s. 30, proceed ex parte, notwithstanding that no umpire has been appointed (*o*).

Appointment of umpire under the Lands Clauses Consolidation Act.

By arbitrators.

By Board of Trade or justices.

Arbitrator acting ex parte, umpire not appointed.

The Railways Clauses Consolidation Act, 1845 (*p*), contains

Under the Railways

(*m*) Lang *v.* Brown, H. L., May 8, 1855.

(*n*) 8 & 9 Vict. c. 18. See Appendix of Statutes.

(*o*) Shepherd *v.* Norwich Corporation, 30 Ch. D. 553.

(*p*) 8 & 9 Vict. c. 20.

Clauses Consolidation Act.

Railway Companies Arbitration Act, 1859.

like provisions. Section 128 of this act is verbatim the same as s. 27, above given; and s. 129 of that act is word for word the same as s. 28 of the above act, except that the words between "Board of Trade," and "shall on the application," are omitted. The Railway Companies Arbitration Act, 1859, 22 & 23 Vict. c. 59, has similar provisions. Telegraphs of railway companies may be purchased by the Postmaster-General under the statute 31 & 32 Vict. c. 110 (*q*).

Under the Companies Clauses Consolidation Act.

Very similar enactments are found in the Companies Clauses Consolidation Act, 1845 (*r*); for that act provides, in s. 130, that "where more than one arbitrator shall have been appointed, such arbitrators shall, before they enter upon the matters referred to them, nominate and appoint by writing under their hands an umpire to decide on any such matters on which they shall differ; and if such umpire shall die, or refuse, or for seven days neglect to act, they shall forthwith, after such death, refusal, or neglect, appoint another umpire in his place; and the decision of every such umpire on the matters so referred to him shall be final."

In s. 131, it is provided that "if in either of the cases aforesaid the said arbitrators shall refuse, or shall, for seven days after request of either party to the arbitration, neglect to appoint an umpire, it shall be lawful for the Board of Trade, if they think fit, in any case in which a railway company shall be one party to the arbitration, on the application of either party to such arbitration, to appoint an umpire; and the decision of such umpire on the matters on which the arbitrators shall differ shall be final."

If arbitrators neglect, judge might appoint umpire by Common Law Procedure Act, 1854, s. 12.

Under a reference which by private act of parliament was to be in the manner provided by the Companies Clauses Act, 1845 (neither party being a railway company), arbitrators were appointed and the submission made an order of Chancery before the Common Law Procedure Act, 1854, passed. The arbitrators not agreeing upon an umpire, the claimant (after the passing of the last-mentioned act) served them with a notice to appoint an umpire within seven days, under s. 12 of that act, and on their failing to do so took out a summons for Wood, V.-C., to appoint one under that statute. That learned

(*q*) See R. *v.* Lord Coleridge, 45 L. J. Q. B. 649.

(*r*) 8 & 9 Vict. c. 16.

judge held that he could make the appointment, as he considered that s. 12 of the last-mentioned act had a retrospective as well as a prospective effect, and applied to pre-existing references, being a section for remedying defects in the course of procedure. He also thought that the clause in s. 12, "if in any case of arbitration when the parties or two arbitrators are at liberty to appoint an umpire," and they fail to do so, the judge may appoint, applied to every arbitration, whether by private act of parliament or by parol agreement, and was not limited to the cases where there is a document authorising the reference. It was discussed by counsel, and doubted by the Vice-Chancellor, whether a private act of parliament could be considered a document authorising a reference; but it is apprehended that the written appointment of the arbitrators which constituted the submission and was made a rule of court, and which authorised them to proceed, was a sufficient document authorising the reference within the meaning of the act (*s*).

Act retrospective.

The Arbitration Act, 1889, applies to every arbitration under any act before or after, except in so far as the act regulating the arbitration is inconsistent with the Arbitration Act (*t*).

Application of Arbitration Act, 1889.

Malins, V.-C., under the 12th section of the Common Law Procedure Act, selected a third arbitrator where one of the two surveyors appointed under the statute 18 & 19 Vict. c. 122, to settle differences between the building owner and adjoining owner, had declined to agree in naming a third arbitrator (*u*).

Third arbitrator appointed by judge.

The articles of association of a joint-stock company incorporated under the Companies Act, 1862 (25 & 26 Vict. c. 89), provided for the appointment of an umpire by a judge under the Common Law Procedure Act, 1854, if the arbitrators failed to appoint one in due time. The arbitrators did not appoint an umpire. It was held that the appointment by a judge was valid, either under the articles of association or under the Common Law Procedure Act, 1854 (*x*).

Umpire.

It may be proper to notice in this place, that by an act,

Board of

(*s*) In re Lord *v.* Copper Mining Co., 1 Kay & Johnson, 90, S. C. 24 L. J. Ch. 145.

(*t*) 52 & 53 Vict. c. 49, s. 24.

(*u*) McBryde, Ex parte, L. R. 2 Ch. D. 200.

(*x*) See De Rosaz *v.* Anglo-Italian Bank, L. R. 2 Q. B. 452; also 38 L. J. Q. B. 161, S. C. L. R. 4 Q. B. 462.

PART II. CH. IV. S. 4.

Trade and Railway Commissioners.

the 9 & 10 Vict. c. 105, ss. 2 and 9, all the powers of the Board of Trade, with respect to railways, or intended railways, were transferred to the Commissioners of Railways appointed under that act. But by the statute 14 & 15 Vict. c. 64, the last-mentioned act was repealed, and the powers of those Railway Commissioners were transferred to the Board of Trade.

Judge may appoint on refusal of party empowered to appoint.

Where an agreement of reference between two telegraph companies provided that in case the parties did not agree on a sole arbitrator, the matter should be referred to a sole arbitrator to be appointed by [the Board of Trade], which, on the failure of the parties to agree, refused to appoint, it was decided that a judge might make the appointment under s. 12 of the Common Law Procedure Act, 1854 (*y*).

Appointment to be made at time prescribed.

II. *When the arbitrators should appoint the umpire.*]—Sometimes, in order to insure the appointment of an umpire before the arbitrators' minds are embarrassed with the matters in difference, the appointment is made a condition precedent to the proceeding at all in the reference; when such is the case, the arbitrators should make the appointment before they take any other step, or the whole proceedings may be invalid (*z*). Merely enlarging the time before appointing the umpire is not an entering on the consideration of the matters in difference, so as to render the appointment a nullity (*a*).

When arbitrators to appoint, no time prescribed.

When the submission makes no special provision respecting the time when the arbitrators are to appoint the umpire, and a day is given to the umpire subsequent to that limited for the arbitrators making their award, they may appoint an umpire at any time before the time for making the umpirage has expired, for the power of appointing an umpire is quite collateral to that of making an award, and survives when the latter power is extinct (*b*).

(*y*) Brazilian, &c., Co. & Western Telegraph Co., In re, 42 L. T. N. S. 234.

(*z*) Hick, In re, 8 Taunt. 694; Bright *v.* Durnell, 4 Dowl. 756.

(*a*) Cudliff *v.* Walters, 2 Moo. & Rob. 232.

(*b*) Harding *v.* Watts, 15 East, 556; Barnard *v.* King, cited 2 Keb. 15, S. C. Rolle Ab. Arb. P. 6; Burdett *v.* Harris, 3 Keb. 387; Adams *v.* Adams, 2 Mod. 169; Anon., Freem. 378; Winteringham *v.* Robertson, 27 L. J. Ex. 301; Watson *v.* Clement, Rolle Ab. Arb. P. 5.

If the submission run, that in case the arbitrators should disagree in their opinion, it shall be competent for them to appoint an umpire, they may appoint one in the first instance, and need not wait until they have investigated the matters, and found that they cannot agree (*c*). This, too, seems the better course to pursue, for the arbitrators are more likely to agree on an umpire before they have disagreed about the subject referred to them (*d*). In an old case, Holt, C.J., held that the arbitrators had no power to choose an umpire before the time allowed for the award had expired (*e*). This view was also adopted by Mansfield, C.J. (*f*), but that decision of Holt's, C.J., seems contrary to another decision of his (*g*), and has been often overruled, and cannot now be considered as law (*h*).

Appointing umpire to act in futuro.

Where arbitrators whose powers extended to the 1st day of September, appointed an umpire in April, but in the appointment stated that his duties should commence on the 1st of September, Crompton, J., thought the appointment good (*i*).

Appointment under Arbitration Act, 1889.

The old cases, however, on this subject must be read in connection with the Arbitration Act, 1889 (*k*). Arbitrators under submission out of court, executing their statutory power of appointing an umpire under the terms of the schedule of that act, may make the appointment "at any time within the period during which they have power to make an award," but they may be called upon by notice under s. 5 to act earlier (*l*).

Appointment of umpire under various statutes.

It will be seen, by reference to the preceding division of this section, that the Lands Clauses Consolidation Act, the Railways Clauses Consolidation Act, and the Companies Clauses Consolidation Act, all contemplate, in the first

(*c*) Bates *v.* Cooke, 9 B. & C. 407.

(*d*) Harding *v.* Watts, 15 East, 556.

(*e*) Reynolds *v.* Gray, 1 Salk. 70.

(*f*) Beck *v.* Sargent, 4 Taunt. 232.

(*g*) Mitchell *v.* Harris, 12 Mod. 512, S. C. Salk. 71.

(*h*) Roe d. Wood *v.* Doe, 2 T. R. 644; Harding *v.* Watts, 15 East, 556; Doyley *v.* Pitalow, E. T. 28 G. II., cited 15 East, 557, n. (*d*); R. *v.* Outram, T. T. 29 G. III., cited 15 East, 557, n. (*d*); Cowel *v.* Waller, 2 Barnard. 154; Elliott *v.* Cheval, 1 Lutw. 541; Jennings *v.* Vandeputt, Cro. Car. 263; Coppin *v.* Hurnard, 2 Saund. 133 (*a*), note.

(*i*) Johnson *v.* Collie, 24 L. J. Q. B. 64.

(*k*) 52 & 53 Vict. c. 49, Sched. I. (b).

(*l*) See ante, p. 223.

instance, that the arbitrators are to appoint an umpire before entering into a consideration of the matters referred to them (*m*). Under the Railway Companies Arbitration Act, 1859, they are to do so "before entering on the business of the reference."

Within what limit under the Lands Clauses Consolidation Act.

In one case the last of the two arbitrators was appointed on the 6th April. As they had neglected to appoint an umpire for seven days after request, application was made to the Board of Trade, who appointed an umpire on the 17th of May. The arbitrators had not enlarged their time. It was objected, that the appointment of the umpire was too late, on the ground that, by the Lands Clauses Consolidation Act, it ought to have been made within twenty-one days after the appointment of the arbitrators. The court, however, held the appointment to be good, and said that, "if the arbitrators failed for twenty-one days to make an award, and did not extend their time, the power to award was taken from them; but that the incapacity to make an award had no effect upon the power given to the arbitrators under s. 27, and to the Board of Trade on their default under s. 28, to appoint a new umpire in case of the death or failure of the first; and that they saw no reason why the same incapacity to award should have any effect upon the powers given for appointing the original umpire (*n*).

Some doubt was thrown upon *Bradshaw's* case, quoted above, in a later decision of the Court of Queen's Bench, apparently from a misapprehension of the facts; but in the Exchequer Chamber *Bradshaw's* case was explained and reasserted to be good law (*o*).

Under the Public Health Act.

Under the Public Health Act, 1875 (stat. 38 & 39 Vict. c. 55), s. 180, if the arbitrators neglect or refuse to appoint an umpire within seven days after request, the Local Government Board may make the appointment. If either of the arbitrators are appointed by parol, their appointment of the umpire would be invalid under this statute (*p*).

(*m*) See p. 225. See Skerratt *v.* North Staffordshire Rail. Co., 17 L. J. Ch. 161, S. C. 12 Jur. 46; 2 Phill. 475.

(*n*) Bradshaw's Arbitration, 12 Q. B. 562.

(*o*) Holdsworth *v.* Wilson, 32 L. J. Q. B. 289, S. C. 3 B. & S. 1, in error, from Holdsworth *v.* Barsham, 31 L. J. Q. B. 145, S. C. 2 B. & S. 480.

(*p*) Gifford *v.* Bury Town Council, 20 Q. B. D. 368.

Under the old Public Health Act, 1848 (stat. 11 & 12 Vict. c. 63), when arbitrators appointed the umpire, on request of the parties, within three months after the appointment of the last arbitrator, such appointment was held good. But an appointment after such three months would probably not have been held valid as a statutory appointment (*q*).

At Quarter Sessions.

An appointment by the Quarter Sessions on refusal of the arbitrators to appoint under the old act, was not necessary to be made at the next sessions, but at any sessions within a reasonable time (*r*).

III. *How the arbitrators are to choose an umpire.*]—The acknowledged general rule as to the mode of appointing the umpire is, that the appointment must be the act of the will and concurring judgment of both the arbitrators; unless the parties consent to or acquiesce in some other mode of appointment (*s*).

Appointment of umpire must be by choice, not chance.

Tossing up.

It has always been held, that if the two arbitrators toss up which shall nominate the umpire to the exclusion of the other, an appointment so made is bad (*t*). In *Cassell, In re* (*u*), the court came to the conclusion that it was better to avoid nice distinctions, and laid down the rule which has since been followed by the courts in subsequent cases (*x*), that the appointment must not be dependent on chance, but must be a matter of choice. Thus, where each arbitrator wrote on a paper the name of a person who was not known to the other, and the one drawn by chance was appointed umpire, the appointment was held bad (*y*).

Drawing lots.

Choice by chance out of persons agreed on as fit.

An important distinction was, however, taken in a case where each arbitrator having nominated a person for umpire whom the other arbitrator acknowledged to be a proper

(*q*) Holdsworth *v.* Wilson, 32 L. J. Q. B. 289, S. C. 3 B. & S. 1, in error, from Holdsworth *v.* Barsham, 31 L. J. Q. B. 145, S. C. 2 B. & S. 480.

(*r*) Ringland *v.* Lowndes, 15 C. B. N. S. 173, S. C. 33 L. J. N. S. C. P. 25, S. C. in error, 17 C. B. N. S. 514, S. C. 33 L. J. C. P. 337.

(*s*) Cassell, In re, 9 B. & C. 624.

(*t*) Harris *v.* Mitchell, 2 Vern. 485; Hewitt *v.* Penny, Sayer, 99; Wells *v.* Cooke, 2 B. & A. 218; Young *v.* Miller, 3 B. & C. 407.

(*u*) 9 B. & C. 624.

(*x*) Ford *v.* Jones, 3 B. & Ad. 248; Greenwood *v.* Titterington, In re, 9 A. & E. 699; Hodson *v.* Drewry, 7 Dowl. 569.

(*y*) Pescod *v.* Pescod, W. N. (1888) 2.

person for the office, agreed to toss up which of the two should be appointed. Lord Ellenborough, C.J., said that he saw no objection to the appointment, and noticed that the mode of appointing jurors is by lot out of those who are fit to serve (*z*). Though this decision was apparently overruled by *Cassell, In re* (*a*), it has since been several times affirmed to be good law (*b*).

In another case, two arbitrators tossed up for the choice of an umpire: the one who won the toss named a person for umpire, but, on the other arbitrator objecting, afterwards abandoned his choice, and proposed to toss up again for the choice of another. The latter arbitrator, however, did not consent to this, but insisted that it was his turn to name an umpire, and he then chose a person who afterwards acted as umpire, the former arbitrator making no objection. The court held, that though the appointment of the first umpire would have been bad as an appointment by lot had it been persisted in, the second appointment was good, being one of choice, not chance, and was not vitiated because one arbitrator devolved on the other the entire discretion as to the selection (*c*).

Consent of parties renders valid appointment by lot.

After the rule laid down in *Cassell, In re* (*d*), there was at one time some inclination shown by the courts to hold, that even the assent of the parties could not render valid an appointment by lot, on the ground that it was better to abide by a simple rule, than to permit an inquiry on affidavit into the doubtful question of whether the parties assented (*e*). Yet it is now beyond dispute that the courts have adopted the exception as well as the rule laid down by Lord Tenterden in *Cassell, In re* (*f*), and the appointment by lot of an umpire will be sustained, if the parties either previously or subsequently give a clear assent to such a mode of election (*g*).

(*z*) Neale *v.* Ledger, 16 East, 51.

(*a*) 9 B. & C. 624.

(*b*) The European and American Steam Shipping Co. *v.* Crosskey, 29 L. J. C. P. 155, S. C. 8 C. B. N. S. 397; Morgan *v.* Bolt, Q. B. 19 Jan. 1863, 1 N. R. 271; Hopper, In re, 8 B. & S. 100, S. C. 36 L. J. Q. B. 97; L. R. 2 Q. B. 367.

(*c*) Vinnikum and Morgan, In re, 5 Jur. 72.

(*d*) 9 B. & C. 624.

(*e*) Ford *v.* Jones, 3 B. & Ad. 248; Hodson *v.* Drewry, 7 Dowl. 569.

(*f*) 9 B. & C. 624.

(*g*) Hodson *v.* Drewry, 7 Dowl. 569; Tunno and Bird, In re, 5 B. & Ad. 488; James *v.* Attwood, 7 Scott, 841; Backhouse *v.* Taylor, 20 L. J. Q. B. 233.

That assent, however, to be binding, must be given with a full knowledge of all the circumstances (*h*). If the arbitrators merely inform the parties that they have mutually chosen A. B. to be umpire, and the parties approve of the appointment, not knowing that the umpire has been selected by lot, the umpire obtains no binding authority by such assent (*i*). Even if the attorney of a party know that the selection has been made by tossing up, and assent to it, assuming that the attorney has power to bind his client, the award will not bind him, if the important circumstance be not disclosed of the arbitrator who lost the toss having previously personally objected to the umpire, when originally proposed by the other arbitrator (*k*).

Assent must be given with full knowledge.

An agent or solicitor who has the conduct of the reference for a party to it, has sufficient authority to bind his principal by assenting to appointing an umpire by drawing lots (*l*).

Assent by agent or solicitor.

The clerks to the solicitors have no authority to bind the parties, by assenting to the selection of an umpire by lot, nor will his authority be ratified, if, in ignorance of the mode of election, the parties attend before him (*m*).

The clerks to the solicitors cannot assent.

Though it was doubted in some old cases (*n*), there does not now seem to be much question that on the refusal of the umpire first named to act, the having once executed their power by appointing an umpire does not prevent the arbitrators from appointing another. For though, when the arbitrators have once executed their authority by the appointment of an umpire, they cannot revoke it and execute it again; this seems to apply only to the case of an effectual appointment, and there is no effectual appointment, unless it be accepted by the person named as umpire (*o*). If they make the appointment in terms conditional on acceptance, it

Appointing fresh umpire if first refuse.

(*h*) Wells *v.* Cooke, 2 B. & A. 218.

(*i*) Greenwood & Titterington, In re, 9 A. & E. 699.

(*k*) Jamieson & Binns, In re, 4 A. & E. 945.

(*l*) Backhouse *v.* Taylor, 20 L. J. Q. B. 233; Thompson *v.* Blythe & Tyne Rail. Co., B. C. May 6, 1863, *per* Wightman, J.

(*m*) Hodson *v.* Drewry, 7 Dowl. 569.

(*n*) Reynolds *v.* Gray, 1 Salk. 70, S. C. 1 Ld. Raym. 222; 12 Mod. 120.

(*o*) Oliver *v.* Collins, 11 East, 367; Trippet *v.* Eyre, 3 Lev. 263, S. C. 1 Show. 76; 2 Vent. 113; Com. Dig. Ab. Arb. F.

is clear their power to make a second appointment remains, in case of a refusal by the party first selected (*p*).

Disapproval of parties no effect.

When there is an effectual appointment of an umpire, it cannot be affected by the disapproval of the parties (*q*).

No special form of appointment.

If the submission provide no special form of appointment of the umpire, a parol appointment is sufficient (*r*). Sometimes the submission requires it to be in writing, sometimes that it be under the hand and seal of the arbitrators, or that it be indorsed on the submission. Whatever the direction is, the arbitrators should follow it closely. When it is to be under the hands of the arbitrators, both must sign it, or at least agree upon the person, together (*s*). The appointment requires no stamp, unless it be under seal, and delivered as a deed (*t*).

Appointment in writing, under Lands, &c., Clauses Acts.

The appointment of an umpire by the arbitrators under the Lands Clauses Consolidation Act, the Railways Clauses Consolidation Act, and the Companies Clauses Consolidation Act, must, we have seen, be in writing under their hands (*u*).

Appointment by Commissioners of Railways.

When the arbitrators disagreed and the umpire was to be appointed by the Commissioners of Railways, the appointment should have been signed by two of the Commissioners and sealed with their seal. There is great doubt whether an appointment in their name signed by a secretary of the Commissioners only was valid (*x*).

Commencement of authority, no time limited.

IV. *Commencement and duration of the umpire's authority.*]—Where no time is limited for the making of the award, the umpire's authority can commence from no other period than the disagreement of the arbitrators (*y*).

Arbitration Act, 1889. Commencement of

By the Arbitration Act, 1889, in submissions out of court by consent, the following provision generally applies: "If the arbitrators have allowed their time or their extended time

(*p*) Reynolds *v.* Gray, 1 Salk. 70, S. C. 1 Ld. Raym. 222.

(*q*) Oliver *v.* Collins, 11 East, 367.

(*r*) Ibid.

(*s*) Lord *v.* Lord, 26 L. J. Q. B. 34, S. C. 5 E. & B. 404; Hopper, In re, 8 B. & S. 100, S. C. 36 L. J. Q. B. 97; L. R. 2 Q. B. 367.

(*t*) Routledge *v.* Thornton, 4 Taunt. 703; Dod *v.* Herbert, Styles, 459.

(*u*) See ante, division 2 of this section, p. 214.

(*x*) The Wilts, Somerset, and Weymouth Rail. Co. *v.* Fooks, 3 Ex. 728.

(*y*) Com. Dig. Arb. F.; Winteringham *v.* Robertson, 37 L. J. Ex. 301.

to expire without making an award, or have delivered to any party to the submission, or to the umpire, a notice in writing stating that they cannot agree, the umpire may forthwith enter on the reference in lieu of the arbitrators" (*z*). An umpire appointed by the court under s. 5 of the act has the like powers as if he had been appointed by consent of parties.

umpire's time.

If there be a time limited for the award, the umpire's authority commences absolutely from that limit, even though the arbitrators have never met to agree or disagree on the subject, for the not making an award shows they have not agreed (*a*).

When time limited for award.

When the umpire has a period allowed him for making his umpirage later than the time given to the arbitrators, his authority may commence before the expiration of the time limited to the arbitrators, subject, however, to defeasance. For if the arbitrators disagree, and refuse to make an award, the umpire may proceed at once with the reference, and need not wait until the time allotted to the arbitrators has expired, and his decision will be binding, even if made before the time for the award has elapsed. It will, however, become a nullity in case the arbitrators afterwards assume their authority, agree, and make an award within the time allotted them (*b*).

Commencing subject to defeasance.

If the *submission name the umpire* as well as the arbitrators, and appoint the *same day* as the limit for both the award and umpirage, some of the older cases seem to show that the appointment of the umpire is absolutely void, and that he cannot make any umpirage, even if the arbitrators make no award. Other cases seem to qualify this opinion, by holding that the umpirage might be good, when the arbitrators had disagreed, and declared they would not intermeddle any more, or where one of the arbitrators had died, and so rendered it impossible for them to agree in an award (*c*).

Submission naming umpire giving same limit for arbitrators and umpire.

The courts, in the first class of cases, seem to have apprehended a difficulty in allowing the umpire to have in any

(*z*) 52 & 53 Vict. c. 49, s. 2, and Sched. I. (d).

(*a*) Lumley *v.* Hutton, Rolle Ab. Arb. p. 1.

(*b*) Smailes *v.* Wright, 3 M. & S. 559; Sprigens *v.* Nash, 5 M. & S. 193; Dare *v.* Chase, 2 Show. 164; Cowel *v.* Waller, 2 Barnard. 154. See also Yeadon Local Board *v.* Yeadon Waterworks Co., 41 Ch. D. 52.

(*c*) Coppin *v.* Hurnard, 2 Saund. 129, and see notes to same, S. C. 1 Lev. 285; Raym. Rep. 187; Mitchel *v.* Harris, 1 Salk. 71; Anon. 2 Vern. 100; Barber *v.* Giles, Rolle Ab. Arb. p. 2; Barnard *v.* King, Vin. Ab. Arb. p. 6.

case a concurrent jurisdiction with the arbitrators, on the ground of the confusion that would be created if there were two awards (*d*), and therefore held the appointment of the umpire void when the same day was limited for the award and umpirage. That difficulty will be removed, however, if the courts, as they probably would, should hold in cases where only one day is limited, as they hold in cases where the umpire has a further day, that the umpirage made after disagreement of the arbitrators shall stand good, unless the arbitrators subsequently agree in making an award within the time, in which case their decision is that which is to conclude the parties.

When arbitrators to choose umpire, and same limit for arbitrators and umpire.

Where there is only *one limit*, and *the arbitrators are to choose the umpire* if they cannot agree, it is held in many old cases, that by choosing an umpire they renounce their power and cannot again resume it, so that if after the appointment of the umpire they agree and make an award, that award is null, and will not invalidate the umpirage previously made (*e*).

We have already seen that where a further day is given to the umpire, the arbitrators do not renounce their authority by appointing an umpire, but are recommended to select one in the first instance; it is probable, therefore, that the same uniform principle would now be extended to cases where one day only is limited for both the award and umpirage, and that the umpire's decision would be held good, but subject to becoming nugatory in case the arbitrators after his appointment made an award within the limited time (*f*).

What a disagreement of the arbitrators.

When the umpire's power is to commence on the disagreement of the arbitrators, to justify the umpire in interfering there must be such a difference between the arbitrators as renders their agreement in an award hopeless (*g*). Whether there has been such an essential difference, is a question of fact, to be decided sometimes by a jury, sometimes by the court, according to the nature of the proceedings.

The word "disagreement," however, must in general be

(*d*) Smailes *v.* Wright, 3 M. & S. 559; see last note.

(*e*) Twisleton *v.* Travers, 2 Keb. 15, S. C. 1 Lev. 174; Dunavan *v.* Mascall, 1 Lev. 302; Fyall *v.* Varier, Rolle Ab. Abr. p. 3; Danes *v.* Monsay, Vin. Ab. p. 18, p. 97.

(*f*) See Coppin *v.* Hurnard, 2 Saund. 133 (*b*), note.

(*g*) Cudliff *v.* Walters, 2 Moo. & Rob. 232.

construed to mean non-agreement (*h*). Where the arbitrators intimate to the umpire that there is no probability of their making any award (*i*), or when one of them, after some meetings, declines to proceed further in the case, or where one of the arbitrators insists on further evidence being produced, which the other refuses to allow (*k*), these states of things may amount to such a disagreement, or non-agreement, as to call the umpire's powers into existence, and, where no time has been limited, finally to determine the arbitrators' authority (*l*). And for this effect it is not necessary that the arbitrators should have heard the whole of the evidence, and then differ. If a sufficient disagreement take place while the evidence is only part heard, the umpire's authority will commence (*m*).

The circumstance of no award having been made by the arbitrators, and of the award having in fact been made by the umpire, will, it seems probable, in the absence of anything to show that the arbitrators are still considering the case, be taken by the court as primâ facie information that the arbitrators did not agree (*n*).

Umpire empowered to enlarge time before disagreement.

The umpire's authority may for some purposes commence before any disagreement of the arbitrators. Where the submission gives both the arbitrators and the umpire power of enlarging the time, and the arbitrators enlarge their time beyond the original limit fixed for the umpire making his umpirage, the umpire may, within his original period, enlarge his time further, although there has been no disagreement between the arbitrators before he makes his enlargement; and it seems necessary that he should take this step, in order to preserve his authority alive (*o*).

Umpire no authority when arbitrators award on part.

If the arbitrators within the time make an award respecting part of the matters submitted to them, the umpire cannot, unless specially authorized, decide on the rest, because he is

(*h*) Doddington *v.* Bailward, 7 Dowl. 640; Middleton *v.* Chambers, Vin. Ab. Arb. p. 17.

(*i*) Doddington *v.* Bailward, 7 Dowl. 640.

(*k*) Cudliff *v.* Walters, 2 Moo. & Rob. 232.

(*l*) Tunno *v.* Bird, In re, 5 B. & Ad. 488.

(*m*) Tunno *v.* Bird, In re, 5 B. & Ad. 488.

(*n*) Doddington *v.* Bailward, 7 Dowl. 640; Com. Dig. Arb. F.

(*o*) Doddington *v.* Bailward, 7 Dowl. 640.

in general only empowered to act in case the arbitrators make no award at all before a certain day, and then he is to decide on all matters (*p*).

Umpire's enlargement not enure for arbitrators.

Where the umpire is to decide on those matters only on which the arbitrators disagree, his enlargement of time does not enure to give the arbitrators further time to make their award on the matters not referred by them to the umpire (*q*).

Duration of umpire's authority.

As the arbitrators must make their award within the time limited to them, so when the submission fixes a limit, the umpire must make his umpirage within the time limited to him (*r*).

Enlargement by court.

But the court or a judge could enlarge the time under the Statute of Will. IV. (*s*), and can now under the Arbitration Act, 1889 (*t*).

Umpire to award in a month.

By the schedule to the Arbitration Act, 1889, the terms of which are deemed to be included in submissions, "the umpire shall make his award within one month after the original or extended time appointed for making the award of the arbitrators has expired, or on or before any later day to which the umpire by any writing signed by him may from time to time enlarge the time for making his award" (*u*).

Duration under the Lands Clauses Consolidation Act.

In the case of references under the provisions of the Lands Clauses Consolidation Act, 1845, the enactments respecting the commencement and duration of the umpire's authority are the following:—

Section 23 provides, "If when the matter shall have been referred to arbitration, the arbitrators or their umpire shall for three months have failed to make their or his award, or if no final award shall be made, the question of such compensation shall be settled by the verdict of a jury as hereinafter provided."

Section 27 enacts, that "where more than one arbitrator shall have been appointed, such arbitrators shall, before they enter upon the matters referred to them, nominate and appoint, by writing under their hands, an umpire, to decide on any such matters on which they shall differ, or which

(*p*) Rolle Ab. Arb. pp. 7, 8; Year-Book, 39 Hen. VI. 11.

(*q*) Lang *v.* Brown, H. L., May 8, 1855.

(*r*) Trew *v.* Burton, 1 C. & M. 533; Salkeld *v.* Slater, In re, 12 A. & E. 767.

(*s*) Bowen *v.* Williams, 3 Ex. 93; Johnson *v.* Collie, 24 L. J. Q. B. 64; and see ante, enlarging the time.

(*t*) 52 & 53 Vict. c. 49, s. 9.

(*u*) Sched. I. (e).

shall be referred to him under the provisions of this or of the special act," &c.

And section 31 directs, that "if where more than one arbitrator shall have been appointed, and where neither of them shall refuse or neglect to act as aforesaid, such arbitrators shall fail to make their award within twenty-one days after the day on which the last of such arbitrators shall have been appointed, or within such extended time (if any) as shall have been appointed for that purpose by both such arbitrators under their hands, the matters referred to them shall be determined by the umpire to be appointed as aforesaid."

Commencement of the umpire's authority under the act.

It is plain, from these sections, that if the arbitrators do not enlarge the time, or enlarge it to a period less than three months from the date of the appointment of the last of the two arbitrators, the authority of the umpire will commence, in the first case, after the expiration of twenty-one days from the date of such appointment, and in the second case from the expiration of the enlarged period.

Whether umpire may proceed at once if arbitrators differ.

Whether the words in section 27, that the arbitrators are to appoint an umpire to decide on any such matters "on which they shall differ," &c., would authorize the umpire in proceeding at once with the case, supposing a final difference and disagreement took place between the arbitrators within the twenty-one days, or within such enlarged period, or whether the apparent effect of these words is controlled by the terms of section 31, has not yet received a judicial interpretation.

There seems to be nothing in the language of section 31 which would prevent the court from deciding that in case of an absolute disagreement at any time between the arbitrators, the umpire might, if called upon, proceed to hear the case and make his award immediately, although the period allowed to the arbitrators had not yet expired, and that his award should be valid, unless the arbitrators within their allotted period should afterwards agree and make an award.

The advantage of such a construction of the statute would be, that it would be in accordance with the rule laid down for umpires in other cases, as has been shown in the pages immediately preceding. It might also in many cases prevent a delay of several months in obtaining a settlement of the

question in dispute. The chance of the arbitrators agreeing in an award, after having once absolutely differed and after the umpire has been called in, is practically very remote.

From what date the three months for umpire to be computed.

By section 23, the arbitrators or the umpire are to make the award within three months. But from what date that period of three months is to be computed, when the umpire is called upon to act, was at one time a matter of doubt (*x*).

To be computed from duty devolving on umpire.

It has since been determined that the proper construction of the statute is, that the umpire has three months to himself in which to make his award, to be computed (when there is no enlargement of time by the arbitrators) from the expiration of the twenty-one days after the appointment of the second arbitrator, and when there is an enlargement, from the end of such enlarged time; provided that, as the arbitrators have no authority to enlarge to any time later than three months after the appointment of the second arbitrator, the umpire's authority will at the latest commence from the end of such first three months, and continue then for three months longer (*y*).

Umpire appointed under s. 28.

It has been recently held, that where the umpire was appointed under section 28 of the act, on failure of the arbitrators to appoint, and after the arbitration time had expired, his three months' authority did not expire with the period of three months from the cessation of the arbitrators' power, but continued for three months from the date of his own appointment (*z*).

Time under Public Health Act, 1875.

By the Public Health Act, 1875, stat. 38 & 39 Vict. c. 55, s. 180, "if the arbitrators fail to make their award within twenty-one days after the day on which the last of them was appointed, or within such extended time, if any [not to exceed two months], as may have been duly appointed by them for that purpose, the matters referred shall be determined by the umpire. The time for making an award by the umpire under this act shall not in any case be extended beyond the period of two months from the date of the reference of the matters to him." Under the corresponding clauses of the repealed

(*x*) Ward *v.* The Great North of England Rail. Co., M. T. 1847.

(*y*) Skerratt *v.* North Staffordshire Rail. Co., 17 L. J. Ch. 161, S. C. 12 Jur. 46; 2 Phil. 475; Bradshaw's Arbitration, 12 Q. B. 562.

(*z*) Pullen *v.* Liverpool Corporation, 51 L. J. N. S. Q. B. D. 285.

Public Health Act, 1848, the umpire's time for making an award was limited to twenty-one days from his appointment, unless he had enlarged his time, although the arbitrators' extended time had not expired before his twenty-one days had run out, and he ought to have made his enlargement during his twenty-one days (*a*).

Duration.

The original limit of time within which an umpire must make his award seems still to be twenty-one days, although this is not expressly provided in the Act of 1875 (*b*). The period may be extended by him to two months, and the court cannot give him more time (*c*).

Commencement.

The commencement of the umpire's authority is the date of the reference of the matters to him, and that is either when he begins to act as umpire on the arbitrators disagreeing, or at the latest when the arbitrators' full time has expired. If, however, he makes his award before the arbitrators' time has expired, his award will be ineffectual, if the arbitrators should come to a subsequent agreement and make an award together within their time (*d*).

Railway Companies Arbitration Act, 1859.

Under the Railway Companies Arbitration Act, 1859 (*e*), by s. 17, if the arbitrators "do not within such a time as the companies agree on, or, failing such agreement, within thirty days next after the reference is made to the arbitrators, agree on their award thereon, then the matters referred to them, or such of those matters as are not then determined, shall stand referred to their umpire;" and by s. 22, the umpire's award, if made within such time as the companies agree on, or, failing such agreement, within thirty days after the matters in difference are referred to him, shall be good. But s. 23 adds, "provided always, that (except where and as the companies otherwise agree) the umpire from time to time, by writing under his hand, may extend the period within which his award is to be made; and if it be made, and ready to be delivered within the extended time, it shall be

(*a*) Kellett *v.* Local Board of Health of Tranmere, 34 L. J. Q. B. 87; Ringland *v.* Lowndes, 17 C. B. N. S. 514, S. C. 33 L. J. C. P. 337. But see Warburton *v.* Haslingden Local Board, 48 L. J. Q. B. D. 451.

(*b*) Yeadon Local Board *v.* Yeadon W. W. Co., 41 Ch. D. 92.

(*c*) Mackenzie *v.* Ascot Gas Co., 17 Q. B. D. 114.

(*d*) Yeadon Local Board *v.* Yeadon W. W. Co., 41 Ch. D. 52.

(*e*) 22 & 23 Vict. c. 59. See Appendix of Statutes.

as valid and effectual as if made within the prescribed period."

If the arbitrators should make an award clearly bad, as, for instance, without hearing evidence, it is possible that the courts would hold that the umpire might make an award (*f*).

Umpire same powers and duties as arbitrators.

v. *Power and duty of the umpire.*]—The umpire, when called upon to act, is in general invested with the same powers as the arbitrators, and bound by the same rules, and has to perform the same duties. He must pursue the same regular course with respect to the conduct of the case, as if

Must re-hear case.

he were commencing a new case as arbitrator. He must examine such witnesses as the parties choose to produce, and as to such points as they choose to raise, although the same witnesses have been examined to the same points before the arbitrators. He may not take the evidence, or any part of it, from the notes of the arbitrators, unless there be a special provision in the submission, or a clear agreement between the parties permitting such a course (*g*).

Usage of merchants.

On a mercantile reference, however, the usage of merchants sanctions each arbitrator making a statement to the umpire respecting the facts put in evidence before both of them.

Arbitrator's misbehaviour.

But if one of the arbitrators, unknown to the other, lays before the umpire a new piece of evidence, the award will be set aside (*h*).

Or interested.

Or if the umpire sits with the arbitrators, and one of them has purchased secretly the claimant's interest, and on the arbitrators differing, the umpire awards; his award, though he himself is not subject to imputation, will be set aside on the ground that he may have been influenced by the interested arbitrator (*i*).

Umpire sitting with arbitrators.

In order to save the delay and expense of two investigations of evidence, it is often arranged that the umpire shall sit with the arbitrators and hear the evidence once for all (*j*).

(*f*) See R. *v.* Grant, 14 Q. B. 43.

(*g*) Salkeld *v.* Slater, 12 A. & E. 767; Jenkins, In re, 1 Dowl. N. S. 276; Waltonshaw *v.* Marshall, 1 H. & W. 209; Matson *v.* Trower, Ry. & M. 17.

(*h*) Brook *v.* Delcomyn, 16 C. B. N. S. 403.

(*i*) Blanchard *v.* Sun Fire Office, 6 Times L. R. 365.

(*j*) Winteringham *v.* Robertson, 27 L. J. Ex. 301.

If without any special arrangement the umpire sit with the arbitrators and hear the evidence, he should take care not to interfere with the arbitrators when they discuss the case together, and try to come to an agreement (*k*).

Agreement award to be made on arbitrator's notes.

Even where there was some evidence of an original consent by a party that the umpire should make his award on the arbitrator's notes without rehearing the witnesses, but his attorney, who conducted the case for him, afterwards demanded that the umpire should receive oral testimony, and the latter refused to receive any vivâ voce evidence, unless it were new evidence, or on a new matter, the court set the award aside (*l*). But in another instance, where it was expressly agreed by parol that the evidence should be taken down by a clerk and signed by the arbitrators, and that the umpire should be at liberty to make his award on the notes, and the umpire, though called upon, refused to hear evidence, Erle, J., said that as the parties could not be put in the same position as before the agreement, and as extra expense had been thereby incurred, he thought the party was not at liberty to repudiate his agreement, and sustained the award (*m*).

Waiving objection to not re-hearing case.

The objection to the umpire proceeding without rehearing the witnesses may be waived by the conduct of the parties, but the waiver must be clearly made out, or the award will be set aside (*n*).

Party not requiring umpire to hear evidence.

Where a party knew that the case had gone before the umpire, and that he had been furnished by the arbitrators with the notes of the evidence and a statement of the claims of the parties, and that the umpire had already said that if he required further information he would call a meeting, the court refused to set aside the award of the umpire, on the objection that it was made without hearing evidence, because under the circumstances it was the duty of the party, if he had thought it necessary, to have called on the umpire to hear evidence, and then his declining might have been a ground of objection. But that as the party had not done so, but had taken the chance of the award, he could not

(*k*) Flag Lane Chapel *v.* Mayor of Sunderland, 5 Jur. N. S. 895.

(*l*) Salkeld & Slater, In re, 12 A. & E. 767.

(*m*) Firth *v.* Howlett, 19 L. J. Q. B. 169.

(*n*) Salkeld & Slater, In re, 12 A. & E. 767; Jenkins, In re, 1 Dowl. N. S. 276.

afterwards come to the court to impeach the award on this ground (*o*).

Umpire under the Lands Clauses Consolidation Act.

On a reference under the Lands Clauses Consolidation Act, a meeting was held on the 4th of November before the two arbitrators and the umpire (the latter sitting with them to hear the evidence, by agreement). Another meeting was appointed and held before the claimant's arbitrator and the umpire, and a witness was then examined, notwithstanding the absence of the other arbitrator and the protest of the company's solicitor. The arbitrators let their time expire and made no award. Without any further meeting, or any notice to the company, the umpire afterwards made an award. A motion on the part of the company was made in the following term to set aside the award, on the ground of the irregularity of the proceedings. The company's solicitor swore that he had had evidence to produce on the part of the company. V.-Ch. Knight-Bruce set the award aside, holding that the umpire had acted improperly in deciding the case without either hearing the case de novo, or at least taking it up from the meeting of the 4th of November, and giving the company an opportunity of producing their evidence (*p*). On appeal to the Lord Chancellor, this decision was confirmed.

Umpire must award on all matters.

In general, unless the submission contains words intimating a contrary intention, though the arbitrators agree on some matters, and the case is referred to the umpire because they disagree on others, the umpire must not confine his award to the latter, but must award equally on all as if the arbitrators had disagreed on all. His judgment is in no way fettered by theirs (*q*).

Joint award by arbitrators and umpire.

An award in which the umpire and arbitrators join, and in which the arbitrators decide some points, but reciting that they cannot agree on another point, refer that to the umpire who decides it, is bad (*r*). But if, after their authority has expired, the arbitrators join with the umpire in making the umpirage, the decision will be held valid as that of the

(*o*) Tunno *v.* Bird, In re, 5 B. & Ad. 488; Hall *v.* Lawrence, 4 T. R. 589.

(*p*) Hawley *v.* North Staffordshire Rail. Co., 12 Jur. 389, S. C. 2 De Gex. & S. 33.

(*q*) Roll. Ab. Arb. p. 7; Wicks *v.* Cox, 11 Jur. 542. See d. 1 of this section.

(*r*) Tollitt *v.* Saunders, 9 Price, 612.

umpire alone; for it is no more than if mere strangers join in the umpirage, and that cannot vitiate it (*s*).

Fees of arbitrators costs of umpirage.

The umpire should charge as costs of his umpirage the fees and charges due to the two arbitrators, for they may be called costs of the umpirage (*t*).

(*s*) Beck *v.* Sargent, 4 Taunt. 232; Soulsby *v.* Hodgson, 3 Burr. 1474; Anon., 1 Bulst. 184.

(*t*) Ellison *v.* Ackroyd, 20 L. J. Q. B. 193.

CHAPTER V.

THE DUTY OF THE ARBITRATOR IN FORMING HIS AWARD.

Scope and contents of the fifth chapter.

IT having been attempted in the preceding chapters of this Part to set forth at large the qualification of the arbitrator, the various powers with which he is invested to facilitate his investigation into the matters before him, and the course which he ought to take in conducting the inquiry from its commencement to its close, the natural division of the subject brings us now to a consideration of that which is the ultimate object of every reference, the award or instrument embodying the decision of the arbitrator on the matters submitted.

This chapter, therefore, treats generally of the award, and of those broad principles of decision, in accordance with which the arbitrator should both frame his judgment in his own mind, and express it in language to the parties.

The first section is confined to the formal requisites of the award, showing the mode in which it is to be made, published, and delivered; and the second contains general observations about the form of the award, and how it should be drawn up.

But the five next sections each announce a principle, disobedience to which will either wholly or partially invalidate the award.

The first of these, section three, announces that the award must be one entire instrument.

Section four proclaims the leading principle of all, into which, indeed, many of the others may be resolved, that the award must be final, that is, a complete adjudication on every matter intended by the parties to be determined; its various divisions illustrate the effect of leaving a matter

undecided, and of the presumption of the courts in favour of the validity of the award, and disclose the consequences of an imperfect decision, or of a reservation of a point for future judgment.

Section five declares the next most comprehensive principle, namely, that the award must be certain.

Section six shows that the award must be mutual; and section seven, that it must direct only what is possible, and that its provisions must be consistent with each other.

The eighth section examines into the effect of a mistake on the part of the arbitrator on the validity of the award, whether that mistake proceed from an erroneous judgment on a point of fact, or arise merely from accident, and whether it be apparent on the face of the award or not. It investigates, also, how far the extrinsic statements of the arbitrator respecting the grounds of his award will be received to impeach it when apparently valid, and points out the course to be pursued by him when he is empowered to raise a point of law on the face of his award for the opinion of the court.

The ninth or concluding section makes manifest that, notwithstanding there may have been some violation of the principles above enumerated, some adjudication on matters not before the arbitrator, or some directions which it exceeded the arbitrator's power to impose, the whole award will not be rendered null, if that portion which is open to objection can properly be separated from the rest.

SECTION I.

OF THE FORMAL REQUISITES OF THE AWARD.

The award must follow the submission.

1. *Making the award.*]—In making his award, the arbitrator must follow the directions of the submission in point of form, for whenever a special authority is created, those who give it have a right to annex to it their own terms, with which he on whom it is conferred must comply; therefore, when the submission provides that the award be in writing under the hand of the arbitrator, the award to be valid must

PART II. CH. V. S. 1.

Arbitration Act, 1889.

Award to be in writing.

be under the arbitrator's hand as well as in writing (*a*). By the Arbitration Act, 1889 (*b*), it is generally prescribed that on a reference by consent out of court the arbitrators shall make their award in writing. It is not expressly stated that this applies to a single arbitrator (*c*). References by order of the court or a judge usually contain the same requirements. Where an award is to be in writing, under the hand and seal of the arbitrator, one in writing only is insufficient (*d*). An award in writing, and under seal, was in one case held invalid, when the submission required that it should be indented, as well as in writing and sealed (*e*); but the objection that the award was not indented has on a later occasion been scouted by the court (*f*).

If the submission be silent as to form, the arbitrator is at liberty to make his award with such formalities as he pleases.

Parol award

Unless prescribed by the submission, the award need not necessarily be in writing, and a verbal award is valid (*g*). Even where the submission required the award to be made and ready to be delivered by a certain day, a parol award was held good, for a parol award was held capable of oral delivery (*h*). But a mere mental determination was never sufficient to make a good parol award. The arbitrator must have shown, by some external act, that he had made up his final mind (*i*).

objectionable.

A parol award is open to serious objections. It is doubtful whether it could be enforced by attachment, and might often be ineffectual as to interests in land.

Signing award.

In general, but subject of course to the particular provisions of the submission, the arbitrator makes his award in

(*a*) Everard *v.* Paterson, 6 Taunt. 625.

(*b*) 52 & 53 Vict. c. 49, s. 2, and Sched. I. (c).

(*c*) See however, 52 & 53 Vict. c. 63, The Interpretation Act, 1889, which provides that in Acts passed since 1850, "unless the contrary intention appears . . . words in the singular shall include the plural, and words in the plural shall include the singular."

(*d*) Henderson *v.* Williamson, 1 Strange, 116; Thaire *v.* Thaire, Palm. 109, 112, S. C. 2 Rol. Rep. 243.

(*e*) Hinton *v.* Cray, 3 Keb. 512.

(*f*) Gatliffe *v.* Dunn, Barnes, 55.

(*g*) Hanson *v.* Liversedge, Carth. 156, S. C. 2 Vent. 242; Rawling *v.* Wood, Barnes, 54.

(*h*) Oates *v.* Bromil, 1 Salk. 75, S. C. 6 Mod. 160; Cocks *v.* Macclesfield, Dyer, 218, b; Blundell *v.* Brettargh, 17 Ves. 232, 240.

(*i*) Thompson *v.* Miller (Ir.), 15 W. R. 353.

writing, and signs his name at the foot. It is customary to have an attesting witness who may prove the execution.

Joint execution by all the arbitrators.

We have already seen that where there are several arbitrators all should execute at the same time and in presence of each other (*k*).

Award drawn up by solicitor of party.

It is highly objectionable for an arbitrator, even after he has fully made up his mind on all points, to employ, to draw up the award in a formal shape, a solicitor who has acted for one of the parties in the reference. It may even endanger the award being set aside (*l*).

Practice, how award made.

In practice, it is usual for the arbitrator to make his award on paper stamped with a proper award stamp. This he commonly delivers to the successful party. For the unsuccessful party he has a copy made on unstamped paper, which he does not usually sign or execute as an award (*m*).

Lands, &c., Clauses Act.

By the provisions of the Lands Clauses Consolidation Act, 1845 (*n*), and the Railways Clauses Consolidation Act, 1845 (*o*), the award must be in writing, and the declaration made and subscribed by the arbitrator, before entering on the reference, is to be annexed to the award when made. The penalty of omitting to annex the declaration is not stated. The 37th section of the former act, and the 137th section of the latter act, enact, that "no award made with respect to any question referred to arbitration under the provisions of this or the special act, shall be set aside for irregularity or error in matter of form." A like provision is contained in the Railway Companies Arbitration Act, 1859 (the 22 & 23 Vict. c. 59), s. 24. Under this act the award must be in writing under the hands of the arbitrators or umpire.

Declaration of arbitrator annexed to award.

Award not void for want of form.

Railway Companies Arbitration Act, 1859.

II. *Publishing the award.*]—The submission generally provides that the arbitrator shall make and publish his award in writing, ready to be delivered to the parties at their request on or before a certain day. Hence, besides making, the arbitrator must publish his award.

Publishing the award.

(*k*) Wade *v.* Dowling, 4 E. & B. 44; Stalworth *v.* Inns, 2 D. & L. 428; Anning *v.* Hartley, 27 L. J. Ex. 145. See ante, Pt. II. ch. 4, s. 3, d. 4, p. 217. Duty of Joint Arbitrators.

(*l*) Underwood *v.* The Bedford and Cambridge Rail. Co., 11 C. B. N. S. 442, S. C. 31 L. J. C. P. 10; Fetherstone *v.* Cooper, 9 Ves. 67.

(*m*) See below as to the delivery of the award.

(*n*) 8 & 9 Vict. c. 18, s. 33. See Appendix of Statutes.

(*o*) 8 & 9 Vict. c. 20, s. 134. See Appendix of Statutes.

Award published when executed.

So far as the validity of the award is affected, it will in general be considered as "published" as soon as the arbitrator has done some act whereby he becomes functus officio, and has declared his final mind, and can no longer change it, that is, as soon as he has made a complete award (*p*).

When the award was executed by the arbitrator in the presence of witnesses who attested it, and to whom it was read over at the time, and the plaintiff died on the following morning, but before he had notice that the award was ready, the court held that it was made and published in the lifetime of the plaintiff, and could not be set aside as published after his death; though two hours after the plaintiff's death, the plaintiff's attorney received a note from the arbitrator, stating he was about to declare his award, and desiring him to attend at his office the same evening (*q*).

If there be several arbitrators, it will not, it seems, be published until it is signed by the requisite number of arbitrators (*r*).

Publishing to the parties.

Where the submission provided that the award should be made and published "utrique partium" by a certain day (the parties being the plaintiff on one side and several defendants on the other), though the award was made and published to the plaintiff and one of the defendants, it was held that the plaintiff could not recover on the award as he had not published it to all of the defendants (*s*).

Regulates time for moving to set aside.

It may be important to mention, that so far as regards the rule which regulates the time for an application to set aside an award, the publication, from which the time begins to run, is not in any case the publishing of the award itself, but the publication of it to the parties (*t*). Therefore, as soon as the arbitrator has executed the award, he should give notice of it to the parties that it is made and ready to be delivered.

Award ready to be delivered.

III. *Delivering the award.*]—The award is usually to be ready to be delivered by a certain day. When it is made it

(*p*) Henfree *v.* Bromley, 6 East, 309; Macarthur *v.* Campbell, 5 B. & Ad. 518.

(*q*) Brooke *v.* Mitchell, 6 M. & W. 473.

(*r*) Little *v.* Newton, 2 M. & G. 351.

(*s*) Hungate *v.* Mease, Cro. Eliz. 885, S. C. 5 Rep. 103; F. Moore, 642.

(*t*) Ord. LXIV. r. 14 (1883); Macarthur *v.* Campbell, 5 B. & Ad. 518; Brooke *v.* Mitchell, 6 M. & W. 473; Moore *v.* Darley, 1 C. B. 445.

is ready to be delivered, and the court will so intend it, especially where it is to be ready to be delivered on request (*u*). It need not be actually delivered by the appointed day in order to its validity, if it be ready to be delivered by that day (*v*). A refusal by the arbitrators to deliver an award to the defendant, who made his request for it on the last day limited, on the ground that it had not been stamped, has been held a good defence to an action on the bond for non-performance of the award, as it showed that the award was not ready to be delivered within the appointed time (*x*).

Not ready till stamped.

If the submission, instead of providing that the award be ready to be delivered, direct that it be delivered to the parties by a certain day, in order to be valid, the award must be actually delivered by the day. When the submission enjoined a delivery to either of the parties, it has been held that the delivery must be made to both (*y*). But when there are two parties on each side, and the award is to be made and given up to the said parties, or to one of them, it has been held sufficient to deliver it to any one of either of them (*z*).

When delivery necessary.

In general, however, the arbitrator's duty is only to have the award ready for delivery to the parties, on their request, before the period of his authority has expired; the delivery itself may take place at any time.

Either party, as soon after the publication as he pleases, may obtain it from the arbitrator on payment of his charges. But until they are paid, it is usual, in order to insure their discharge without any trouble, for the arbitrator to keep the award in his own hands. This course has been recommended by the court, even when the party who takes up the award is not to be ultimately liable to pay them (*a*). If the unsuccessful party be the one who comes to take up the award, in practice the unstamped and unsigned

Arbitrator delivering award on payment of fees.

(*u*) Veale *v.* Warner, 1 Saund. 327*b*, notes; Garret *v.* Weeden, 1 Lev. 133; Bradsey *v.* Clyston, Cro. Car. 541; Marks *v.* Marriot, 1 Ld. Raym. 114; Joyce *v.* Haines, Hard. 399; Freeman *v.* Bernard, 1 Ld. Raym. 247; Robison *v.* Calwood, 6 Mod. 82; Anon., 2 Ld. Raym. 989.

(*v*) Brown *v.* Vawser, 4 East, 584.

(*x*) Wilson *v.* Wilson, 1 Saund. 327*c*, n. (*m*).

(*y*) Parker *v.* Parker, Cro. Eliz. 448; Block *v.* Palgrave, Cro. Eliz. 797.

(*z*) Cocks *v.* Macclesfield, Dyer, 218 b.

(*a*) Hicks *v.* Richardson, 1 B. & P. 93. See post, Pt. II. ch. 11, s. 1.

PART II. CH. V. S. 1.

copy is commonly all that is given him, while the award itself is kept for the party in whose favour the arbitrator has decided.

Award under the Lands Clauses Act.

In cases of references under the Lands Clauses Consolidation Act, 1845 (*b*), it is provided by section 35, that "the arbitrators shall deliver their award in writing to the promoters of the undertaking, and the said promoters shall retain the same, and shall forthwith on demand, at their own expense, furnish a copy thereof to the other party to the arbitration, and shall at all times, on demand, produce the same award, and allow the same to be inspected or examined by such party, or any person appointed by him for that purpose."

Stamp on award.

IV. *Stamping the award.*]—By the Stamp Act (the 33 & 34 Vict. c. 97), a duty is imposed on all awards in writing (*c*).

Exceptions, masters and workmen.

Exceptions, however, have been made by statute in favour of awards in certain cases. Thus awards made under the acts for settling by arbitration disputes between masters and workmen (*d*) are exempted from stamp duty.

Bankrupts' estates.

Possibly the Bankruptcy Act, 1883 (*e*), s. 144, which exempts from stamp duty every "instrument or writing relating solely to the property of any bankrupt or to any proceedings under any

(*b*) 8 & 9 Vict. c. 18. See Appendix of Statutes.

(*c*) In the statute 33 & 34 Vict. c. 97, the schedule runs thus:

Award in England or Ireland and Award or Decreet Arbitral in Scotland.

	£	s.	d.
Where the amount or value of the matter in dispute does not exceed £5	0	0	3
Exceeds £5 and does not exceed £10	0	0	6
,, 10 ,, 20	0	1	0
,, 20 ,, 30	0	1	6
,, 30 ,, 40	0	2	0
,, 40 ,, 50	0	2	6
,, 50 ,, 100	0	5	0
,, 100 ,, 200	0	10	0
,, 200 ,, 500	0	15	0
,, 500 ,, 750	1	0	0
,, 750 ,, 1000	1	5	0
And where it exceeds £1000 and in any other case not above provided for	1	15	0

(*d*) 5 G. IV. c. 96, s. 32. (*e*) 46 & 47 Vict. c. 52.

bankruptcy," exempts from stamp duty awards made on references by the trustee of a bankrupt. Parke, B., held at Nisi Prius that submissions by assignees respecting claims of the bankrupt for work and labour were freed from duty (*f*).

Informal award.

In general, however informal the decision may be, if it be an award in fact, the Stamp Act applies. Thus, where a bond had been given conditional for A. M.'s due discharge of the duties of clerk, to be ascertained by the inspection of A. M.'s accounts by J. S., and the amount so ascertained to be liquidated damages, J. S. being looked upon as an arbitrator, a paper, in which J. S. had ascertained the amount of the deficiency in A. M.'s accounts, was held by Parke, B., to be an award, and to require stamping as such (*g*). So also a partnership account, ascertaining how much each partner had received and disbursed, dividing the profits among them according to their respective interests, and directing those who have money to pay to the partnership to hand it over to those who have money to receive, though not purporting to be an award on the face of it, is an award, and requires a stamp as such, if the party who makes out the account be empowered to act as an arbitrator, but is not an award if he merely make it out for the information of the parties, and have no power to bind them (*h*).

One stamp, several parties.

Though the several parties to the submission have separate rights and liabilities, the award will need only a single stamp, if they have a sufficient community of interest in the subject-matter referred, as, for instance, when the several underwriters on a policy of insurance agree to refer the demand of the assured on that policy (*i*).

Inclosure award not require ad valorem stamp.

Where an inclosure act gave the commissioners power to award lands in exchange for others in an adjoining parish, and also to award lands to those who bought them of persons entitled to allotments, their award, awarding lands given in exchange partly for other lands and partly for money, was held sufficiently stamped with the ordinary stamp, and not

(*f*) Wright *v.* Webb, Guildford Summer Assizes, 1846.

(*g*) Jebb *v.* M'Kiernan, Moo. & M. 340.

(*h*) Carr *v.* Smith, 5 Q. B. 128; Goodyear *v.* Simpson, 15 M. & W. 16.

(*i*) Goodson *v.* Forbes, 6 Taunt. 171, S. C. 1 Marsh. 525; see also Allen *v.* Morrison, 8 B. & C. 565.

to require an ad valorem stamp on the money consideration, although it operated as a conveyance of the lands (*j*).

Award under seal no deed.

It was decided under a previous statute, imposing only a 10*s.* stamp on awards, that an award in writing, and under seal, was no deed or specialty, and therefore need not have a deed stamp, unless it were delivered as a deed, but if it were delivered only as an award, an award stamp was sufficient (*k*).

Appraisement no award.

In order to necessitate an award stamp, the document must strictly be an award. Hence, where on an agreement between an incoming and an outgoing tenant, the valuation of some goods on a farm and of the repairs was to be determined by certain referees, an appraisement stamp on the written valuation was held sufficient under the 46 G. III. c. 43, and an award stamp unnecessary, the valuation not being looked upon as an award, although in some respects it had the same effect; as in the opinion of the court, the parties in appointing persons to settle the account, had no contemplation of submitting any differences to the award of arbitrators (*l*).

Instrument not purporting to be an award.

Parke, B., is in one case reported to have said that an award stamp is only to be imposed on those instruments which on their face purport to be awards. This proposition, according to other decided cases, does not seem maintainable so broadly as it is stated. In the case referred to, the learned judge held admissible in evidence, though unstamped, a written verdict of a miner's jury, who were to determine whether the defendant was possessed of a certain shaft of a mine, the defendant having agreed to be bound by their determination, and the plaintiff having also assented to the arrangement (*m*). The document, though in the nature of an award, and strong evidence against the defendant, was not considered as an award in fact, or conclusive in evidence, as an award would have been, and the jury were looked upon rather as accredited agents than arbitrators. They do not

(*j*) Doe d. Ld. Suffield *v.* Preston, 7 B. & C. 392.

(*k*) Brown *v.* Vawser, 4 East, 584; Blundell *v.* Brettargh, 17 Ves. 232; Dod *v.* Herbert, Sty. 459; Perry *v.* Nicholson, 1 Bur. 278; Hodsden *v.* Harridge, 2 Saund. 64*l*.

(*l*) Leeds *v.* Burrows, 12 East, 1; Perkins *v.* Potts, 2 Chit. 399.

(*m*) Sybray *v.* White, 1 M. & W. 435.

Animus arbitrandi.

appear to have had any animus arbitrandi, though the parties had agreed to be bound by their opinion. In order to the validity of a decision as an award, there must, it is apprehended, be, besides the submission of the parties, an intention in the person who decides it to decide as arbitrator. The correctness of this view the court seemed inclined to sanction, though there was no positive decision, on an occasion when it was questioned whether an opinion of counsel subjoined to a case, containing a recital of an agreement to be bound by the counsel's opinion, which opinion commenced "upon the facts above stated, I am of opinion," was an award, and required a stamp. It was also discussed, but not decided, whether the case was "a matter annexed" to the award within the meaning of the Stamp Act, the words of which were to be reckoned in calculating the amount of stamp duty (*n*).

Opinion of counsel.

Matter annexed.

Award may be stamped at any time.

An award, if not stamped when made, may be stamped at any time on paying the penalty, and it cannot be set aside on the ground that the stamp is improper, when no step has been taken to enforce it (*o*). Where an objection to the stamp was not alleged as a ground for obtaining a rule nisi to set aside an award, the court would not suffer the objection to be relied on afterwards when cause was shown (*p*). But when it is sought to draw up a rule for an attachment for non-performance of an award, it is competent for the officer of the court to object to the absence of a stamp on the award, and on that account to refuse to draw up the rule (*q*).

Master objecting to want of stamp.

No stamp on a certificate.

If an arbitrator have to certify for whom and for what amount a verdict is to be entered in the cause referred, the certificate does not require a stamp. This course of directing an arbitrator to certify, instead of to make an award, is often adopted for the very purpose of saving the expense of the stamp on the award (*r*).

(*n*) Boyd *v.* Emmerson, 2 A. & E. 184; Sybray *v.* White, 1 M. & W. 435.

(*o*) Preston *v.* Eastwood, 7 T. R. 95.

(*p*) Liddell *v.* Johnstone, 2 Tidd. Pr. 874, 7th ed.; 884, 9th ed.

(*q*) Hill *v.* Slocombe, 9 Dowl. 339.

(*r*) Salter *v.* Yeates, 5 Dowl. 291.

SECTION II.

OF THE FORM OF THE AWARD.

Any words expressing a decision an award.

With regard to the substance of the award, any form of words that amounts to a decision of the questions referred, will be good as an award. No technical expressions are necessary (*s*). But as awards often bind valuable rights for all time, it is incumbent on the arbitrator to be very precise and clear in his adjudication (*t*).

On a dispute respecting the amount of dilapidations, the report of an umpire in these words, "I have surveyed and estimated the several works necessary to be done in repairing the dilapidations to the house, and find the same amount to 55*l.* 5*s.*," was held a conclusive award, binding on the parties (*u*). So the words, "I am of opinion that A. is entitled to claim of B. 134*l.* for non-performance of his contract," was held a sufficient award (*x*). Where parties agreed to be bound by the opinion of a professional man upon the construction of an act of parliament, his opinion being positive and decisive was considered a binding award, notwithstanding it recommended that the printed statute should be compared with the parliament roll before the matter was settled, under a doubt whether the statute was not misprinted (*y*).

But where the arbitrator wrote a letter to A. and B., the parties, in which he said, "To meet the circumstances of the case in a liberal manner, I propose that B. should pay A. 10*l.*," this was not considered an award, because it did not express a decision that A. was *entitled* to the 10*l.*, but only recommended that that sum should be given him (*z*).

An award deciding in the plaintiff's favour, and *requesting* the defendant to pay the balance, was held equivalent to an order to pay (*a*).

(*s*) Eardley *v.* Steer, 4 Dowl. 23.

(*t*) Stonehewer *v.* Farrar, 9 Jur. 203.

(*u*) Whitehead *v.* Tattersall, 1 A. & E. 491.

(*x*) Matson *v.* Trower, 1 Ry. & Moo. 17.

(*y*) Price *v.* Hollis, 1 M. & S. 105.

(*z*) Lock *v.* Vulliamy, 2 N. & M. 336, S. C. 5 B. & Ad. 600.

(*a*) Smith *v.* Hartley, 10 C. B. 800.

No recitals necessary in award.

It is not necessary to the validity of the award that there should be any introductory recitals. The award will be good, although the arbitrator neglect to set out his authority, either by reciting the submission, or in any other manner; or if he omit to recite the fact of the time having been enlarged, even when the award appears to have been made beyond the time originally limited for making it (*b*). Failing to recite that he had taken a view of the premises in dispute was considered unimportant, although the taking a view was enjoined before proceeding in the reference (*c*).

Where an arbitrator was not to proceed in the reference until he had awarded in a particular action, the omission to aver that he had awarded in the action was held immaterial. The court presumed that he had done so, nothing appearing to the contrary (*d*).

But though such recitals are not essential, it is advisable that they should be made, in order in many cases to explain the award, and that they who peruse it may see on the face of the instrument that the arbitrator had authority to award as he has done, and that he has fully performed his duty.

What recitals advisable.

In general an arbitrator recites verbatim so much of the order of reference, or other submission, as contains his authority to make the award, and specifies the subject-matter on which the award is made. Any provisions of the submission which are necessary to warrant particular directions, as, for instance, respecting costs, or saying what should be done, ought to be set forth. But those clauses which confer on him powers which he does not exercise, or those which more especially affect the parties, it is not recommended that he should specify (*e*).

Reciting that the award was drawn by a solicitor, when by the submission the solicitor was authorized to prepare it, is not objectionable, though unadvisable (*f*).

Recital specifying

It is not necessary that the award should specify what the

(*b*) Baker *v.* Hunter, 16 L. J. Ex. 203, S. C. 16 M. & W. 672; George *v.* Lousley, 8 East, 13.

(*c*) Spence *v.* Eastern Counties Rail. Co., 7 Dowl. 697.

(*d*) Davies *v.* Pratt, 25 L. J. C. P. 71, S. C. 17 C. B. 183.

(*e*) King *v.* Bowen, 8 M. & W. 625.

(*f*) Baker *v.* Cotterill, 18 L. J. Q. B. 345.

matters in difference.

matters in difference are (*g*). The arbitrator should exercise his discretion as to whether in the particular case it is advisable to set them out. He should consider that questions difficult of proof may sometimes arise long after the award has been made, whether certain matters were matters in difference at the time of the submission. In such cases it would often be convenient that the recital should specify the subjects in difference, and that the disposing part of the award should refer to them, because in an action subsequently brought on any of the matters referred, the award would then give a complete and indisputable defence (*h*).

Nor would this course leave the award open to any cavil for having omitted to specify some little matter, which though in difference was of no real importance, if the arbitrator has followed the course previously advised, of requesting the parties respectively to furnish him with a written statement of the matters on which they require his decision (*i*).

False recital not give authority.

An arbitrator cannot by a false recital give himself an authority beyond the submission. Thus a recital that the arbitrator has power to determine what should be done by the parties, will not cure an excess of authority in awarding something to be done, when it appears that he has in fact no such authority (*k*).

False recital not vitiate award.

As a false recital cannot bind the parties beyond the submission, neither will it invalidate the award (*l*). An award by an umpire is not vitiated by a mistake in the recital of the award in the Christian name of one of the original arbitrators who had appointed the umpire (*m*), or by a statement that the umpire was appointed by the parties, when he was in fact chosen by the arbitrators (*n*), or where the award purports to be made by three, and is executed only by two (*o*), or by a misrecital respecting the date of the sub-

(*g*) Smith *v.* Hartley, 10 C. B. 800.

(*h*) Brown *v.* Croydon Canal Co., In re, 9 A. & E. 522; King *v.* Bowen, 1 Dowl. N. S. 21.

(*i*) See ante, Angus *v.* Redford, 11 M. & W. 69, S. C. 2 Dowl. N. S. 735.

(*k*) Price *v.* Popkin, 10 A. & E. 139.

(*l*) Watkins *v.* Philpotts, M'Lel. & Y. 393; Baker *v.* Hunter, 16 M. & W. 672; Thames Iron Works, &c. Co. *v.* The Queen, 20 L. T. 318.

(*m*) Trew *v.* Burton, 1 C. & M. 533.

(*n*) Adams *v.* Adams, 2 Mod. 169, S. C. Vin. Ab. Arb. (N. 2) 3.

(*o*) White *v.* Sharp, 12 M. & W.

mission (*p*), or the date of an enlargement of time, so that it appeared too late (*q*), or the extent of the subject-matter (*r*), or where the arbitrators, having appointed an umpire, who was to decide in case they should disagree, recited that they had "considered the decision of the umpire," and there had in fact been no disagreement, and consequently no consultation of the umpire (*s*).

In one instance of a reference by a judge's order, where the award misrecited the submission as a reference by order of Nisi Prius, the Court of Common Pleas used the expression that the award was a "nullity." It was not, however, necessary to determine the validity of the award to dispose of the motion, and it may be gathered from the reports that they only meant to say that they would not enforce it by attachment, for in one report they are said to add, that the plaintiff, if he thought fit, had his remedy by action (*t*). This case, as Parke, B., subsequently remarked, was decided "rather rapidly." It is no authority against the previous propositions (*u*).

Certificate instead of award.

Instead of making a formal award, the arbitrator, on a reference at Nisi Prius, is often directed or empowered to express his decision in a certificate addressed to the officer of the court. The expense of the award stamp is thereby saved (*x*).

Arbitrator to determine amount of verdict.

When the arbitrator has only to determine how far, if at all, the amount for which the verdict has been taken is to be reduced, his decision though in terms an award is in reality a certificate (*y*).

712, S. C. 1 D. & L. 1030, overruling Thomas *v.* Harrop, 1 S. & S. 524.

(*p*) Dole *v.* Dawson, 2 Keb. 878, S. C. Vent. 184; Ingram *v.* Webb, 1 Rolle Rep. 362.

(*q*) Addison *v.* Spittle, 6 D. & L. 531.

(*r*) Paull *v.* Paull, 2 C. & M. 235, S. C. 2 Dowl. 340; Kynaston *v.* Jones, Styles, 97, S. C. Vin. Ab. Arb. (N. 2) 2, S. C. Al. 85.

(*s*) Harlow *v.* Read, 3 D. & L. 203.

(*t*) Christie *v.* Hamlet, 2 M. & P. 316, S. C. 5 Bing. 195.

(*u*) Baker *v.* Hunter, 16 L. J. Ex. 203, S. C. 16 M. & W. 672.

(*x*) Salter *v.* Yeates, 5 Dowl. 291.

(*y*) Sim *v.* Edwards, 25 L. J. C. P. 175, S. C. 17 C. B. 527.

SECTION III.

THE AWARD MUST BE ENTIRE.

PART II. CH. V. S. 3.

Award not to be made in parts.

It is implied in all cases, unless something to the contrary is expressed, or may be inferred from the submission, that the arbitrator can make but one award. This must be one entire and complete instrument in itself; therefore, if it be made part one day and part at another, though each and every part be made within the time limited for the award, it will be void (*z*).

Consulting as to parts good.

If there be several arbitrators, they may indeed assemble and consult, and form their final determination on specific matters at several days, but their award, which expresses their final determination on all the matters together, must be one and entire (*a*).

Thus, where by an order of reference a cause and all matters in difference between A. and B. were referred, and by a subsequent order made after the first reference had commenced, it was directed that C. should be made a party thereto, as if he had been an original party, and that a cause between A. and C., and all matters in difference between A., B., and C., each and every of them jointly and severally, should be referred to the same arbitrator, and the arbitrator made two awards, in one of which he awarded that A. was indebted to B. without mentioning C.; in the other, that A. was indebted to C. without mentioning B.; it was held both awards were bad, and that the arbitrator had not properly performed his duty, as there was no one award determining all the matters in difference between all the parties (*b*).

Separate certificates in two actions.

But in a more recent case, where an arbitrator had to certify on cross actions between the parties, and he made a separate certificate in each action on a separate piece of paper, it was held, that the two pieces formed but one award if they were executed at the same time (*c*).

When arbitrator em-

It is, however, perfectly legal, and sometimes very advis-

(*z*) Com. Dig. Arb. E. 16; Rolle Ab. Arb. H. 1, 2, p. 250; Gould *v.* Staffordshire Potteries Waterworks Co., 5 Ex. 223, per Parke, B.

(*a*) Com. Dig. Arb. E. 16; Rolle Ab. Arb. H. 3, p. 250.

(*b*) Winter *v.* Munton, 2 Moore, 723.

(*c*) Smith *v.* Reece, 6 D. & L. 520.

able, for the parties to give the arbitrator power to make several awards, if he shall think fit. When so empowered, he may include the several matters referred to him distributively in separate awards, which may be final and binding from the time of their several executions (*d*).

Powered to make several awards.

Where an arbitrator had power to make two awards, and in the first award to state a case for the opinion of the court and assess damages contingently, but neither party was to enforce payment of any sum found due by the first award until the arbitrator had made his final award, it was considered by the court that the first award was not in law and effect a final award (*e*).

First award not final.

Under the Railway Companies Arbitration Act, 1859 (the 22 & 23 Vict. c. 59), s. 21, the arbitrators may, if they think fit, make several awards each on part of the matters referred.

Railway Companies Arbitration Act, 1859.

SECTION IV.

THE AWARD MUST BE FINAL.

1. *Effect of clause, Ita quod fiat de præmissis.*]—The arbitrator must be careful to see that his award is a final decision on all matters requiring his determination.

Award must be final.

The submission, after referring the matters to the arbitrator, usually contains a condition, "so that the award be made of and concerning the premises." The old Latin expression containing the like condition ran thus, "Ita quod fiat de præmissis."

Ita quod.

The old rule, both in equity and law, was, that unless the submission was expressly made conditional with an ita quod fiat de præmissis, an award respecting one matter submitted was good, provided it was not necessary to make the award just that the other matters should have been decided also; but that, where there was such a condition, all matters brought before the arbitrator must have been determined or the award would have been void (*f*). A determination of all

Old rule when no ita quod, award on part good.

(*d*) Dowse *v.* Coxe, 3 Bing. 20; Wrightson *v.* Bywater, 3 M. & W. 199.

(*e*) Wood *v.* The Copper Miners' Co., 24 L. J. C. P. 34.

(*f*) Wrightson *v.* Bywater, 3

matters was held imposed where the submission ran, "so as the said award," or "so as the same award," be made within the time, even though it did not say, "of and concerning the premises" (*g*).

Modern rule, whether parties intend a decision of all.

In more modern instances, it is said an express condition is not required; but the question in all cases to be decided is, whether the terms of the submission show that the parties mean every point in dispute to be decided by the arbitrator (*h*). The courts, relaxing their ancient rigour, will now put on the submission a reasonable construction according to its plain meaning, and as it is not ordinarily the intent of the parties that some matters only should be determined, and that they should be at liberty to go to law for the rest, it follows that the arbitrator is generally bound to make a final decision upon all the matters referred to him, in order that his award as to any should be effectual (*i*).

Arbitrator empowered to make several awards.

In ascertaining, however, the supposed intention of the parties, every part of the submission must be looked to. If there be a clause empowering the arbitrator to make one or more awards at his discretion, the courts, unless there be something repugnant to such a view, will hold that the arbitrator may make a valid and final award on one matter only, although the submission be in terms conditional, "so as such award or awards be made before a certain day," or so as the arbitrator shall make his award "concerning the premises;" for by such a submission the courts have held that though the parties give the arbitrator power to dispose of all matters in difference, they do not make it a condition to the validity of his decision on one subject, that all matters should be disposed of by him (*k*).

Matter not notified as a matter in difference.

Notwithstanding the submission be expressly conditional with an "ita quod," no objection can be made to the award

M. & W. 199; Dowse *v.* Coxe, 3 Bing. 20; Ormelade *v.* Coke, Cro. Jac. 354; Hide *v.* Cooth, 2 Vern. 109; Baspole's case, 8 Rep. 97 b; Payne *v.* Cook, cited in Simmonds *v.* Swaine, 1 Taunt. 548; Rolle Ab. Arb. L.; Simmonds *v.* Swaine, 1 Taunt. 548; Bean *v.* Newbury, 1 Lev. 139; Randall *v.* Randall, 7 East, 81.

(*g*) Cockson *v.* Ogle, 1 Lutw. 550; Risden *v.* Inglet, Cro. Eliz. 838.

(*h*) Wrightson *v.* Bywater, 3 M. & W. 199; Bradford *v.* Bryan, Willes, 268; Birks *v.* Trippet, 1 Saund. 32. See notes, p. 32*a*; Bowes *v.* Fernie, 4 M. & C. 150.

(*i*) Simmonds *v.* Swaine, 1 Taunt. 554; Hide *v.* Petit, 1 Cas. in Chanc. 185.

(*k*) Wrightson *v.* Bywater, 3 M. & W. 199; Dowse *v.* Cox, 3 Bing. 20.

if the arbitrator determine all questions brought before his notice, though there are other matters within scope of the submission to which his attention has not been drawn (*l*). In order to invalidate the award for not deciding a particular question, the point must have been specifically stated. Thus, where an action of trespass for taking the plaintiff's goods as a distress for rent was referred with all matters in difference, and the main question before the arbitrator was, whether the plaintiff became a tenant of the defendant at a certain day, the court held that the award was good, although it did not decide whether, at the date of the order of reference, a tenancy existed between the plaintiff and defendant, as that question was not specifically brought before the arbitrator for decision (*m*).

Collateral dispute to main question.

On a reference of all disputes respecting the right and interests of the parties under a deed of partnership, each of them contended before the arbitrator for a different construction of the clause regulating the amount of the profits which they were respectively to receive: though it was necessary for the arbitrator to put a construction on the clause in order to settle the balance between them, the court held that he was not bound to determine the effect of the clause in the award, as he was not specifically required to do so by the submission, nor called upon by the parties to decide it as a separate matter in difference, but only to deal with it as a collateral question necessary to be disposed of with a view to the deciding the main question, the amount of the past profits (*n*).

II. *Award void if a matter left undecided.*]—Assuming the arbitrator, as is generally the case, bound by the submission to make a final determination on all the matters referred to him, it may be instructive to consider the consequences of the rule in particular instances.

Excepting one matter on face of award.

If an arbitrator determine all matters except one, which in his award he particularly excepts out of his decision, and states he has not decided, and give liberty to one of the

(*l*) Middleton *v.* Weeks, Cro. Jac. 200; Elsom *v.* Rolfe, 2 Smith, 459; Hawksworth *v.* Brammall, 5 M. & C. 281.

(*m*) Rees *v.* Waters, 16 M. & W. 263, S. C. 4 D. & L. 567.

(*n*) Keene and Atkinson, In re, Exch. April 16, 1847.

parties to prosecute that matter if he please, his award will be bad in toto, for it will thus be appearing on its very face that he has not performed his duty of deciding every question (*o*).

Not deciding between co-defendants.

So, on a reference of all matters in difference between the parties to a Chancery suit, instituted to enforce a pecuniary demand against the real and personal estate of a testator, where the arbitrators ordered one defendant, who was the executor, to pay a certain sum to the complainants in satisfaction of all demands on him or his testator, and directed that certain other defendants, who under the testator's will took interests in his real estate, should be at liberty to prosecute their claims against the testator's estate in like manner as if no reference had been made, the Court of Chancery held the award void for not deciding the various claims existing between the co-defendants, on the ground that the intention of the order of reference was, that not merely the matters in difference between the plaintiffs on one side and the defendants on the other should be determined, but that the individual rights of all the parties to the suit should be adjusted (*p*).

Not deciding on matter in suit in Chancery.

In like manner, where the arbitrators stated in their award that they had declined to arbitrate respecting a certain claim to an annuity, as they thought they were precluded from so doing by reason of a suit pending in Chancery concerning it, the court held, that as the reason for not deciding it was wholly untenable, the award was clearly defective in this respect, and therefore void altogether (*q*).

Not deciding whether there was a partnership.

It being disputed whether A. had been in partnership with B., and if so, whether and when it had been put an end to, an award that if a partnership ever existed it was terminated by consent on a certain day is not final (*r*).

Not determining right to indemnity.

An award for the like reason was held void, where one of the matters in difference was, whether the defendant was entitled to an indemnity from the plaintiff against his, the defendant's, liability to pay a promissory note, of which he,

(*o*) Bradford *v.* Bryan, Willes, 268.

(*p*) Turner *v.* Turner, 3 Russ. 494.

(*q*) Bowes *v.* Fernie, 4 M. & C. 150. See Browne *v.* Meverell, Dyer, 216 a.

(*r*) Bhear *v.* Harradine, 7 Ex. 269.

the defendant, was the maker and the plaintiff an indorser, and the award as to this merely declared that the liabilities of the defendant on the note as between the plaintiff and defendant should remain unaffected by the award (*s*).

Award, all actions to cease excepting certain bonds.

But an award that one should release to the other all actions and debts except bonds made for the performance of former awards, was held a good award, as amounting to an award that the bonds should stand in full force, and not an excepting them from decision (*t*). So an award that all suits and action should cease, and that all matters should be determined except concerning a certain bond, which was to stand in full force, was held a sufficient determination concerning all the controversies, and no disclaimer to meddle with any (*u*).

Award, one of two co-contractors to pay.

On the reference of a claim between A. on the one side, and B. and C. on the other, an award that B. shall pay A. a sum of money in respect of it, is good against B., whatever objection either A. or C. might make to it, as not saying anything about C.'s liability (*x*).

Awarding nothing due at present.

A cause having been referred with all matters in difference, the award, deciding that the plaintiff had no cause of action, declared that it was not intended to exclude him from the receipt of a certain commission, to which he would subsequently be entitled under an agreement; though it was objected that the award was not final, because the arbitrator had not settled the point about the commission, the court held it sufficient, on the ground that the award in fact said that there was nothing due on that agreement at present, and that the arbitrator was only empowered to decide on matters in difference up to the date of the submission (*y*).

No loss at date of reference.

In a similar case, where the arbitrator reciting in his award that the plaintiff had made a claim for a loss alleged to have been sustained on some hats, but had failed to prove that at the date of the order of reference he had sustained any such loss, adjudged that therefore the plaintiff under the reference was not entitled to recover anything in respect thereof; the court held this a sufficiently final determination of the claim,

(*s*) Wilkinson *v.* Page, 1 Hare, Cas. in Ch. 276.

(*t*) Sallows *v.* Girling, Cro. Jac. 277.

(*u*) Berry *v.* Penring, Cro. Jac. 399.

(*x*) Wood *v.* Adcock, 7 Ex. 468.

(*y*) Harding *v.* Forshaw, 1 M. & W. 415.

since it was an adjudication that up to the time of the order of reference nothing was due in respect of the hats (*z*).

Awarding matters not to be matters in difference.

If an arbitrator to whom a cause is referred recite on the face of his award that claims have been made by the plaintiff in respect of specified matters, and award in terms that these are not matters in difference in the cause, and therefore do not take them into the account, the court will, nevertheless, examine whether they are matters in the cause or not, and if they find them to be within the scope of the submission, will set aside the award as not being final (*a*).

Award showing matter undecided.

If the award recite several specific matters in difference, and as to one matter there be no specific adjudication, and the general words of the deciding part of the award cannot be construed so as to comprehend a decision on that particular subject, the award will be as invalid as if it expressly professed not to decide it.

No direction as to rent.

As, for instance, where the recitals showed that the arbitrators had to determine all actions and controversies, and also to ascertain the rent to be paid by the plaintiff, and the arbitrators found the balance due from the defendant, but gave no direction respecting the rent, the court held the award void altogether for the omission as to the rent (*b*).

Gross sum for extra work and defects in building.

So, also, in a dispute upon a building contract where arbitrators were to award on alleged defects in the building on claims for extra work and deductions for omissions, and to ascertain what balance, if any, might be due to the builder, in respect of the extras and omissions; the award, which ordered that the builder should be paid a gross sum, to be received by him as compensation and satisfaction for all the matters in difference, was held bad, as it left undecided the question respecting the alleged defects, and it was doubtful whether the sum awarded was to be applied in discharge of the extra work or to a general balance of accounts (*c*).

Awarding in one sum respecting all matters.

It is sufficient for an arbitrator to whom a cause and all matters in difference are referred, after duly determining the cause, to award a gross sum in respect of the matters in difference not included in the cause, without in his award

(*z*) Cockburn *v.* Newton, 2 M. & G. 899.

(*a*) Samuel *v.* Cooper, 2 A. & E. 752. See Brophy *v.* Holmes, 2 Molloy, 1.

(*b*) Randall *v.* Randall, 7 East, 81.

(*c*) Rider and Fisher, In re, 3 Bing. N. C. 874.

specifying what they are, for id certum est quod certum reddi potest, and on showing by parol evidence what the claims brought before the arbitrator were, the award will be final as to them (*d*).

Intention that arbitrator should decide separately.

An arbitrator may award one sum generally in respect of all money claims submitted to him, unless the intention of the parties, as expressed by the submission, be, that he is to award separately on some one or more of them, or there is some legal necessity for his awarding separately—as, for instance, to determine the right to costs (*e*). Of course if the submission be ambiguous it is better to make a distinct adjudication on each head.

Clerical error.

The arbitrator should be careful to make no mistake in describing a thing respecting which he is called upon to adjudicate, or inconvenience at least may arise (*f*).

Arbitration Act, 1889, power to correct.

By the Arbitration Act, 1889 (*g*), s. 7 (c), an arbitrator on a reference by consent out of court has power "to correct in an award any clerical mistake or error arising from any accidental slip or omission."

An award of balance of set-off to defendant.

When an action of debt, to which the pleas are never indebted and set-off, is referred with all matters in difference, and the arbitrator finds both pleas in defendant's favour, the award on the face of it will not be final, unless it goes further, since by the finding the arbitrator shows that the plaintiff is indebted to the defendant. The award ought, therefore, to ascertain the amount of the defendant's claim, and direct the plaintiff to pay it (*h*).

Arbitrator making partition of land must direct a conveyance.

If the arbitrator omit to give the necessary directions to effectuate the objects for which he is appointed, the award is not final. For instance, if several tenants in common, wishing to make partition of their land, covenant to abide by the award of an arbitrator as to their allotments, though the arbitrator allots the whole in separate portions to the several parties, the award, according to an old case, will be bad, if he do not direct deeds of conveyance to be executed,

(*d*) Wrightson *v.* Bywater, 3 M. & W. 199.

(*e*) Rule *v.* Bryde, 1 Ex. R. 151; Whitworth *v.* Halse, 35 L. J. Ex. 149; L. R. 1 Ex. 251.

(*f*) Spooner *v.* Payne, 16 L. J. C. P. 225.

(*g*) 52 & 53 Vict. c. 49.

(*h*) Maloney *v.* Stockley, 2 Dowl. N. S. 122, S. C. 4 M. & G. 647; Williams *v.* Moulsdale, 7 M. & W. 134. See Fenton *v.* Dimes, quoted in Williams *v.* Moulsdale, 7 M. & W. 134.

to vest the allotments in the respective owners, for the property in the land cannot pass by virtue of the award alone (*i*).

The directions, generally, which an arbitrator should give in his award, are fully considered hereafter (*j*).

Omission not on face of award.

If the fact, that a matter submitted has not been decided, be brought before the court in any regular manner, as by plea or affidavit, according to the nature of the proceedings, the award will be deemed invalid, however good it may be on its face (*k*).

Not deciding ejectment.

Where, among the matters in difference brought before the arbitrator, there was an action of ejectment, on which the award did not decide; this fact appearing by affidavit, the court set the award aside (*l*).

Admitted demand is a matter in difference.

A demand made by one party before the arbitrator, admitted to be correct and due by the other, is a matter in difference, which the arbitrator ought to consider in estimating the ultimate amount awarded, though he be not in terms called upon to adjudicate respecting it, and the award will be set aside if he fail to do so (*m*). But if a claim brought forward on the reference be afterwards abandoned, the arbitrator need not notice it in his award (*n*).

Not claim abandoned.

Claim to indemnity.

In another case the award was adjudged void, it appearing by plea that the defendants had made a claim before the arbitrator to be indemnified by the plaintiff against certain liabilities on some bills of exchange, and that the award did not decide respecting the claim (*o*).

In this case, it is to be observed that there was an award of mutual releases to be executed, but as it was stated by Parke, B., on a subsequent occasion, that fact did not appear clearly by the plea on which the judgment proceeded, and at all events the attention of the court was not drawn to it (*p*);

(*i*) Johnson *v.* Wilson, Willes, 248. See Smalley *v.* Blackburn Rail. Co., 2 H. & N. 158, S. C. 27 L. J. Ex. 65.

(*j*) See P. II. ch. 8.

(*k*) Sallows *v.* Girling, Cro. Jac. 277.

(*l*) Stone *v.* Phillipps, 4 Bing. N. C. 37.

(*m*) Robson and Railston, In re, 1 B. & Ad. 723. See P. II. ch. 2, s. 1, p. 123, as to what are matters in difference.

(*n*) Bird *v.* Cooper, 4 Dowl. 148. See P. II. ch. 2, s. 1, p. 124.

(*o*) Mitchell *v.* Staveley, 16 East, 58.

(*p*) Wharton *v.* King, 2 B. & Ad. 528.

and the decision of *Birks* v. *Trippet* (*q*), as to the effect of an award of mutual releases, was not adverted to.

Omission must be proved.

The award will not be avoided unless it be very clearly made out that the matter has not been considered in the award (*r*).

Arbitrator must decide the question, not settle the case.

On a reference on the ordinary terms, the arbitrator must decide the very question submitted to him, and is not justified in lieu thereof in directing what seems to him an equitable arrangement on the whole. Therefore, on a reference respecting the right, title, interest, and possession of a certain parcel of land, an award that the defendant should have the brakes growing in it for his life is bad, because the property in the land is not awarded, but only a profit out of it (*s*). So, on a reference of all questions relating to an agreement for the sale of land, and a question being raised on the sufficiency of the vendor's title, the duty of the arbitrator is to decide whether the title be good or bad, and an award that the purchaser shall take a conveyance of the title with all its faults, receiving an indemnity, is invalid, as not being a final settlement of the question referred (*t*).

Omitting to decide as to all parties.

As the award must decide on all the matters, so it must decide respecting all the parties. Thus, if there be a submission of all controversies between A. and B. of the one part, and C. of the other, an award of all between A. and C., omitting B., is void (*u*).

Awarding on the cause and costs.

The proper mode of awarding on the cause referred (*x*), and as to costs (*y*), being fully discussed in the two following chapters, it is not requisite here to do more than to refer to those chapters as further illustrating the duty of making a final and certain award.

Award of mutual releases a decision of all matters.

III. *Effect of awarding mutual releases.*]—If, on a submission of a cause and all matters in difference, the award order the defendant to pay the plaintiff a sum of money, and direct mutual and general releases to be executed, the award is final, although the arbitrator does not expressly adjudicate on some

(*q*) 1 Saund. 32. See next division as to mutual releases.
(*r*) R. *v.* St. Katherine's Dock Co., 1 N. & M. 121.
(*s*) Anon., Dyer, 242 a.
(*t*) Ross *v.* Boards, 8 A. & E. 290.
(*u*) Com. Dig. Arb. E. 5; Harris *v.* Paynter, Rolle, Ab. Arb. O. 8, p. 261.
(*x*) See P. II. ch. 6.
(*y*) See P. II. ch. 7.

specific questions raised before him, as, for instance, on particular liabilities of the parties with respect to some bills of exchange, or on the liabilities in an action between them; for by the award of general releases he must be deemed to have taken into consideration the particular matters in difference, since the releases would operate as a final determination respecting them (*z*).

But where the arbitrator stated on the face of his award that he had, for certain reasons which the court held untenable, refused to arbitrate on certain claims within the scope of the submission, his proceeding to direct the parties to execute mutual general releases respecting the matters submitted was not held to cure the defect, since if the award were not set aside, the result would be most unjust, in directing the general releases, as they would prevent the party for ever from enforcing those claims which the arbitrator had declined to investigate (*a*).

Intendment in favour of award.

IV. *Rule awarding de præmissis.*]—The courts are always inclined to support the validity of an award, and will make every reasonable intendment and presumption in favour of its being a final, certain, and sufficient termination of the matters in dispute (*b*).

Award "de præmissis" presumed final.

To this end the following rule of construction has for a very long period been universally adopted—that when an award purports to be made "de præmissis," or "of and concerning the premises," that is, concerning the matters referred by the submission, if the terms of the awarding part be general and large enough to apply as a comprehensive decision of all the different specific matters submitted, the award is taken primâ facie to be a decision of all and of nothing more; while if the adjudication apply in terms to a particular matter only, though the submission be of all matters in difference, the award will be presumed good, until it be proved that there were other matters before the arbi-

(*z*) Birks *v.* Trippet, 1 Saund. 32; Wharton *v.* King, 2 B. & Ad. 528; Addison *v.* Gray, 2 Wils. 293.

(*a*) Bowes *v.* Fernie, 4 M. & C. 150. See Wilkinson *v.* Page, 1 Hare, 276.

(*b*) Wood *v.* Griffith, 1 Swanst. 43; Hawkins *v.* Colclough, 1 Burr. 275; Bowes *v.* Fernie, 4 M. & C. 150; Doe d. Madkins *v.* Horner, 8 A. & E. 235; Stonehewer *v.* Farrar, 9 Jur. 203; Harrison *v.* Creswick, 13 C. B. 399.

trator to which the limited adjudication cannot be construed to apply (*c*).

Award purporting to be on all matters an award de præmissis.

According to the more liberal construction of later decisions, the award need not now in terms profess to be made "of and concerning the premises," or formally express that the arbitrator adjudicates on every matter in difference, if it appear on the face of the instrument that it is an award on all the matters submitted (*d*). If the arbitrator state in his award, "Having considered the allegations of the parties and the evidence touching the matters in difference, I award," &c.; this purporting to be an award touching the matters in difference, is equivalent to an award of and concerning the premises, which will be presumed to be final as to all the matters submitted to the arbitrator until the contrary be shown (*e*).

Award not made de præmissis.

Where the award is not made de præmissis, the like presumption will not be made in its favour. Thus, when the reference was of the plaintiff's claim on a certain account, and the award was, that there was now due to the plaintiff a certain sum, the court would not presume, without proof, that the award was limited to the account, and the action on the award failed (*f*).

When it was referred to arbitration to settle the price of certain canals and bogs, and the arbitrator merely directed one party to pay the other a certain sum, the Court of Common Pleas in Ireland held that it did not sufficiently appear that the arbitrator had dealt with the matters referred to him, and that the award was bad (*g*).

v. *Award de præmissis, general finding presumed final.*]—A few illustrations of the effect of the general terms of an award being held a decision of the specific matters will here be given.

(*c*) Knight *v.* Burton, 6 Mod. 231; Baspole's case, 8 Coke, 97 b; Veale *v.* Warner, 1 Saund. 323*e*, note, p. 324; Bradford *v.* Bryan, Willes, 268; Rolle, Ab. Arb. L. p. 256; Risden *v.* Inglet, Cro. Eliz. 838; Middleton *v.* Weeks, Cro. Jac. 200.

(*d*) Brown *v.* Croydon Canal Co., 9 A. & E. 522.

(*e*) Craven *v.* Craven, 7 Taunt. 642; Baspole's case, 8 Coke, 97 b; Bradford *v.* Bryan, Willes, 268; Rolle, Ab. Abr. L. p. 256; Risden *v.* Inglet, Cro. Eliz. 838; Middleton *v.* Weeks, Cro. Jac. 200.

(*f*) King *v.* Bowen, 8 M. & W. 625.

(*g*) Richards *v.* Browne, 9 Irish C. L. Rep. 199.

Awarding a gross sum on all matters.

A canal company agreed to pay an engineer an annual sum for a term of years, for the use of an engine constructed by him, and for his services in managing it. In the course of the term, disputes arising, the parties put an end to the agreement, and referred all matters in difference between them to arbitration. On the reference the engineer sought to recover (among other things) for unpaid instalments of the sum agreed on, and also claimed a compensation for future loss in respect of the part of the term unexpired. The company stated a set-off. The arbitrators, by their award, reciting the submission bonds, and that they had fully heard and maturely considered all the evidence produced by each, and investigated all the accounts and vouchers produced touching the matters in difference referred to them, awarded (but not saying that they did so "of and concerning the premises") that there was due to the engineer from the company a certain sum, which they directed the company to pay to him. The court held this award to be a sufficiently certain and final decision of all the matters in difference, and that it was not necessary to specify each item of compensation, or to say how much was awarded in respect of the existing debt, and how much for contingent damages, or to make any allusion to the set-off; but that the arbitrators were entitled to fuse the whole claim into one set of damages, and deducting what they thought due on the set-off, to state the balance alone in their award (*h*).

In another case, differences existed between the parties respecting the portion each was by agreement between them to pay of the sum of 2,500*l.*, for which judgment had been previously recovered against the plaintiff by a stranger, and also respecting the value of the goods and stock which each had received from a farm, and concerning the costs of certain actions. These they referred to arbitration. The arbitrators, reciting that they had taken the matters in difference into their consideration, awarded that all disputes between the parties should cease, that the defendants should pay the plaintiff 444*l.*, that the plaintiff should pay five-eighths and the defendants three-eighths of the costs of the actions, and that all such sums as either party should have expended on

(*h*) Brown and the Croydon Canal Co., In re, 9 A. & E. 522.

account of the actions should be deemed as part payment of their respective shares, and that the parties should execute mutual releases. The court held the award sufficiently final, as they would presume that the arbitrators meant that 444*l.* was the proportion the defendant was to pay, taking the 2,500*l.* and the value of the goods and stock into consideration, and that it was unnecessary to direct the plaintiff to pay the remainder of the 2,500*l.*, as he was bound to do that already (*i*).

VI. *Award de præmissis, particular finding presumed final.*]— A few examples will now be given illustrating the position previously laid down, that where an award purports to be made concerning the matters submitted, the courts will construe a particular adjudication to be final, though the submission be general.

General reference award respecting banking account.

On a general reference of all actions, suits, controversies, and demands, the arbitrators by their award reciting that they had considered the allegations and evidence of all parties concerning the premises, proceeded to award that all actions and suits pending between the parties should cease, and directed payment by the defendant of a certain sum of money which it stated to be "the balance due on the banking account of the defendant with the plaintiffs." It was objected that this was a settlement of one matter only, and not of all. But the court said, if it could be shown that there was any other matter in difference between these parties than the banking account, the award could not be sustained in any respect; but they thought it lay on the party who impeached it to show that there was some other matter in difference; and that otherwise they could not intend it, though the reference was of all matters in difference between the parties (*k*).

Ordering release to day before submission.

An award made de et super præmissis, that the parties shall execute mutual releases of all actions and demands before a certain day, is good, though that day be before the day of the date of the submission, for the court will not presume that any new controversies arose in the intervening

(*i*) Cargey *v.* Aitcheson, 2 B. & C. 170. See also Gillon and Mersey Navigation Co., In re, 3 B. & Ad. 432. See also Hopper *v.* Hackett, 1 Lev. 132.

(*k*) Ingram *v.* Milnes, 8 East, 444.

period; but if it be shown that any new demands arose in the interval, the award will be void in toto (*l*).

Award on cause only.

If, on a reference of all controversies, the award be made de præmissis, and merely contain an adjudication respecting one action between the parties, this will be held final, for it will be intended that the award is made of all matters submitted to the arbitrator, and it need not state that there were no other matters in difference than the matters in the cause (*m*).

Thus the court supported, as final, an award on a reference of all actions, controversies, and suits, which, after reciting the pendency of one action, awarded de et super præmissis, that each party should pay his own costs, and that the defendant should pay the plaintiff five shillings for making the first breach in the law (*n*). So, if a cause and all matters in difference be referred, and the award, purporting to be concerning the matters in difference only, direct that the defendant shall pay the plaintiff a certain sum in full of all demands in the cause, this will be held sufficiently final, if it be not proved that there are other matters out of the cause on which the arbitrator has omitted to award (*o*).

So, where an arbitrator had to award of and concerning all matters of account then pending between L. and C., and he awarded of and concerning the premises that L. should pay C. a certain specified sum, "the amount due in respect of the W. farm account," and a further sum "due from him to C. in respect of shares in the W. Cement Company," the award was held sufficiently final on demurrer when set out on the record in an action (*p*).

Award silent, sometimes presumed a decision.

VII. *Whether matter presumed decided when award silent.*]—Even where it has been proved that there were other matters in difference before the arbitrator than those on which the arbitrator has adjudicated, the rule of presuming in favour of the sufficiency of the award has been carried so far, that his

(*l*) Ward *v.* Uncorn, Cro. Car. 216; Busfield *v.* Busfield, Cro. Jac. 577; Barnes *v.* Greenwel, Cro. Eliz. 858.

(*m*) Baspole's case, 8 Rep. 97 b; Wyatt *v.* Curnell, 1 Dowl. N. S. 327.

(*n*) Hawkins *v.* Colclough, 1 Burr. 275.

(*o*) Day *v.* Bonnin, 3 Bing. N. C. 219; Wynne *v.* Edwards, 12 M. & W. 708.

(*p*) Harrison *v.* Lay, 13 C. B. N. S. 528.

silence respecting them has, in many instances, been held not to make the award bad, but somehow to amount to a decision concerning them (*q*).

Equitable claim not noticed in award.

An award was sustained where, on a reference respecting some causes and all matters in difference, the arbitrator reciting that he had considered all the evidence and papers touching the matters in difference, awarded respecting the actions only, although it appeared that the plaintiff had set up an equitable claim, which the arbitrator did not notice, deeming it wholly unsustainable (*r*).

Cross claim by defendant.

By order of Nisi Prius, an action for a tort and all matters in difference were referred, and a verdict was taken for the plaintiff subject to the reference. Before the arbitrator, the defendant claimed a sum as the balance of an account, which sum the plaintiff admitted to be due. The award reciting that all matters in difference were referred, awarded (though not saying de præmissis) that a verdict should be entered for the plaintiff for a certain amount of damages, but made no mention of the sum admitted to be due to the defendant. The court held that it sufficiently appeared from the award that the arbitrator had decided concerning all the matters referred to him, and said that if he had used in the award the words "de præmissis," there could have been no doubt upon the subject; for they considered that the fair interpretation to be put on the award was, that the arbitrator gave as damages the sum which he found to be due after settling all accounts between the parties (*s*).

Claim for breach of warranty.

In close accordance with the above decision is the following case. On a reference of an action for the balance of the price of some horses, together with all matters in difference, the defendant made a claim before the arbitrator for an alleged breach of warranty of the horses' soundness; the arbitrator awarded, "of and concerning the matters in difference," that the plaintiff had no cause of action against the defendant, but was silent respecting the defendant's claim; the court held the award sufficient, and said they would presume the

(*q*) See the notes to Birks *v.* Trippet, 1 W. Saund. 33 a.

(*r*) Craven *v.* Craven, 7 Taunt. 642.

(*s*) Gray *v.* Gwennap, 1 B. & A. 106.

arbitrator took the claims of both parties into his consideration (*t*).

Plaintiff's claim beyond action not noticed.

In a later case, however, where a cause and all matters were referred, the arbitrator found specifically on each of the issues in the action, determining in favour of the defendant the issue on a plea which went to the whole cause of action. The award took no notice of a claim by the plaintiff respecting a matter in difference not in the action, though the arbitrator swore that he had taken it into his consideration. The court, on the strength of the authorities, especially of that of *Gray* v. *Gwennap* (*u*), held that they could not set aside the award for this omission, Lord Abinger, C.B., however, saying that had the matter been res integra, he should have been disposed to have thought the award void; and that as the award was in writing, its silence as to any matter in difference brought before the arbitrator, prevented it from being a sufficient exercise of the authority vested in him by the submission (*x*).

Award silent, sometimes not presumed a decision.

In one case, in which it appeared by affidavit that on the reference the plaintiff made a claim not included in the cause, on which claim no award was made, Coleridge, J., held that the award, though made of and concerning the matters referred, was not final, and set it aside on the ground that there was no decision as to the matter in difference out of the action (*y*).

Silence on claim for indemnity.

In a case before Lord Ellenborough, C.J., when on a general reference the defendant set up a claim to be indemnified against a liability on certain bills of exchange, and the award did not notice the claim, the court construed the silence of the arbitrator to amount to an omission to decide the point, and held the award bad in consequence, although it purported to be made touching the matters in difference (*z*).

Cross claim by defendant.

More recently, however, where a cause and all matters in difference were referred, the defendant made a cross claim for damages. The award, purporting to be "of and concerning the matters so referred as aforesaid," disposed of the issues, directing the defendant to pay the plaintiff a certain sum, on

(*t*) Hayllar *v.* Ellis, 3 M. & P. 553.
(*u*) 1 B. & A. 106.
(*x*) Dunn *v.* Warlters, 9 M. & W. 293.
(*y*) Gyde *v.* Boucher, 5 Dowl. 127.
(*z*) Mitchell *v.* Staveley, 16 East, 58.

payment of which the plaintiff was to execute to the defendant a general release. The Court of Common Pleas, distinctly overruling *Gyde* v. *Boucher* (*a*) (which opinion they have since ratified (*b*)), held the award sufficient (*c*).

Guiding rule when award silent, sufficient.

And the case was affirmed in the Exchequer Chamber. There Parke, B., stated the governing principle thus: "The rule is this,—where there is a further claim made by the plaintiff or a cross demand set up by the defendant, and the award professing to be made of and concerning the matters referred is silent respecting such further claim or cross demand, the award amounts to an adjudication that the plaintiff has no such further claim, or that the defendant's cross demand is untenable; but where the matter so set up from its nature requires to be specifically adjudicated upon, mere silence will not do." And he illustrated the latter position by the case of an arbitrator called upon to decide upon which of two demises a plaintiff in ejectment was entitled to recover, or whether or not a partnership existed between two persons, or what was the interest that a party took in certain property, whether an estate tail or an estate in fee, and said that in such cases a general award professing to adjudicate upon all the matters referred would not suffice (*d*).

Silence as to severance damage under Lands Clauses Act.

Though by s. 63 of the Lands Clauses Consolidation Act, 1845, the arbitrator, on estimating the compensation, is to have regard not only to the value of the land taken, but to the damage, if any, by severance, and the landowner claims compensation for his land taken and for severance damage also, the award will be good if it give compensation for the value of the land only, for the court will assume from the silence of the arbitrator that he is of opinion that there is no damage by severance (*e*).

VIII. *Conditional award.*]—An award leaving the result conditional on the voluntary performance by one party of some

(*a*) 5 Dowl. 127.
(*b*) Duke of Beaufort *v.* Swansea Harbour Trustees, 29 L. J. C. P. 241, S. C. 8 C. B. N. S. 156.
(*c*) Creswick *v.* Harrison, 10 C. B. 441.
(*d*) Harrison *v.* Creswick, 13 C. B. 399. See more recently Jewell *v.* Christie, 36 L. J. C. P. 168, S. C. L. R. 2 C. P. 296.
(*e*) Duke of Beaufort *v.* Swansea Harbour Trustees, 29 L. J. C. P. 241, S. C. 8 C. B. N. S. 156.

particular act for the benefit of the other, seems generally open to the objection of not being final (*f*). The remarks of Lord Brougham in the following case point out what sort of a condition may properly be imposed in certain cases.

Event conditional on voluntary act.

An action was brought by a subscriber against a company for the value of his shares, on the ground that they had engaged in speculations foreign to their original undertaking. The company having brought a cross action for calls, both were referred; and the arbitrator, among other things, awarded that the subscriber was entitled to decree for a certain specified sum as the price of his shares, which sum, after deducting what was awarded for the calls, the award proceeded to find that he was entitled to receive from the company on surrendering or transferring his shares to them, or to any person they might direct. The House of Lords held the award not to be final, since it merely said conditionally that if the subscriber chose to give up his shares, the company should pay him so much; that the direction should have been in positive terms, that the subscriber should surrender his shares, and that the company should pay him the compensation awarded; and Lord Brougham said, "It is in vain to argue that this direction was the same as a direction to a party to do so and so upon another producing letters of administration, or that it was like the case of a party who is directed to do so upon a discharge being executed to him." "There was no necessary connexion between the arrangement which the arbitrator was in the course of directing and [the subscriber] divesting himself of his property in ceasing to be a shareholder" (*g*).

On a reference respecting a claim by the plaintiff for work done, an award, that the work done was rated at a certain sum, and that for that the plaintiff should accept a bill of sale of a part of a ship, was considered bad for not directing the defendant to give the bill of sale in question, on the ground that if the defendant refused to deliver it, the plaintiff could not assign a breach of the award, and that the court could not imply any order to deliver, so as to make the award good by implication (*h*).

(*f*) Crofts *v.* Harris, Carth. 187.

(*g*) Baillie *v.* Edinburgh Oil Gas Co., 3 C. & F. 639.

(*h*) Clapcott *v.* Davy, 1 Ld. Raym. 611.

But an award, "that one shall keep and enjoy the goods, paying so much money to the other," though objected to on the ground that there was no positive direction to pay the money, was held good, as amounting to an award to pay the amount (*i*).

Conditional direction valid.

A conditional direction in an award otherwise final is often perfectly valid. Thus, a direction to do an act on the premises of a third party, though void if absolute, as rendering a party liable to an action of trespass, is perfectly good, if it be made conditional on obtaining the consent of the owner of the land (*k*). So, where the lease of certain premises was awarded to the defendant, and it was provided that if the rent awarded to be paid by him were not paid, the award should be void as to his enjoying the lease, the court held the award good, notwithstanding the conditional award as to the lease, for it became absolute if the defendant paid the rent, and if he did not, he lost the enjoyment by his own default (*l*).

Award conditioned to be void on event.

If an award contain a proviso that it shall be wholly void on the happening of a certain event, whether that event be within the control of the parties to the reference or not, the award will be bad in toto, for by adding the proviso, the arbitrator has prevented his decision being a certain and final termination of the matters in dispute. Thus, where it was awarded that one should pay the other so much money, and that the latter should give the former a release, provided that if the first should be discharged of any arrears due to soldiers by an act of indemnity, then the award should be void, the award was held not final (*m*); and the like result followed where the award provided, that if either party were dissatisfied with the award, and within a specified time paid a small sum to the other, the award should be void, and the parties be at liberty to proceed against each other as before the award (*n*).

To set aside deeds "if I have power."

Where a submission authorised the arbitrator to set aside certain deeds, and gave him power to direct what should be

(*i*) Stiles *v.* Triste, 1 Sid. 54.

(*k*) Turner *v.* Swainston, 1 M. & W. 572. See P. II. ch. 8, s. 4, d. 3.

(*l*) Furser *v.* Prowd, Cro. Jac. 423.

(*m*) Kinge *v.* Fines, Sid. 59; Vin. Ab. Arb. H. 18.

(*n*) Sherry *v.* Richardson, Pop. 15.

done, and he awarded that certain specified deeds should be set aside, "if and so far as the same respectively are in force, and if and so far as I have jurisdiction to set the same aside; and if I have no power to set them, or any of them aside, I declare that the rest of my award is yet to stand," Turner, L.J., was of opinion that the award was not final (*o*).

Alternative award good.

IX. *Award in the alternative.*]—An award in the alternative is sufficiently certain and final.

Thus an award to pay 100*l.* at such a day, or if the party do not pay it by the day, to pay 110*l.* at a future day, is good, for the additional payment is in the nature of a penalty, which the arbitrator has a power to impose (*p*). So, an award is good which orders a party to pay a certain sum by instalments on several days, and if he fail on the first day, to pay the whole sum immediately afterwards (*q*). So, on a difference respecting a right of way, the award was sustained, which directed that in case the way were taken away, the plaintiff was to pay so much less than a specified sum, and if not, so much more (*r*).

One alternative uncertain or impossible.

If an award direct one of two things to be done, and one of them be uncertain or impossible, the award is nevertheless sufficiently certain and final if the second alternative be certain and possible; and it will be incumbent on the party to perform the second alternative (*s*); as, for instance, if the direction be that defendant should cause satisfaction to be entered on the judgment-roll in a certain action, or pay a sum of money, and there be no such action in fact, the award is good to compel the defendant to pay the money (*t*). So, if it be to deliver a deed which is not in his power or possession, or to pay a sum of money, the party must perform the alternative of paying the money, which is within his power (*u*).

Award payment or to find sureties.

An award that the defendant should pay the plaintiff 100*l.* by such a day, or should find two sureties to be bound

(*o*) Nickels *v.* Hancock, 7 De G. M. & G. 300.

(*p*) Royston *v.* Rydall, Roll. Ab. Arb. H. 8, p. 250; Com. Dig. Arb. E. 15.

(*q*) Kockill *v.* Witherell, 2 Keb. 838.

(*r*) Collett *v.* Podwell, 2 Keb. 670.

(*s*) Simmonds *v.* Swaine, 1 Taunt. 548.

(*t*) Wharton *v.* King, 2 B. & Ad. 528.

(*u*) Lee *v.* Elkins, 12 Mod. 585.

with him to the plaintiff to pay the 100*l.* by 20*l.* a year, until the whole be paid, was held a good award as to the former part, but void as to the latter, and not even to give the defendant the liberty of electing whether he would pay the 100*l.* at once, or find the sureties to secure the yearly instalments (*x*).

Arbitrator cannot reserve or delegate authority.

x. *Award reserving or delegating judicial authority.*]—An arbitrator cannot in his award reserve either to himself, or delegate to another, the power of performing in future any act of a judicial nature respecting the matters submitted (*y*). His duty is to make a final and complete determination respecting them by his award, and it is a breach of that duty to leave anything to be determined hereafter.

Reservation by arbitrators to themselves.

Thus an award directing the defendant to leave on certain land so many trees to the plaintiff for house-bote and hedge-bote, as the arbitrators, upon advice with counsel at the next assizes, should appoint, was held void as imperfect, and as reserving a future authority to themselves (*z*).

The same was held respecting an award which directed A. to pay B. certain sums by instalments, and to give B. a bond, and to execute a warrant of attorney to enter judgment thereon to secure the payment, but that the warrant should be lodged with the arbitrators, and that judgment should not be entered thereon without their consent (*a*).

Where the award ordered the defendant to pay a sum to the plaintiffs, with a proviso, that if it should afterwards appear to the arbitrators that the plaintiffs had not discharged the defendant from certain debts, in which he was bound for them, that so much of the sum should be repaid by them as to the arbitrators should seem due; the award was considered bad; for these words, "if it should appear," were construed to be a retention by the arbitrators to themselves of a discretionary power of judging hereafter (*b*).

(*x*) Oldfield *v.* Wilmer, 1 Leon. 140, 304.

(*y*) Winch *v.* Saunders, 2 Rolle, Rep. 214, S. C. Cro. Jac. 584; Palmer, 145; Thorpe *v.* Cole, 2 C. M. & R. 367, S. C. 4 Dowl. 457; Com. Dig. Arb. E. 16; Selby *v.* Russell, 12 Mod. 139; Nott *v.* Long, 9 G. II. B. R., cited in Cayhill *v.* Fitzgerald, 1 Wils. 28.

(*z*) Thinne *v.* Rigby, Cro. Jac. 314.

(*a*) Lindsay *v.* Lindsay, 11 Ir. C. L. Rep. 311.

(*b*) Winch *v.* Saunders, 2 Rolle, Rep. 214, S. C. Palm. 145.

When award good, though reservation void.

Sometimes, however, the award may be good, though the reservation be void. An arbitrator, to whom power was given to award respecting the use of a stream, decided the question referred, and ordered certain works to be made by the defendant, but contemplating in his award the possibility of differences arising respecting the execution of the works, he reserved to himself the power of deciding them, and then making a final award, stating at the same time that his present award was final, unless the plaintiff complained within a certain time. The court held the reservation of authority void, but the rest of the award good, as it contained a final decision on the matter referred (*c*). The reservation, it will be seen, was not a reservation of authority to decide on any of the subject-matters of the reference, but on matters not submitted, consequently the reservation was a mere excess of authority.

Arbitrator cannot delegate.

In pursuance of the rule which forbids the delegating a judicial authority, the award is bad if the arbitrators, instead of deciding the matter submitted, award that the parties shall abide by the award of a third person whom they name (*d*); or that the defendant shall account before such auditors as the plaintiff shall assign, and if he be found in arrears, shall pay the amount (*e*).

Partial delegation.

A partial delegation of authority equally vitiates the award; as, for instance, if on a reference to settle the terms and conditions of a lease of certain premises, the arbitrators direct them to be put into repair to the satisfaction of a person named in the award; or, after determining the head of water a miller might keep, ordering the miller to put up such durable marks for denoting the height of water as a specified surveyor should direct (*f*); for that amounts to a transferring to the party named a portion of the authority vested in themselves (*g*).

Delegating to party.

An award that the defendant should pay to the plaintiff a certain sum, unless within a definite time the defendant should exonerate himself by affidavit from certain payments and receipts, in which case he was to pay a less sum, was held

(*c*) Manser *v.* Heaver, 3 B. & Ad. 295; Goddard *v.* Mansfield, 19 L. J. Q. B. 305.

(*d*) Lower *v.* Lower, Rolle, Ab. Arb. B. 20; Rolle, Ab. Arb. H. 11.

(*e*) Rolle, Ab. Arb. I. 9.

(*f*) Johnson *v.* Latham, 19 L. J. Q. B. 329.

(*g*) Tomlin *v.* Mayor of Fordwich, 5 A. & E. 147.

bad by Lord Kenyon, on the ground that the arbitrators, instead of determining all the points in dispute, had left one sum in dispute to be decided by the person who, of all others, was least qualified to decide it, namely, the defendant himself (*h*).

So, where the arbitrator directed that A. should pay B. 50*l*., and that A. should beg B.'s pardon in such manner and in such place as B. should appoint, the award was held void as to the latter direction, because giving B. the power to determine the time and place, was making him a judge in his own cause, which the arbitrator ought to have determined; and though time and place were but circumstances, yet in that sort of satisfaction they make the most considerable part (*i*).

Exception delegating to the Master the taxing of costs.

There seems to be an exception to the rule against delegating authority in respect of costs. For an award, which directs the payment of such costs as shall be taxed by the officer of the superior court which has cognizance of the submission, is undoubtedly good (*k*), though if the award direct the costs to be taxed by one, not an officer of the court, it will be bad, as delegating a judicial authority, even where it provides that the costs shall be such as a Master in Chancery would allow. Though a reference to a stranger is judicial, yet it seems the officer of the court, in taxing costs, is considered as acting in a ministerial capacity only (*l*). If this be so, this class of cases, which has been termed an exception to the general rule, would fall properly into the class next considered. Before leaving this subject, it may be observed, that it is only to causes in the superior courts that this exception applies, for the arbitrator must ascertain for himself the amount of costs in a cause in an inferior court, and cannot delegate that duty to the officers of the inferior court (*m*).

Arbitrator may reserve or delegate

XI. *Award reserving or delegating ministerial duty.*]—An important distinction has been taken by the courts, that

(*h*) Pedley *v.* Goddard, 7 T. R. 73. See Rous *v.* Lun, 1 Keb. 569.

(*i*) Glover *v.* Barrie, 1 Salk. 71.

(*k*) See post, p. 290. Selby *v.* Russell, 12 Mod. 139; Lingood *v.* Eade, 2 Atk. 501; Thorp *v.* Cole, 2 C. M. & R. 367, S. C. 4 Dowl. 457; Pedley *v.* Goddard, 7 T. R. 73; Worrel *v.* Atworth, Sid. 358; Cargey *v.* Aitcheson, 2 B. & C. 170.

(*l*) Knott *v.* Long, 2 Strange, 1025.

(*m*) Addison *v.* Gray, 2 Wils. 293. See Arbitration Act, 1889, 52 & 53 Vict. c. 49, Sched. I. (i).

ministerial duties.

though the arbitrator cannot reserve a further *judicial* act to be done, he may reserve a further *ministerial* act to be done either by himself or a stranger, at any time, even after the time limited for making the award has expired (*n*).

Measurement of land.

Whether the matters are referred to be finally decided by the arbitrator, or whether he is simply to make a valuation of certain landed property, after ascertaining in his award the rate to be charged per acre, he may direct the number of acres to be ascertained by measurement, for measuring is a merely ministerial act (*o*).

Where the arbitrators to whom it was referred to fix the price of an estate, stated in their award the sum to be paid, and the number of acres in the whole estate, and added, that if there were any error in the admeasurement, an allowance should be made at the rate of a certain amount per acre, either less or more than the admeasurement, if the mistake were in the land on one side of a brook, but an allowance of twice the amount per acre if the mistake were in the land on the other side; the court held that the award was not certain and final, as the arbitrators had not stated how much of the estate they considered lay on each side of the brook respectively, so that there were no means of ascertaining to what extent the double rate per acre, for additions and deductions, or to what extent the single rate only was to be allowed. The court, however, added, that if the addition or deduction upon admeasurement had been to be made at a uniform rate per acre as to all the land, the award, according to the rule, "id certum est quod certum reddi potest," would have been good (*p*).

Whether valuer ministerial officer.

In an old case, two judges were of opinion that a reservation of a power to value certain goods was a reservation of a judicial power, and therefore void; Powell, J., however, thought it merely ministerial. The award being bad on other grounds, it did not become necessary to determine the point (*q*). In more recent cases, a valuer's functions have been treated as of a judicial character (*r*).

(*n*) Winch *v.* Saunders, 2 Rolle, Rep. 214, S. C. Palm. 145; Cro. Jac. 584; Thorp *v.* Cole, 2 C. M. & R. 367, S. C. 4 Dowl. 457.

(*o*) Thorp *v.* Cole, 4 Dowl. 457, S. C. 2 C. M. & R. 367; Winch *v.* Saunders, 2 Rolle, Rep. 214; Hunter *v.* Bennison, Hard. 43.

(*p*) Hopcraft *v.* Hickman, 2 S. & S. 130.

(*q*) Cockson *v.* Ogle, 1 Lutw. 550.

(*r*) Anderson *v.* Wallace, 3 C. & F. 26. See ante, p. 209.

Arbitrators often direct the parties to execute bonds, releases, or other documents, to be settled by themselves or others. Such a direction will sometimes avoid the award, sometimes not, according as in each case it is treated as a reservation of a judicial or ministerial duty.

Reserving power to settle deeds.

A reservation to the arbitrator is generally construed to be judicial. Thus it has been held, that if the arbitrators award that the defendant shall pay the plaintiff a sum certain, and in security for the payment shall execute such a bond as they shall advise (*s*), or that the defendant shall secure the payment of such a sum to the plaintiff in such a manner as they shall advise, the award is invalid (*t*).

Reservation to arbitrator.

So also a direction to execute such bond by way of security for the sum awarded, or such releases as a stranger shall advise, has been considered equally bad (*u*), though the distinction in principle between these and the next class of cases does not seem very clear. It may be observed that an award that one shall release another, by the advice of J. S., has been held good (*x*).

Reservation to stranger.

If the direction be, that one party shall execute to the other such a bond, by way of security for the amount, as his opponent's counsel shall advise, or if the award direct that the one shall execute to the other a general release, as fully and beneficially as counsel shall advise, the award has been held to be good; for it is said that the delegation to the counsel in either case is not a delegation to him as arbitrator, and that he has no power to perform any judicial act, but acts in a ministerial capacity only, for the arbitrators having directed the extent of the bond and release, the counsel has only to make them as strong in law as he can (*y*). Where, in order to decide the title to certain land, the arbitrator awarded that an action should be conceived by the advice of certain counsel, this was held to be a reference to their judgment, not on the substance, but only on the form (*z*).

Reservation to counsel.

The following case illustrates the rule, that only the formal drawing up of the instrument may be deputed, and that the

To settle conveyance.

(*s*) Rolle, Ab. Arb. H. 4, p. 250.
(*t*) 19 E. IV. 1, cited in Hunter *v.* Bennison, Hard. 43.
(*u*) Rolle, Ab. Arb. H. 6, p. 250; Emery *v.* Emery, Cro. Eliz. 726.
(*x*) Anon., Jenk. 3d cent. case 61, p. 129.
(*y*) Cater *v.* Startut, Rolle, Ab. Arb. H. 7, p. 250, S. C. Sty. 217; Jenk. 129.
(*z*) Brooke, Ab. Arb. 37.

PART II. CH. V. S. 4.

award must determine its nature and character. On a reference respecting the right to a certain house and premises, the award, which directed certain parties to execute to another party all such conveyances, releases, and assurances, as might be necessary to pass their respective interests to him, was held void in toto, because it did not specify the manner in which the conveyance was to be effected, but reserved to the arbitrator, in case of dispute, a power to appoint a counsel or solicitor hereafter, to decide as to what should be the proper conveyances, releases, or assurances, and as to the clauses, provisions and covenants which they were to contain (*a*).

To court.

Where the arbitrators, on a reference out of Chancery, awarded mutual releases of all matters in difference, the leaving it to the court, if they thought proper, to give directions to the Master to settle the form, was not held to make the award bad (*b*).

SECTION V.

THE AWARD MUST BE CERTAIN.

PART II. CH. V. S. 5.

1. *What certainty requisite.*]—An award ought to be certain, so that no reasonable doubt can arise upon the face of it as to the arbitrator's meaning, or as to the nature and extent of the duties imposed by it on the parties.

Certainty to a common intent.

Certainty to a common intent only is sufficient, for the award will be construed by no technical rules, but in a fair and liberal spirit, with a view to support it as far as a sensible and reasonable interpretation will allow (*c*).

Certainty as to time.

If the arbitrator direct one party to pay money, or to execute a release to the other, the award is sufficiently certain, though it mention no time; for if a request to do the act be necessary, it must be done in a convenient time after the request; if there need no request, it must be performed in a

(*a*) Tandy *v.* Tandy, 9 Dowl. 1044.

(*b*) Lingood *v.* Eade, 2 Atk. 501.

(*c*) Hawkins *v.* Colclough, 1 Burr. 275.

reasonable time (*d*). If the award be without a date, and the arbitrator direct a party to do a thing a certain number of days after the date of the award, this will not be so uncertain as to be invalid, for the date will be computed from the delivery of the award (*e*).

Award without date.

The arbitrator need not specify any place for the payment of money awarded (*f*).

As to place.

If it be doubtful whether the award has decided the question referred, it will be set aside for the uncertainty.

When doubtful whether matter decided.

Hence, where a Chancery suit had been brought to rescind an agreement, and the main question in the reference was, whether the agreement should be rescinded, and the suit put an end to, and the arbitrator directed certain things to be done, the performance of which was to be taken in full satisfaction of all the matters in difference, and that each party should bear his own costs of the suit, the award was set aside, inasmuch as the directions of the arbitrator did not clearly determine whether the agreement was to be rescinded and the suit terminated (*g*).

The award will be equally invalid if it be uncertain how it has decided the matters referred.

When doubtful how matter decided.

When, on the reference of a cause and all matters in difference, a verdict was taken in the cause for a specified amount of damages, subject to the award of an arbitrator, and he was empowered to order a verdict for the plaintiff or the defendant, as he might think proper, and the arbitrator directed a verdict to be entered for the plaintiff (not saying for how much), and that the defendant should pay the plaintiff a certain sum, the court held the award bad, as it was uncertain whether the arbitrator meant the verdict to stand for the sum originally taken, and the amount directed to be paid by the defendant to be in respect of the matters out of the cause, or whether he intended the sum ordered to be paid by the defendant to be substituted for the nominal verdict (*h*).

An award directing an executor to pay the balance due

No finding as to assets.

(*d*) Freeman *v.* Bernard, 1 Salk. 69.

(*e*) Armitt *v.* Breame, 2 Ld. Raym. 1076, S. C. 1 Salk. 76.

(*f*) Anon., 1 Keb. 92, S. C. 2 Brownl. 309.

(*g*) Tribe and Upperton, In re, 3 A. & E. 295.

(*h*) Martin *v.* Burge, 4 A. & E. 973.

from his testator out of the assets in his hands, is sufficient, though it does not ascertain whether there are any assets in his hands (*i*).

Awarding separately on separate matters.

As the question, whether the arbitrator has with sufficient particularity decided all the matters submitted to him, arises as naturally on the objection that the award is not final, as on the objection that it is not certain, the reader is referred to the previous section for information on the point, how far it is necessary for the arbitrator to decide separately on separate matters (*k*).

11. *Certainty as to the amount awarded.*]—When the arbitrator directs anything to be done, he must give his directions with such precision that the parties may know at once what they are to do.

Arbitrator must fix precise amount to be paid.

If he order a sum of money to be paid, the award must ascertain the amount; therefore, an award is bad that orders one party to pay the others so much money as is due in conscience, without settling what is due (*l*); or so much as such land is worth, the value of the land being undetermined (*m*); or the money due for task work, without ascertaining the amount owing in that respect (*n*); or to pay the arrears of rent accruing due after the purchase by a stranger of certain lands, without showing what the arrears are, or from what period they are to be calculated (*o*); or to pay a moiety of a debt for which A. is bound, without saying in what sum (*p*); or to pay so much for every quarter of malt as malt may then be sold for, without saying in what place, for the price of malt may vary in different markets (*q*).

When arbitrator to allow at market price.

But where the parties had agreed that in case the arbitrator should think the plaintiff not entitled to recover in respect of some articles of iron machinery supplied to the defendant, the arbitrator was to allow the plaintiff the value of them at the market price of pig-iron, as the defendant still kept them,

(*i*) Love *v.* Honeybourne, 4 D. & R. 814.

(*k*) See P. II. ch. 5, s. 4, dd. 2, 5, 7; see also P. II. ch. 6, as to awarding on a cause; P. II. ch. 7, as to awarding in respect of costs.

(*l*) Watson *v.* Watson, Sty. 28.

(*m*) Titus *v.* Perkins, Skin. 247, per Jones, C. J., 248.

(*n*) Pope *v.* Brett, 2 Saund. 292.

(*o*) Massy *v.* Aubry, Sty. 365.

(*p*) Gray *v.* Gray, Rolle, Ab. Arb. Q. 2, p. 263; Com. Dig. Arb. E. 11.

(*q*) Hurst *v.* Bambridge, Rolle, Ab. Arb. Q. 7, p. 263; Com. Dig. Arb. E. 11; Waddle *v.* Downman, 12 M. & W. 562.

the award directing the defendant to pay for them according to the present market price of pig-iron was held good, and to have sufficiently ascertained the price, because, according to the agreement of the parties, the arbitrator was, in fact, merely to determine whether the defendant was to pay for them as machinery or as pig-iron (*r*).

Awarding sufficient to release securities.

When the submission, among other things, provided that the arbitrator should direct the plaintiff to pay into a bank such a sum of money as would be sufficient to entitle the defendant to have restored to him some documents deposited by him with the bank as a security for advances, and the arbitrator, following the submission, awarded that the plaintiff should pay to the bankers such a sum of money as would be sufficient to entitle the defendant to have his securities restored to him; the court held the award bad, for not ascertaining and directing payment of the exact amount due to the bankers, and necessary to be paid in order to release the defendant's securities (*s*).

To pay over money received, if any.

So, where on a reference between assignees of a bankrupt and a banking company respecting some bills of exchange, the arbitrator awarded that the bills and money secured thereby were the property of the assignees, that the bills, and moneys, and proceeds should be delivered and paid to the assignees, and that in case the bank should have received the whole or any part of the money secured by the bills, they should pay it to the assignees, the award was held bad on its face, for not ascertaining the amount, if any, received by the bank in respect of the bills (*t*).

To pay share of expenses.

On a submission concerning all controversies relating to a certain voyage, an award directing that one party should pay his share of the expenses of the voyage, and allow on account his proportion of the loss which should happen to the ship during the voyage, was held good, on the ground that those expenses and losses might be reduced to a certainty (*u*). This case, however, being cited in a later argument, Alderson, B., seemed to question whether any action could be maintained on such an award (*x*).

(*r*) Waddle *v.* Downman, 12 M. & W. 562.

(*s*) Hewitt *v.* Hewitt, 1 Q. B. 110.

(*t*) Marshall and Dresser, In re, 3 Q. B. 878.

(*u*) Beale *v.* Beale, Rolle, Ab. Arb. H. 14.

(*x*) Perry *v.* Mitchell, 2 D. & L. 457.

To pay joint damages to plaintiff and stranger.

Where a third person became a party to an order of reference of a cause and all matters in difference, and the arbitrator was to settle all matters in difference between the plaintiff and defendant, and between the defendant and the third person, and the arbitrator did not specify the amount of damages payable by the defendant to the third party separately from the damages awarded to the plaintiff in the action, but awarded a joint sum to them, the court refused to enforce the award summarily (*y*); but an action being brought on the award, they held it valid (*z*).

Money due from A., B., and C., some or one of them.

An award that so many pounds are due to the defendant from A., B., and C., "some or one of them," and directing the amount to be paid by them, "some or one of them," is uncertain (*a*).

Arbitrator need not ascertain amount of costs.

III. *Certainty as to costs awarded.*]—If a cause, either alone or with other matters, be referred, and the arbitrator in any terms direct one party to pay the whole or any proportion of the costs of the cause, as, for instance, if he order the defendant to pay all such moneys as the plaintiff has expended about a certain action, or that the plaintiff shall pay five-eighths and the defendant three-eighths of the costs, the award is sufficiently certain, though it does not ascertain the amount. The exception, or apparent exception, to the rule requiring certainty, is grounded on the practice of the superior courts, in accordance with which the costs on such an award will be taxed as a matter of course by the officer of the court, whose peculiar duty it is to settle their amount, and who in so doing is considered as acting rather in a ministerial than judicial capacity (*b*).

Except costs in inferior courts.

This applies only to causes in the superior courts, for a direction to pay the costs of an action in an inferior court, without ascertaining the amount in the award, is void for the uncertainty (*c*). But if the arbitrator direct payment of

(*y*) Hawkins *v.* Benton, 2 D. & L. 465.

(*z*) Hawkins *v.* Benton, 15 L. J. Q. B. 139, S. C. 8 Q. B. 479.

(*a*) Rainforth *v.* Hamer, 25 L. T. 247.

(*b*) Pedley *v.* Goddard, 7 T. R. 73; Hanson *v.* Liversedge, 2 Vent. 242; Cargey *v.* Aitcheson, 2 B. & C. 170; Holdsworth *v.* Barsham, 31 L. J. Q. B. 145, S. C. 2 B. & S. 480, S. C. in error, 32 L. J. Q. B. 289, S. C. 3 B. & S. 1, sub nomine Holdsworth *v.* Wilson.

(*c*) Addison *v.* Gray, 2 Wils. 293; Winter *v.* Garlick, 1 Salk. 75.

the costs of a cause depending between the parties, it will be presumed, until the contrary be shown, that it is a cause in one of the superior courts (*d*). In an old case, a direction to pay all reasonable expenses which the plaintiff had sustained about the suit, was held too uncertain and void (*e*). So, likewise, an order to pay the charges spent at the making of the award (*f*). But in a subsequent case, where the award enjoined the defendant to pay the plaintiff all such costs, charges, and expenses, as the plaintiff had been put to in a certain cause then depending between the parties, the court held that the direction respecting costs meant such costs as would be taxed and allowed by the officer of the court, and that therefore the award was good (*g*).

Giving rule for computing amount.

If the arbitrator give the rule for calculating the amount of money to be paid, without stating the result of such calculation, the award is sufficiently certain according to the general rule, "id certum est quod certum reddi potest" (*h*). Thus, where an award that one party should pay the other all such moneys as he had expended about the prosecution of a suit was held sufficiently certain, the reason given was that the amount would be ascertained by the attorney's bill (*i*). So, where the award was to pay the charges of a suit depending between the plaintiff and defendant, and that the plaintiff should give the defendant a bill of the charges; this was held certain on the ground that the charges would be ascertained by the bill delivered (*k*). These cases are strictly in accordance with the present holding of the courts, if we may presume that they meant the attorney's bill after taxation, which reduces the amount, if disputed, to a certainty.

Amount made certain by reference to other document.

Though the award do not fix the amount, yet if it refer to any instrument, by reference to which the sum may be readily computed, it is good enough. Thus, where the arbitrators directed the defendant to pay to the plaintiff's solicitor a certain amount, stated to be the amount of his bill delivered, which bill included charges for professional services

(*d*) Fox *v.* Smith, 2 Wils. 267.
(*e*) Bargrave *v.* Atkins, 3 Lev. 413.
(*f*) Pinkny *v.* Bullock, cited 3 Lev. 413.
(*g*) Fox *v.* Smith, 2 Wils. 267.
(*h*) Higgins *v.* Willes, 3 M. & R. 382; Hopcraft *v.* Hickman, 2 S. & S. 130.
(*i*) Beale *v.* Beale, Cro. Car. 383.
(*k*) Linfield *v.* Ferne, 3 Lev. 18.

PART II. CH. V. S. 5.

for another as well as for the plaintiff, the award was considered by Parke, B., as sufficiently certain, although the amount of the plaintiff's share of that bill was unascertained by the award, since, as the sum awarded was stated to be for a bill already delivered, the sum due from the plaintiff to his solicitor might easily be ascertained by reference to the bill (*m*).

Costs of reference taxable on rule of court.

Where the reference was by agreement, and contained a stipulation that it might be made a rule of one of the superior courts, the amount of the costs of the reference could be taxed by the officer of the court; and therefore it was no objection that they were not settled by the arbitrators (*n*). Thus, an award under such a submission, directing the defendant to pay to the plaintiff's attorney his costs of attending the arbitration and of procuring the signature of his clients and other parties to the enlargement of time, was held sufficiently certain, as the amount of these would be taxed by the master (*n*). It is to be remembered that now submissions generally are to have the same effect as if made orders of court (*o*).

Submission under Arbitration Act.

Costs taxable on submission made rule by statute.

On a reference under an act of parliament, under which the submission may be made a rule of court, when the arbitrator has a discretion as to costs, as under the Public Health Act, 1848, and the present Public Health Act, 1875, and is not bound by the statute to ascertain the amount himself, he may leave to the master to settle the amount (*p*).

Presumption no dispute about amount.

IV. *Award when presumed certain.*]—The courts will strive to hold the award to be certain, if possible. Therefore, when an arbitrator ordered the plaintiff and defendant to pay the costs of some actions in certain proportions, and directed that the sums already expended by either party in respect of the actions (the award not specifying their amount) should be allowed as part of the proportion of the costs to be borne by each, the court said, that this was a certain and final award or otherwise, according as there were or were not disputes

(*m*) Thorp *v.* Cole, 2 C. M. & R. 367, S. C. 4 Dowl. 457.
(*n*) Ibid.
(*o*) Arbitration Act, 1889, 52 & 53 Vict. c. 49, s. 1.
(*p*) Holdsworth *v.* Barsham, 31 L. J. Q. B. 145, S. C. 2 B. & S. 480, S. C. in error, 32 L. J. Q. B. 289, S. C. 3 B. & S. 1, sub nomine Holdsworth *v.* Wilson; Chesterfield Corporation *v.* Brampton L. B., 50 J. P. 824.

about the amount expended; but as it was not shown that there were any such disputes, the court would not presume that there were any (*q*). The above decision was relied on in a case in which the award directed payment of a sum of money with interest to be computed from the date of the last settlement of accounts (not stating the date of such settlement), and the court sustained the award as not being necessarily uncertain, since they would not presume that the date of the settlement was in dispute (*r*). On the like principle, where the arbitrator ordered two persons to pay a debt in proportion to the shares which they held in a certain ship, without saying what they were, the court held it sufficiently certain, as it did not appear there was any dispute what their respective shares were (*s*).

Interest "from date of last settlement."

In proportion to shares in ship.

According to the rule previously mentioned in the last section, where an award purports to be made "of and concerning the premises," it is held that these words have the effect of applying the general words of the award to the particular matters submitted (*t*). As, for instance, where the award, purporting to be of and concerning the matters referred, ordered the defendant to pay to the plaintiff's solicitor a certain sum as the amount of his bill delivered, without saying what the bill was for, the court sustained it as sufficiently certain, for they said they would intend that the bill was respecting the costs of certain notices of appeal, which was one of the matters submitted, the context showing that the costs of the submission and of the reference, which were also submitted, were not included in the amount directed to be paid (*u*).

Award de præmissis presumed certain.

To pay amount of bill delivered.

A submission,—reciting that the parties were relatives, and entitled to distributive shares of the effects of M., who died intestate; that the estate of M. consisted of debts, farm stock, cattle, and other effects; that differences of opinion had arisen respecting the value of the farm stock, cattle, and other effects (not naming the debts),—agreed to refer all disputes to arbitration. The award, which was made touching

To pay distributive shares.

(*q*) Cargey *v.* Aitcheson, 2 B. & C. 170.

(*r*) Plummer *v.* Lee, 2 M. & W. 495.

(*s*) Wohlenberg *v.* Lageman, 6 Taunt. 250.

(*t*) Rose *v.* Spark, 1 Saund. 324, n. (2), Al. 51; Thorp *v.* Cole, 4 Dowl. 457, S. C. 2 C. M. & R. 367. See the last section, p. 270.

(*u*) Thorp *v.* Cole, 4 Dowl. 457; S. C. 2 C. M. & R. 367.

and concerning the matters in difference, found that the defendant had moneys, farm stock, and cattle (not mentioning effects), to a certain amount, and, after other directions, directed the defendant to pay to the several parties their respective distributive shares of the residue of M.'s estate. The court held the award final and certain, though it did not ascertain the amount of the debts, or of the distributive shares, since, as the award was made of and concerning the premises, the court would presume there was no dispute respecting them; they held, also, on the same principle, that although the arbitrator found nothing in respect of "*other effects*," but ascertained the moneys, farm stock, and cattle, they would not presume that there were any other effects than those enumerated (*v*).

To apportion trust estate.

An arbitrator who had to award and to apportion a trust estate among the persons entitled, after finding a certain sum due from a party, directed him to pay or account for it to the trust estate; the award was held bad and uncertain, on the ground that it ought to have specified to whom and in what proportions the money ought to be paid (*x*).

Arbitrator awarding security must specify its nature.

v. *Certainty as to general directions.*]—The arbitrator must be equally precise in his directions to the parties to do any act as in those with respect to payment of money. Hence, if an arbitrator direct a party to give security for payment of a specified sum, without naming the kind of security, this is void for the uncertainty (*y*). So if he direct the defendant to enter into a bond to the plaintiff conditioned that the plaintiff and his wife should enjoy certain lands, the award will be void for uncertainty if he do not specify the amount of the bond (*z*). In one case, however, where a sum was directed by the award to be paid, or to be secured to be paid, within a week from the date of the award, the court held that the party must within the time either pay the sum or give such security as was satisfactory to the party entitled to receive the money (*a*). If the arbitrator order a party to give up a

Must specify

(*v*) Perry *v.* Mitchell, 2 D. & L. 452.
(*x*) Tidswell, In re, 3 N. R. 281.
(*y*) Tipping *v.* Smith, 2 Stra. 1024; Thinne *v.* Rigby, Cro. Jac. 314. See Duport *v.* Wildgoose, 2 Bulst. 260.
(*z*) Samon's case, 5 Rep. 77 b.
(*a*) Simmons *v.* Swaine, 1 Taunt. 548.

document described merely as a "certain obligation" (*b*), or to deliver up "three boxes and several books," without specifying the number or otherwise identifying the books, the direction is void (*c*).

Property awarded.

We shall subsequently have occasion to notice the degree of specification and certainty requisite in the directions respecting alterations in the property of the parties or regulating their mode of carrying on their business, when the arbitrator is empowered to say what shall be done by the parties respecting the matters in difference (*d*).

Reasonable precision sufficient.

A reasonable degree of precision is all that is required of the arbitrator. Hence a direction to a mortgagee to reassign the mortgaged lands is sufficient, although it do not state for what period the reassignment is to be; for the court will intend that it is to be extended to the whole interest mortgaged (*e*).

To pull down nuisance.

A direction that a nuisance erected on the defendant's land should be pulled down, without saying by whom, has been held certain enough, on the ground that it will be intended that the defendant, who is the owner of the soil, is the party meant to pull it down (*f*).

Defendant or executors to release.

An award that the defendant or his executors or administrators shall execute a release to the plaintiff, was held not to be void for uncertainty, and that it might be read as if it were he *and* his executors and administrators were to do the act, and that the introduction of the personal representatives into the award was but cautionary, and would not vitiate it, since executors and administrators are by law bound by the submission of the testator, and the award creates a duty (*g*).

Not saying which of two to do act.

The arbitrator must specify the particular party who is to perform what the award directs. Therefore, where by the submission the arbitrator was to direct at what price A. or B. should purchase a certain piece of land, and the arbitrator, following the submission, directed that A. or B. should purchase it at a certain price, the court set aside the award for uncertainty, as the arbitrator, as well as ascertaining the

(*b*) Bedam *v.* Clerkson, 1 Ld. Raym. 123.

(*c*) Cockson *v.* Ogle, 1 Lutw. 550.

(*d*) See P. II. ch. 8, s. 2, dd. 2, 3.

(*e*) Rosse *v.* Hodges, 1 Ld. Raym. 233.

(*f*) Armitt *v.* Breame, 2 Ld. Raym. 1076, S. C. 1 Salk. 76; Com. Dig. Arb. E. 11.

(*g*) Freeman *v.* Barnard, 1 Ld. Raym. 247; Bac. Ab. Arb. E. 4; Dawney *v.* Vesey, 2 Vent. 249.

PART II. CH. V. S. 5.

price, ought to have decided which of the two was to purchase it (*h*).

To pay plaintiff or his solicitor.

But awarding payment to be made to the plaintiff, or to A., his solicitor in the cause, is sufficient (*i*).

To pay upon proof of certain things done.

Directing the defendant to pay the plaintiff a sum of money upon proof that the plaintiff has discharged certain claims, is uncertain, for not saying to whom the proof is to be made (*k*).

Defendant to pay costs, not saying to whom.

On the reference of an action, directing the defendant to pay the costs of the reference and award is sufficient without saying to whom they are to be paid, for the plaintiff will be intended to be the party to receive them (*l*).

SECTION VI.

THE AWARD MUST BE MUTUAL.

PART II. CH. V. S. 6.

Something must be awarded for both parties.

In the old cases great stress is laid on the necessity of the award being mutual. It is said that awards must not be on one side only; that they are void, unless something be arbitrated for the defendant's benefit, as well as for the plaintiff's; that all controversies being between two parties, that which is awarded to be done by one must be an advantage to both, so as to end the controversy and discharge one as well as give satisfaction to the other; for, if it do not, it is manifestly unjust, and therefore whenever it appears to the court that notwithstanding the award the thing remains a duty as before, and is not discharged, that apparently is an award on one side, and consequently void (*m*).

Compensation awarded must be a discharge of claim.

Nothing more, however, is requisite to be done to form the mutuality of an award, than that the thing awarded to be done should be a final discharge of all future claim by the party in whose favour the award is made against the other for the cause submitted; and if one party alone be ordered to

(*h*) Lawrence *v.* Hodgson, 1 Y. & J. 16.
(*i*) Hare *v.* Fleay, 11 C. B. 472.
(*k*) Miller *v.* De Burgh, 4 Ex. 809.
(*l*) Bailey *v.* Curling, 20 L. J. Q. B. 235.
(*m*) Bac. Ab. Arb. E. 3; Stains *v.* Wild, Cro. Jac. 352.

do something, and nothing else appear to the court, it shall be presumed that he alone is the wrong-doer, and the award is good, if it have the effect of releasing him from all future liability in respect of the wrong (*n*).

Old rule of construction.

Where, in the case of a trespass submitted, the arbitrator awarded that one party should pay the other a certain sum, this formerly was held to be a void award, as being only on one side; on the ground that the award did not say for what the money was to be paid, that the trespass was not discharged, and that the party ordered to pay received no advantage by the award; but it was said, if it had been awarded de et super præmissis, it would have been well enough: likewise if the award had been that he should pay the money *for the trespass*, it had been good, for though only one party was to do the act, yet that the trespass by that award would have been discharged, and so both parties would have received an advantage (*o*).

Award de præmissis.

In another old case, where there were disputes between A. and B., and C. as attorney for B. submitted to an award respecting the differences between A. and B., and the arbitrator awarded that C. should pay A. a certain sum, that A. and C. should execute mutual releases, *viz.*, that A. should sign a release to C. *to the use of C.*, and that C. should sign a release to A. to the use of A., the award was held bad as not being mutual, on the ground that nothing was awarded to B. or to B.'s benefit; but that it would have been good, if the release to be made by A. to C. had been awarded to B. for B.'s benefit, or if it had been to C. generally, for then it might have been intended to be for B.'s use, since the submission was on B.'s behalf, but that as it was to C. for the use of C. such intendment could not be made (*p*).

Arrears of rent.

An award that one shall pay so much for arrears of rent is mutual, since the word "*for*" implies that it is to be in satisfaction of the arrears, and so both parties are benefited (*q*). So an award to pay 5*s.* for having made the first breach in

(*n*) Bac. Ab. Arb. E. 3.

(*o*) Nichols *v.* Grunnion, Hob. 49; Horton *v.* Benson, Freem. 204; Bac. Ab. Arb. E. 3; Roll. Ab. Arb. K. p. 253; Ayland *v.* Nicholls, Freem. 265; Ormelade *v.* Coke, Cro. Jac. 254; Veale *v.* Warner, 1 Saund. 327, n. (2).

(*p*) Bacon *v.* Dubarry, 1 Ld. Raym. 246; Cayhill *v.* Fitzgerald, 1 Wils. 28, 58.

(*q*) Hopper *v.* Hackett, 1 Lev. 132.

PART II. CH. V. S. 6.

the law is plainly in satisfaction and discharge of the breach (*r*). So, also, an award for a debtor to pay a debt is mutual, as the payment is manifestly intended as a discharge of the debt (*s*). An award that all suits shall cease is mutual, since it has the effect of a release (*t*).

Sum awarded presumed in satisfaction.

Awards contrary to justice are equally objectionable now as ever, but less strictness and critical nicety is now used in construing these instruments than formerly. It is not now necessary, whatever it may have been, that an award should express that a sum awarded to be paid, or an act to be done in favour of one of the parties, shall be in satisfaction, or that it should contain any equivalent terms; a discharge to the other must necessarily be presumed from the payment of the sum or the performance of the act (*u*). If the arbitrator direct the defendant to pay the plaintiff a sum without saying in respect of what it is to be paid, and the reference be of a cause only, the court will presume the payment is to be in respect of the plaintiff's claim in the cause (*x*).

Award manifestly unequal.

If trespass be for taking and detaining the plaintiff's beasts, and the arbitrator award merely that the owner shall have his beasts again, this is said in the old books to be void, on the ground that it is against natural justice to give him his own again, without satisfaction for the unjust taking and detention (*y*). So if an award be that the owner shall have parcel of his own goods. But if the arbitrator award, whereas the parties are indebted to each other in the like sum, or have done each other a trespass, that they should release each other, this is mutual and good (*z*).

When infants and married women parties.

An objection was often made to awards affecting infants and married women on the ground of want of mutuality, for it was said that as these could not be forced to comply with the directions of the award imposing burdens on them for the benefit of the other parties, it was not reasonable that

(*r*) Hawkins *v.* Colclough, 1 Burr. 275.

(*s*) Basspoole *v.* Freeman, Cro. Jac. 285, S. C. 8 Rep. 97 b; Elliott *v.* Chevall, 1 Lutw. 541.

(*t*) Strangford *v.* Green, 2 Mod. 228; Harris *v.* Knipe, 1 Lev. 58; —— *v.* Palmer, 12 Mod. 234.

(*u*) Thomlinson *v.* Arriskin, Com. Rep. 328; Cooper *v.* Hirst, 1 Lutw. 539; Veale *v.* Warner, 1 Saund. 327, n. (2).

(*x*) Hobson *v.* Stewart, 4 D. & L. 589.

(*y*) Bac. Ab. Arb. E. 3; Rolle, Ab. Arb. I. 3, p. 251.

(*z*) Bac. Ab. Arb. E. 3; Rolle, Ab. Arb. I. 6, 7, p. 252.

the latter should be bound by the provisions affecting themselves, as they had no reciprocal benefit insured. Thus the Court of Chancery, in an old case, set aside an award, which awarded a sum of money to an infant, and that a bond should be given by the guardian, that the infant should at his full age convey certain lands, on the ground that it was unreasonable and not mutual, since the infant might die, or, if he lived to full age, might refuse to convey (*a*). The principle has been sanctioned by the Court of Queen's Bench at no very distant period (*b*). But it may be doubted whether this objection will be entertained at the present day, for the rule now acted upon by the courts of law seems to be, that when a party has voluntarily and knowingly entered into a submission with married women or infants, and an award has been made, the court will refuse to set it aside on the ground that the married women or infants are not bound by it, as the party knew beforehand that they could not be bound, and therefore has all the consideration for his agreeing to the submisson for which he stipulated, and if he did not mean to be satisfied with such effect as the award could have upon them, he ought never to have consented to the reference (*c*).

Party knowing the disability bound by award.

The objection, however, is really an objection to the submission rather than to the award in most cases, and has been more fully considered in the previous part of this work concerning the parties to a submission, where it treats of the capacity of infants (*d*) and femes covert (*e*) to enter into a reference.

(*a*) Cavendish *v.* ——, 1 Cas. in Chanc. 279.

(*b*) Biddell *v.* Dowse, 6 B. & C. 255.

(*c*) Warner, In re, 2 D. & L. 148; Wrightson *v.* Bywater, 3 M. & W. 199; Jones *v.* Powell, 6 Dowl. 483.

(*d*) See P. I. ch. 2, s. 1, d. 4, p. 18.

(*e*) See P. I. ch. 2, s. 1, d. 2, p. 16.

SECTION VII.

THE AWARD MUST BE POSSIBLE AND CONSISTENT.

Impossible award bad.

An award ought to be possible. If the arbitrator award a thing impossible ex naturâ rei, as to surrender an estate or to pay a sum of money at a day already past, the award will be void. But if he direct a thing to be done, which cannot be done, but which is not in the nature of the act itself contradictory or repugnant, this may be a good award, as an award that one shall pay twenty pounds when he has not twenty pence, for no contradiction appears on the award itself (*f*).

If an act possible at first afterwards becomes impossible by the act of the party or of a stranger, the party is not freed from his obligation to perform the award (*g*).

If the award direct a party to do or cause to be done an act which is presumably not within his power to effect, as to turn the river Thames, the direction will be void (*h*).

Unintelligible award.

An award must be an intelligible and consistent instrument (*i*). Great strictness was formerly held in construing awards. Thus an award to pay a sum "on the *said* first day of May," when no such day had been previously mentioned, was in an old case held void (*k*).

Contradictory award.

It is said in an old report that if there be any contradiction in the words of an award, so that one part cannot stand with the other, the first part shall stand and the second be rejected; yet if the latter be but an explanation of the former, then both parts shall stand (*l*).

Award when held inconsistent.

A more liberal interpretation of awards is now adopted than formerly, and the courts will strive, as far as they sensibly can, to put such a construction on them as will sustain them despite of any apparent inconsistency or repugnancy (*m*).

(*f*) Com. Dig. Arb. E. 12; Rolle, Ab. Arb. E. p. 248; Rolle, Ab. Arb. F.; Bac. Ab. Arb. E. 4; Colwel *v.* Child, Cas. in Chanc. 86.

(*g*) Com. Dig. Arb. E. 12.

(*h*) Bac. Ab. Arb. E. 4; Co. Lit. 206.

(*i*) Storke *v.* De Smeth, Willes, 66; Sherry *v.* Richardson, Pop. 15. See Doe *d.* Oxenden *v.* Cropper, 10 A. & E. 197.

(*k*) Com. Dig. Arb. E. 11; Markham *v.* Jennings, Rolle, Ab. Arb. 254, 263.

(*l*) Berry *v.* Perry, 3 Bulst. 62.

(*m*) Templeman *v.* Reed, In re, 9 Dowl. 962; Stonehewer *v.* Farrar, 9 Jur. 203.

Thus an award directing proceedings in the actions (several of which were referred) to cease, and also directing judgment to be entered up in one of them (an ejectment), was held not to be an inconsistent award, since, by reading together the two directions, this construction was put on it by the court, that the award meant that the action of ejectment was to cease, unless the defendant failed to give up the premises by a certain day, in which event the lessors of the plaintiff were to enter up judgment and take out their execution (*n*).

Repugnant award set aside.

Where, however, the award is manifestly inconsistent and repugnant, the court will set it aside. On an action for a fraudulent representation of A.'s circumstances, the arbitrator found in his award, that the defendant, in answer to the plaintiff's inquiries respecting A.'s conduct, had not given a fair representation, but had omitted to state material facts. The arbitrator, however, distinctly acquitted the defendant of all fraud at the time of making the representation, yet thinking himself, as he stated, bound by adjudged cases to decide that knowledge of the falsehood of the statement was fraud and deceit, he concluded by awarding in favour of the plaintiffs. The court held the arbitrator's law to be wrong, and set aside the award, Parke, J., saying, "The conclusion to which the arbitrator has come in this case is quite absurd. He says, 'I think he is innocent,' and then awards against him" (*o*).

Finding on inconsistent issues.

The necessity of finding on each issue has sometimes exposed the arbitrator to a charge of making an inconsistent award, but the two following cases will free him from any ungrounded apprehension on that score. In an action on an agreement, the defendant by his first plea denied the agreement, in the second the breach, in the third he admitted the agreement, but alleged it was rescinded before breach, in another plea that it was varied by consent. There were other pleas also. The arbitrator awarded a general verdict to be entered for the defendant. The court, treating this as equivalent to a finding for the defendant on each issue, held that such a finding of inconsistent pleas in favour of the defendant did not render the award inconsistent, as possibly

(*n*) Jones *v.* Powell, 6 Dowl. 483.

(*o*) Ames *v.* Milward, 8 Taunt. 637.

if the cause had been tried at Nisi Prius the circumstances of the case might have warranted such a finding (*p*).

In debt the pleas of nunquam indebitatus and payment might consistently both be found for the defendant, for if on a trial the plaintiff had failed in proof of his case, and the defendant proved a payment, the verdict would be entered for the defendant on both issues (*q*).

So where to an action of assumpsit on a retainer to project certain works, and to examine certain bills with care, the defendant pleaded: 1st, non assumpsit; 2nd, no retainer; 3rd, that the defendant did use care in projecting the works; 4th, that he did use care in examining the bills. The award found for the defendant on the 1st, 2nd, and 4th issues, and for the plaintiff on the 3rd. It was held that the award was good, and not repugnant, for that the finding on the 3rd and 4th issues must be regarded as hypothetical, and only for the purpose of determining the costs of them (*r*).

Where the plaintiff declared in case, alleging that he was entitled to the reversion in a close, that a person named Hearn had wrongfully and injuriously erected incumbrances thereon, and that defendant had wrongfully and injuriously kept and continued the incumbrances so wrongfully erected, and the defendant pleaded: 1st, not guilty; 2nd, that Hearn did not erect the incumbrances on the close; an award directing a verdict for the plaintiff on the first plea, and for the defendant on the second, was held not to be inconsistent, since the first plea put in issue only the continuance of the nuisance by the defendant, and not the erection by Hearn (*s*).

Whether award must be reasonable.

It is said that an award ought to be reasonable, and that therefore an award that one party should serve the other for two years is void (*t*), or that one should release his right to the land in satisfaction of a trespass (*u*). The courts in general, though probably at the present day they would consider the award, in the first instance at least, to be void,

(*p*) Cooper *v.* Langdon, 9 M. & W. 60, S. C. 1 Dowl. N. S. 392. See Brown *v.* Hellaby, 26 L. J. Ex. 217, S. C. 1 H. & N. 729.

(*q*) Maloney *v.* Stockley, 4 M. & G. 647.

(*r*) Duke of Beaufort *v.* Welch, 10 A. & E. 527.

(*s*) Grenfell *v.* Edgcome, 7 Q. B. 661.

(*t*) Com. Dig. Arb. E. 13; Rolle, Ab. Arb. B. 12, p. 243.

(*u*) Com. Dig. Arb. E. 13; Rolle, Ab. Arb. B. 13, p. 243.

as exceeding the authority given, decline examining into the reasonableness of the arbitrator's decision (*x*); and the courts of equity will enforce a specific performance of an award, notwithstanding it appears to be unreasonable in some respects.

Hence, although the question whether the vendor could make a good title to an estate was depending in a suit in the Exchequer, the Court of Chancery compelled one of the vendees, in pursuance of an award, to join the other in the sale of their equitable interest under the contractor, although the court was of opinion that forcing the sale while the title was in dispute was unreasonable, and must depreciate the property (*y*).

SECTION VIII.

THE AWARD, HOW AFFECTED BY A MISTAKE OF THE ARBITRATOR.

1. *When the award is good on its face.*]—It is a point of some importance to ascertain how far, when the arbitrator has done his best to arrive at a right determination, and when there is nothing on the face of the award to show that the decision is wrong, the courts will listen to the suggestion that he has made a mistaken decision on questions of law or fact. On one occasion, when an arbitrator's decision was questioned on the ground of mistake, Lord Ellenborough, C. J., said that he feared it was impossible to lay down any general and certain rule to indicate in what cases the court would refuse to allow an award to be opened (*z*).

Effect of mistake, award good on its face.

For some time the common law courts made a distinction between a legal and a lay arbitrator, holding that when the merits both of law and fact were referred to a barrister the court would not open the award for any alleged mistake, unless something could be urged that amounted to a perverse

No distinction between lay and legal arbitrator.

(*x*) Waller *v.* King, 9 Mod. 63.
(*y*) Wood *v.* Griffith, 1 Swanst. 43.
(*z*) Chace *v.* Westmore, 13 East, 356.

misconstruction of the law; but they did not entertain the same confidence in the competency and probity of a non-legal arbitrator (*a*). This distinction, however, has been done away, and it has been settled by repeated decisions that the awards of legal and of lay arbitrators will be treated by the courts of law on exactly the same principles (*b*). In the courts of equity no such distinction was ever recognized (*c*).

General rule, arbitrator's decision on law and fact final.

A close examination of the cases compels one to say that one uniform principle has not been adhered to as to the consequences of a mistake. Greater latitude was allowed formerly in reviewing the arbitrator's judgment than the courts would be disposed to permit at present. The general rule is, that as arbitrators are judges of the parties' own choosing, they cannot object to their decision as an unreasonable judgment, or a judgment against law (*d*). They cannot impeach it as an erroneous judgment on the facts (*e*), or raise objections to it which involve questions arising altogether on the merits (*f*), whether the arbitrators have expressed their determination in an award, or merely in a certificate (*g*). No court of law or equity has any cognisance by way of appeal from the arbitrator's decision (*h*).

Claim by apothecary.

Thus, where an action by a London apothecary for the amount of his bill was referred, and the arbitrator awarded a certain sum to the plaintiff, the court refused to permit the

(*a*) Chace *v.* Westmore, 13 East, 356; Sharman *v.* Bell, 5 M. & S. 504; Perriman *v.* Steggall, 9 Bing. 679; Cramp *v.* Symons, 1 Bing. 104; Williams *v.* Jones, 5 M. & R. 3.

(*b*) Marsh, In re, 16 L. J. Q. B. 330; Fuller *v.* Fenwick, 3 C. B. 705, S. C. 16 L. J. C. P. 79; Brown *v.* Croydon Canal Co., 9 A. & E. 522; Ashton *v.* Poynter, 3 Dowl. 201; Jupp *v.* Grayson, 3 Dowl. 199; Huntig *v.* Ralling, 8 Dowl. 879. See Wade *v.* Malpas, 2 Dowl. 638; Wilson *v.* King, 2 Dowl. 538, n. a, S. C. 2 C. & M. 689.

(*c*) Ching *v.* Ching, 6 Ves. 281; Steff *v.* Andrews, 2 Madd. 6.

(*d*) Fuller *v.* Fenwick, 3 C. B. 705, S. C. 16 L. J. C. P. 79; Marsh, In re, 16 L. J. Q. B. 330; Steff *v.* Andrews, 2 Madd. 6; Ives *v.* Metcalfe, 1 Atk. 63; Evans *v.* Pratt, 3 M. & G. 759; Hogg *v.* Burges, 3 H. & N. 293, S. C. 27 L. J. Ex. 318; Hodgkinson *v.* Fernie, 27 L. J. C. P. 66, S. C. 3 C. B. N. S. 189; Baguley *v.* Markwick, 30 L. J. C. P. 342, S. C. 10 C. B. N. S. 61.

(*e*) Morgan *v.* Mather, 2 Ves. 17; Dick *v.* Milligan, 2 Ves. 23; Baguley *v.* Markwick, 30 L. J. C. P. 342, S. C. 10 C. B. N. S. 61.

(*f*) Winter *v.* Lethbridge, 13 Price, 533; Brown *v.* Brown, 1 Vern. 157; Lancaster *v.* Hemington, 4 A. & E. 345; Bouttilier *v.* Thick, 1 D. & R. 366; Hill *v.* Ball, 1 Dow. N. S. 164.

(*g*) Price *v.* Price, 9 Dowl. 344.

(*h*) Goodman *v.* Sayers, 2 J. & W. 249.

award to be impeached by affidavits offered to show that the arbitrator had allowed charges for attendances, which a London apothecary was not legally entitled to make, and held the award conclusive, there being nothing on the face of it to warrant the objection (*i*).

Decision on a demurrer.

In another case, an arbitrator having awarded that some pleas demurred to were good, and the declaration bad in substance, on a motion to set aside the award on the ground that the arbitrator had manifestly come to an erroneous decision respecting the validity of the pleas in law, the court refused to entertain the question, as the demurrers were among the things referred, and there was nothing in the reference empowering the parties to appeal to the court as a court of error upon the judgment given on the demurrers, and Wilde, C. J., said, "The court has no more authority to review the arbitrator's decision upon a point of law referred to him than upon a point of fact. Whatever may have been formerly the understanding, it is enough to say that in modern times the decisions are distinct and uniform, that if parties choose to refer a matter of law to an arbitrator, his decision upon the matter is final" (*j*).

This principle was reasserted recently in the House of Lords, in a case where the fluctuations in the ancient practice were noted (*k*).

Liquidated damages as penalty.

On the same principle the court refused to grant a rule to set aside an award on a suggestion that the arbitrator had improperly treated as a penalty that which was by the express contract of the parties stipulated and ascertained damages (*l*).

Deciding claim for damages to be a debt.

So where the claims in an action of debt were referred, and the arbitrator received evidence of a claim for damages for a breach of covenant in not delivering up some lands which were claimed as a debt, notwithstanding the defendant objected that such claim did not constitute a debt recoverable in the action, and the award was made for an amount which

(*i*) Gensham *v.* Germain, 11 Moore, 1.

(*j*) Emmerson *v.* Simpson, Doe *d.* Simpson *v.* Emmerson, Law Times, June 5, 1847. Reported as Stimpson *v.* Emmerson, 9 L. T. 199.

(*k*) Adams *v.* Great North of Scotland Rail. Co., (1891) 1 A. C. 31. See also the remarks of the M.R. in Darlington Waggon, &c. Co. *v.* Harding, (1891) 1 Q. B. 245, S. C. 39 W. R. 167.

(*l*) Fuller *v.* Fenwick, 3 C. B. 705.

evidently included a compensation in respect of his claim, the Court of Exchequer granted a rule to enforce the award, saying that the arbitrator was the judge of law and fact, and that as he had taken upon himself to decide whether this claim was a debt, or only a ground for damages, and he had decided it to be a debt, though possibly wrongly, the parties were concluded by his decision (*m*).

Decision contrary to evidence.

It cannot be alleged, as a ground for setting aside an award, that the decision of the arbitrator is contrary to the evidence (*n*).

Exceptions on ground of mistake.

There are, however, very many cases which recognise an extensive head of exceptions on the ground of mistake, and which show that the courts, as a matter of course, in many cases investigated the correctness of the principles on which

Reviewing taxation.

the arbitrator founded his decision (*o*). Thus, where an attorney had brought an action on a bill not taxable, and it was referred to the clerk of assize, the Court of Exchequer held that it was competent for them to examine whether the arbitrator had adopted the right rule of taxation (*p*).

Pure question of law.

In Lord Eldon's time a somewhat refined distinction was made, for it was held that if a *pure* question of law were referred to an arbitrator, his decision on it, whether right or wrong, was final, as such a reference amounted in effect to an agreement by the parties to be bound by whatever he

Mixed question, law and fact.

should say to be the law between them (*q*); yet on a *mixed* question of law and fact, which the arbitrator was bound to decide according to law, if, intending to decide according to law, he arrived at a wrong conclusion on the question of law, it was said that the court would set the award aside, as it was not what he intended it to be, namely, a decision according to law (*r*).

Plain mistake.

It was laid down as law, in 1715, by Lord Chancellor Harcourt, that if it appeared that the arbitrator proceeded upon a *plain mistake*, either as to the law, or in a matter of

(*m*) Faviell *v.* Eastern Counties Rail. Co., 2 Ex. 344. See Hodgkinson *v.* Fernie, 27 L. J. C. P. 66, S. C. 3 C. B. N. S. 189.

(*n*) Bradshaw's Arbitration, 12 Q. B. 562.

(*o*) Hardy *v.* Innes, 6 Moore, 574; Johnson *v.* Durant, 2 B. & Ad. 925.

(*p*) Broadhurst *v.* Darlington, 2 Dowl. 38.

(*q*) Ching *v.* Ching, 6 Ves. 281; Young *v.* Walter, 9 Ves. 364; Steff *v.* Andrews, 2 Madd. 6; Price *v.* Hollis, 1 M. & S. 105.

(*r*) Kent *v.* Elstob, 3 East, 17; Young *v.* Walter, 9 Ves. 364; Broadhurst *v.* Darlington, 2 Dowl. 38.

fact, the award would be set aside in like manner as it would for an error appearing in the body of the award (*s*). This view of the law was sanctioned in numerous instances (*t*). But if the point of law were a doubtful one (*u*), or the error in fact could only be detected by unravelling matters of account (*x*), the Court of Chancery would give no relief against the decision of the arbitrator. Yet in one instance Lord Chancellor Loughborough said he could not set aside the award on motion, supposing that it appeared that by a mistake of calculation the arbitrators had awarded a wrong sum, though he intimated a doubt whether in the case of such an evident mistake the court would enforce the award by attachment (*y*).

In a later case, where an action was referred at Nisi Prius, an attempt was made to set aside the award by a bill in Chancery, on the ground chiefly that the arbitrator had treated as a settled account a document which was not so. Lord Cottenham, C., however, dismissed the bill on the ground that the court had no jurisdiction to correct the mistake if there were one, there being no proof of misconduct on the part of the arbitrator, or fraud on that of the defendants (*z*).

Award set aside for gross mistake.

The result of the numerous cases cited seems clearly to establish, that though the courts could not interfere with the arbitrator's decision on the simple ground that he had judged erroneously, yet where there was a *clear gross mistake* affecting the result of the award, and that admitted or made out to the satisfaction of the arbitrators (as to which Lord Thurlow insisted on having their affidavits), the courts both of law and equity would, as a general rule not many years ago, have set aside the award (*a*).

Modern rule.

And now, when Chancery is the proper court to apply to,

(*s*) Corneforth *v.* Geer, 2 Vern. 705.

(*t*) Anon. 3 Atk. 644; Richardson *v.* Nourse, 3 B. & Ald. 237.

(*u*) Ridout *v.* Pain, 3 Atk. 486, S. C. 1 Ves. 11.

(*x*) Brown *v.* Brown, 1 Vern. 157.

(*y*) Morgan *v.* Mather, 2 Ves. Jr. 15.

(*z*) Chuck *v.* Cremer, 17 L. J. Ch. 287.

(*a*) Knox *v.* Symonds, 1 Ves. Jr. 369; Anderson *v.* Darcey, 18 Ves. 447; Delver *v.* Barnes, 1 Taunt. 48; Anon. 2 Chit. 44; Payne *v.* Bailey, 7 Moore, 147; Ward *v.* Dean, 3 B. & Ad. 234; Potter *v.* Newman, 4 Dowl. 504; Rogers *v.* Dallimore, 6 Taunt. 111; Wade *v.* Huntley, 2 Tidd Pr. 841, 9th ed.; Hardy *v.* Ringrose, 1 H. & W. 185.

PART II. CH. V. S. 8.

that court will set aside or refer back an award on the ground of a mistake if it be admitted by the arbitrator, but not if it be not admitted (*b*). The courts of law are now evidently inclined to hold that an award good on its face is not to be impeached on the ground of mistake alone (*c*).

Admitted mistake.

Mistake amounting to misconduct.

In one case, A. claiming two sums to be due to him from B., the contention before the arbitrators was merely whether A. was entitled to both, or to only one of the sums, and the arbitrators, though meaning to give A. both sums, instead of adding them together, by mistake deducted the smaller from the greater, and instead of directing B. to pay A., awarded that the payment should be made by A. to B. The Court of Common Pleas, labouring to find a reason for setting aside this incorrect and inequitable award, did not rest on the simple ground of mistake, but adverting to the circumstance that the award did not express the intention of the arbitrators, held that the mistake and negligence were so gross as to amount, in the judicial sense of the term, to misconduct in the arbitrators, and so to justify the court in setting aside the award (*d*).

Exchequer not set aside award for mistake.

The Court of Exchequer went still farther from the old rule above cited, and avowedly adopted the principle that awards ought not to be set aside for mistakes, and expressed their dissatisfaction with the above decision, *In re Hall & Hinds* (*e*); they refused to be governed by it, not indeed in terms overruling it quite, but distinguishing it, and expressing a determination not to extend it farther. It is better, say they, to adhere to the principle of not allowing awards to be set aside for mistakes, although possibly the rule may cause injustice to be done in particular instances, than by allowing mistakes to be a ground of impeaching the award, to open a door for enquiry into the merits in almost every case, for in nine cases out of ten it would be argued that there was some mistake (*f*). Therefore, where the arbitrator made a

(*b*) Mills *v.* Bowyer's Society, 3 Kay & J. 66; Graham *v.* Turnbull, 44 L. J. Chanc. 538.

(*c*) Fuller *v.* Fenwick, 3 C. B. 705; Hodgkinson *v.* Fernie, 27 L. J. C. P. 66, S. C. 3 C. B. N. S. 189.

(*d*) Hall and Hinds, In re, 2 M. & G. 847; Ashton *v.* Poynter, 2 Dowl. 651.

(*e*) 2 M. & G. 847.

(*f*) Phillips *v.* Evans, 12 M. & W. 309, S. C. 13 L. J. Ex. 80. See Hagger *v.* Baker, 14 M. & W. 9.

mistake in omitting to take into account and give credit to the plaintiff for a large sum admitted by the defendant to be due to the plaintiff, and on the error being pointed out to him, the arbitrator acknowledged his mistake, and wished the matter to be referred back to him, that he might rectify it, though to this the defendant objected, the court refused to set aside the award, as the error did not appear on the face of the award, and (what distinguished the case from *Hall & Hinds, In re* (*g*)) the arbitrator had not made any affidavit himself admitting the mistake (*h*).

Award set aside by Queen's Bench for mistake.

More recently, however, the Court of Queen's Bench intimated their approval of the case of *Hall & Hinds* (*i*); and considered the expressions in *Phillips* v. *Evans* (*j*) as rather too strong for a general rule, and as not fettering their discretion. They consequently set aside an award where it appeared by the oath of the arbitrator, that he, from a misapprehension of the parties' intention, had omitted to include in his award a large sum admitted to be due to the plaintiff (*k*).

Award by mistake not the mind of the arbitrator.

When a gross mistake has been made by an arbitrator, as when one sum has been put for another, the award, though the writing of the arbitrator, has in some cases been considered as not his award, it not being the intentional decision of his mind (*l*).

Admitted mistake.

The latest cases show that in order to re-open the award it must be shown that the arbitrator admits that he has, in his own opinion, made a mistake of law or fact, and is willing to review his decision on the point on which he has gone wrong (*m*).

Not every admitted mistake is sufficient, for the Queen's Bench Division refused to refer back awards, in one case where the arbitrators swore that they had awarded the plaintiff a sum intended by them to cover his costs of suit, thinking that he could not recover them, and now found that he was suing the defendant for such costs (*n*); and in another case

(*g*) 2 M. & G. 847.
(*h*) Phillips *v.* Evans, 12 M. & W. 309, S. C. 13 L. J. Ex. 80.
(*i*) 2 M. & G. 847.
(*j*) 12 M. & W. 309.
(*k*) Hutchinson *v.* Shepperton, 13 Q. B. 955.
(*l*) Brown *v.* Hellaby, 26 L. J. Ex. 217, S. C. 6 H. & N. 729. See Whitmore *v.* Smith, 31 L. J. Ex. 107, S. C. 7 H. & N. 509.
(*m*) Dinn *v.* Blake, L. R. 10 C. P. 388, S. C. 44 L. J. C. P. 276; Flynn *v.* Robertson, 38 L. J. C. P. 240, S. C. L. R. 4 C. P. 324.
(*n*) Allen *v.* Greenslade, 33 L. J. Q. B. D. 567.

where the arbitrator swore that he meant to award so as to give the defendant the costs of his counterclaim (*o*).

Correcting clerical mistake.

By the Arbitration Act, 1889 (*p*), s. 7, in cases of submission as to references by consent out of court, "the arbitrators or umpire acting under a submission shall, unless the submission expresses a contrary intention, have power . . . (c) to correct in an award any clerical mistake or error arising from any accidental slip or omission. This power does not seem to extend to arbitrations under references by order of court.

Statements by arbitrator after award made.

11. *Effect of extrinsic statements by the arbitrator showing a mistake on his part.*]—Until the Arbitration Act, after the award was made, the power of the arbitrator was at an end to alter the rights of the parties as settled by it, except in so far as his statements made subsequently to it were admissible to affect it. Statements made subsequent to the award are to be distinguished from the statements made by the arbitrator during the reference. What the arbitrator says in the course of the proceedings may sometimes be given in evidence as part of the transactions themselves, for his statements may amount to acts, and are different from mere narrations of former acts or former processes of thought. In such case they are admissible in evidence when the rest of the proceedings in the reference can be inquired into. What we now proceed to consider is the effect of statements made subsequent to the award.

Hearsay evidence.

Kekewich, J., in 1891, refused to set aside an award though oral evidence was given before him that after the award the arbitrator had made statements admitting that he had been bribed. The arbitrator himself was not called, however (*q*).

Whether admissible to affect award.

When an award is good on its face, the cases do not all agree in showing how far the courts will allow it to be impeached by extraneous evidence of statements of the arbitrator, showing that he has decided on reasons not tenable in law. As the courts of law are now inclined to hold that awards are not to be impeached for mistakes in law or fact not apparent on the award, they will, it is apprehended, at the present day in general reject such statements (*r*).

(*o*) Greenwood *v.* Brownhill, 44 L. T. N. S. 47.
(*p*) 52 & 53 Vict. c. 49.
(*q*) Whiteley *v.* Roberts, (1891) 1 Ch. 558.
(*r*) See Leggo *v.* Young, 16 C. B. 626, S. C. 24 L. J. C. P. 200; Hogg *v.* Burgess, 27 L. J. Ex. 318,

In the older cases, however, a different rule prevailed. On a reference respecting an injury to a ship at sea, where the arbitrator delivered a paper with his award, stating his reasons, the court treated this statement as embodied in the award, and consequently set the award aside, as it appeared that the arbitrator had acted on some marine law, and not on the law of England, in deciding on the right to damages (*s*).

Statement of reasons delivered with award received.

In another instance, where the arbitrator, having decided that the defendant was indebted to the plaintiff in a certain sum in the cause referred, delivered to the parties with his award a certificate, stating his wish that the defendant should not be precluded from taking the opinion of the Court of King's Bench on a point of law, and certifying certain facts which showed that the plaintiff and defendant were partners; the court, as a matter of course, and without any objection made, took notice of the facts stated in the certificate, and set aside the award, holding the action not maintainable on the ground of the partnership (*t*).

Case stated with award.

In a third case, where the arbitrator awarded a verdict for the defendant, and annexed to the award a certificate stating the facts, and that on his construction of the Building Act the plaintiff was not entitled to recover, the validity of the arbitrator's decision was fully discussed on a rule to set aside the award, which was ultimately discharged, the court agreeing with the arbitrator in his view of the law (*u*).

Statements of reasons, in paper annexed to award.

The court on one occasion took into consideration, and set aside, an award on a letter of the arbitrator, showing that the award extended to matters not within the submission (*x*).

Letter of arbitrator.

We have seen in the preceding pages that where a mistake was alleged as the ground of setting aside an award, the statements of the arbitrator were not only admitted, but his affidavit in some instances required (*y*).

Affidavit by arbitrator of mistake.

S. C. 3 H. & N. 293, explained in Holgate *v.* Killick, 31 L. J. Ex. 7, S. C. 7 H. & N. 418; Dinn *v.* Blake, L. R. 10 C. P. 388.

(*s*) Kent *v.* Elstob, 3 East, 18; Sharman *v.* Bell, 5 M. & S. 504.

(*t*) Holmes *v.* Higgins, 1 B. & C. 74.

(*u*) Pratt *v.* Hillman, 4 B. & C. 269. See Toby *v.* Lovibond, 17 L. J. C. P. 201, per Wilde, C. J.

(*x*) The Ayre and Calder Navigation case, cited in Williams *v.* Jones, 5 M. & R. 3.

(*y*) See the previous division of this section.

PART II. CH. V. S. 8.

Statement with a view to court's opinion.

Under the following circumstances, the Court of Common Pleas received a statement from the arbitrator to impeach his decision. An action against executors for work done to the testator's house during his lifetime was referred, with all matters in difference between the parties and the heir of the testator, who became a party to the reference. The plaintiff had done work to the house after the testator's death. The arbitrator directed the verdict for the plaintiff to stand for a specified amount, and awarded that the plaintiff had no further claim upon the defendants or the heir. The defendants having applied to the arbitrator, the latter, for the purpose of enabling the defendants to make an application to the court to review his decision, stated that the construction he had put upon the order of reference was, that if anything were due to the plaintiff either from the defendants or the heir, whether such debt were the subject of the action or not, the verdict in that action was to stand for the whole amount, and that he had acted on that principle in making his award. It was held by the court that though such statements, after the proceedings were finished, were not admissible in ordinary cases to impeach the award, yet that they were admissible here, as this case was an exception to the general rule, where the arbitrator on being told that his judgment was to be reviewed, for the purpose of enabling the defendants to appeal, assigned the ground of his judgment, and showed that he had mistaken his powers (*z*).

In another case, where the arbitrator for a like cause had, after award made, set forth in a letter the ground of his judgment, and *Jones* v. *Corry* (*a*) was relied upon in support of an application to refer the award back, that the arbitrator might state a case, the Court of Queen's Bench seemed disinclined to follow that decision, but distinguished the case before them, and refused the rule on the ground that the party had not applied to the arbitrator during the reference to state a case (*b*).

Statements of the arbitrator

Older cases, however, are not wanting which show that

(*z*) Jones *v.* Corry, 5 Bing. N. C. 187.

(*a*) Ibid.

(*b*) The London Dock Co. *v.* St. Paul's, Shadwell, 32 L. J. Q. B. 30.

the courts have declined to receive statements of the arbitrator to impugn the award.

when not receivable.

Thus, when previous matters had been settled by an award, a second arbitrator, to whom other differences were referred, the day before he made his award for the defendant wrote a letter to the plaintiff's attorney, stating that he felt himself bound to make an award in favour of the defendant, on the ground that the matter in dispute had arisen before the former reference, and that although he thought the first arbitrator mistaken, he considered himself concluded by his award: a motion having been made to set aside the award on the ground of the arbitrator being mistaken in supposing himself concluded by the first award, the court refused to entertain the question, the arbitrator not having raised it on the award itself, or on any paper annexed (*c*).

Letter of arbitrator rejected.

Letter of barrister arbitrator.

In another case, on a motion to set aside an award, where arbitrators, who were barristers, wrote letters explaining what were the matters in difference, and the course the matters took on the reference, Pollock, C.B., seemed to think he might look upon the letters, since they were barristers', as good as affidavits; but Parke, B., doubted whether the court could notice them at all (*d*).

Affidavit to explain award.

Where an award ordered that if certain sums of money were restored to the defendants they should pay them over to the plaintiff, the court refused to receive an affidavit of one of the arbitrators to explain the intention of this clause (*e*).

Letter of arbitrator to show his intention.

So, in another instance, where the plaintiff was entitled to the costs of the cause, and the arbitrator directed each party to pay half the costs of the reference, and the master allowed the plaintiff only half the costs of the witnesses examined on his part, the Court of Exchequer, on a motion by the plaintiff to review the taxation and allow him the whole costs of the witnesses as costs in the cause and not in the reference, refused to take notice of a letter written by the arbitrator to the plaintiff's attorney, stating that his intention was that the plaintiff should have the costs of the witnesses attending

(*c*) Williams *v.* Jones, 5 M. & R. 3.

(*d*) Keene and Atkinson, In re, Ex., Ap. 16, 1847.

(*e*) Gordon *v.* Mitchell, 3 Moore, 41.

before him, saying, that if the arbitrator had made a mistake they could not rectify it (*f*).

Paper delivered with award to limit verdict.

So also in the Court of Queen's Bench, where an ejectment brought to recover two closes was referred with an action of trespass, and the arbitrator ordered a general verdict for the plaintiff in the ejectment, the court held that they could not amend the postea in the ejectment by confining it to one of the two closes, although it appeared by a paper which the arbitrator delivered with his award, stating his reasons, that he considered the plaintiff was entitled to one close only, and though he awarded in defendant's favour on a plea in the action of trespass, justifying by reason of the defendant's title to the other close (*g*).

Letter of umpire.

And more recently the Court of Common Pleas refused to notice a letter of an umpire accompanying his award, in which he stated his opinion that the plaintiff ought to have had his costs, but that he had not awarded any costs to the plaintiff, as he, the umpire, had no power to do so, and that he would have awarded them to the plaintiff had he possessed the power (*h*).

Inquiring grounds of damages.

III. *Inquiry by the court of the arbitrator's grounds of award.*]—Under peculiar circumstances, when the parties do not object, the court will inquire of the arbitrator upon what grounds he has made his award. It used to be said that the inquiry would not be made without such consent (*i*). Where the plaintiff's attorney obtained an order of Nisi Prius referring the cause only, and served it on the arbitrator, and the defendant's attorney also obtained from the associate an order not strictly a duplicate, since it referred the cause and all matters in difference, and the arbitrator, among other things, directed the defendant to pay the plaintiff a specified sum, the court ordered a reference to the associate to ascertain which of the two orders was in accordance with his minutes of the agreement made at the trial, and if the associate reported in favour of the defendant's order, then they

(*f*) Brown *v.* Nelson, 13 M. & W. 397.

(*g*) Doe d. Oxenden *v.* Cropper, 10 A. & E. 197.

(*h*) Leggo *v.* Young, 16 C. B. 626, S. C. 24 L. J. C. P. 200.

(*i*) Brown *v.* The Croydon Canal Co., 9 A. & E. 522.

directed a reference to the arbitrator, requesting him to state upon what ground he gave the damages (*k*).

As to what matters awarded on.

So in a later case in the Queen's Bench, where the arbitrator was to award compensation to the prosecutor of an indictment for conspiracy, and the arbitrator stated in his award that he had not awarded anything in respect of damages to the prosecutor accruing between the time of filing the indictment and the reference, and it was proved that he had rejected evidence of damages accruing in the interval, the court directed an inquiry to be made of the arbitrator, whether he had rejected evidence of damages arising after the indictment filed from the old conspiracy, or merely evidence of damages from a new conspiracy subsequent to the filing, being of opinion that under the submission the prosecutor was entitled to compensation beyond the time of filing the indictment, if the injury were the result of the original conspiracy (*l*).

Inquiry in open court.

On an application made to enter a suggestion to deprive a plaintiff of his costs under the London Courts of Requests Act, the arbitrator having awarded less than 25*l*., part of the plaintiff's demand being for rent, and actions for rent being excepted from the operation of the statute, the affidavits not showing whether the plaintiff had been allowed anything for rent, it was agreed to apply for information to the arbitrator, who happened to be in court, and the arbitrator stating that he had made an allowance for rent, the court discharged the rule (*m*).

In an old case in Chancery, on an inquiry whether the court ought to decree an award, the Master of the Rolls was on appeal held justified in ordering the arbitrators to certify to the court whether they had considered certain particulars which were in issue in the cause, but which the party objecting to the award asserted had not been considered (*n*).

In another instance in Chancery, where the court, for its own satisfaction, wished to inquire of the arbitrators respecting the course of business between the parties, it declined to make any order of reference to the arbitrators without consent,

(*k*) Alder *v.* Savill, 5 Taunt. 453.

(*l*) R. *v.* Brewer, Q. B., June 11, 1845.

(*m*) Holden *v.* Newman, 13 East, 160.

(*n*) Squib *v.* Bolton, Cas. in Chanc. 186.

and the plaintiff refusing to consent, no order was made. In consequence, however, of what fell from the court, the arbitrators made a certificate, in which, instead of giving a short answer to the points on which the court wanted information, they went into a long history of their conduct, on which account the court refused to read the certificate (*o*).

But Giffard, V.-C., more recently held that on a motion to set aside an award an arbitrator may be examined as a witness on a question of fraud, or to show that he has made a mistake in point of the subject-matter on which he ought to have awarded, or a mistake in point of legal principle going directly to the basis on which the award is founded (*p*).

Award stating grounds of decision, whether court will review them.

IV. *When the award sets forth the grounds of decision.*]—In other sections of this chapter it is shown that the courts will invariably take notice of errors on the face of the award, if they be imperfections in the mode of deciding (*q*), or unwarranted assumptions of authority by the arbitrator (*r*); but when the decision is one that complies with all the rules previously laid down for the framing a valid award, and is confined strictly to matters within the arbitrator's jurisdiction, it is not quite clear how far the courts will annul the decision, when it is manifest from statements on the face of the award that the arbitrator has mistaken the law.

In the older cases the courts seem generally to have considered the statements and reasons assigned in the award as the ground of decision, and have set aside the award when the arbitrator has proceeded on principles contrary to law (*s*). Possibly, however, in many cases where the report does not give the submission, the arbitrator may have been authorised to state a case for the decision of the court.

Court not examine reasons unless

The Court of Queen's Bench, however, more recently refused to consider the validity of the legal principles on which

(*o*) Morgan *v.* Mather, 2 Ves. Jr. 15. See Dobson *v.* Groves, 6 Q. B. 637, 643.

(*p*) Rhys *v.* Dare Valley Rail. Co., 37 L. J. Ch. 719, S. C. L. R. 6 Eq. 429. See also P. II. ch. 11, s. 4, p. 504.

(*q*) Ss. 3, 4, 5, 6, 7.

(*r*) S. 9, post.

(*s*) Pratt *v.* Hillman, 4 B. & C. 269; Sharman *v.* Bell, 5 M. & S. 504; Williams *v.* Jones, 5 M. & R. 3; Wood *v.* Hotham, 5 M. & W. 674; Ames *v.* Milward, 8 Taunt. 637; Gaby *v.* Wilts. Canal Co., 3 M. & S. 580; Kent *v.* Elstob, 3 East, 18. See also Fuller *v.* Fenwick, 3 C. B. 705; Toby *v.* Lovibond, 17 L. J. C. P. 201.

arbitrators had proceeded, where they were not authorised to submit a point of law for their review (*t*).

arbitrator empowered to raise point.

If the arbitrator, not being empowered to state facts for the purpose of raising any point of law for the decision of the court, set out in his award a statement of facts on which he professed to ground his decision, and those facts apparently did not warrant the conclusion at which he ultimately arrived, or the reasons he assigned were unsatisfactory, the court would in general decline to draw any conclusion themselves from them so as to impeach the award, and would support it as valid, provided it contained a positive definite adjudication on the matters in difference (*u*); and according to one case, provided also there were any evidence which a judge would have been justified in leaving to a jury (*x*).

Court not examine sufficiency of facts stated.

They would refuse to interfere, even if their opinion were invited (*y*).

Unnecessary statement of facts.

If an arbitrator, to settle the accounts pending between C. and L., direct L. to pay C. a certain sum, his stating in the award that he finds that no partnership existed between L. and C. is not an excess of authority. It was simply unnecessary for him to make the statement, though the fact be the basis on which he has taken the account (*z*).

Court not presume facts stated, only grounds.

In many cases the court will not presume that there were no other facts to warrant the award than those recited in it; the arbitrator may have a particular reason for stating certain facts, as, for instance, to clear the character of a party from an imputation (*a*).

Stating facts without positive finding formerly bad.

If, without special authority, the arbitrator, before the Common Law Procedure Act, 1854, merely found certain facts, and, instead of finally adjudicating on the points in difference, left the law to be applied by the court, the award would not have been final. For instance, where after stating the facts the award proceeded, "If on these facts the court be of opinion that the plaintiff is entitled, then I award in favour

(*t*) Wright and Cromford Canal Co., In re, 1 Q. B. 98.

(*u*) Archer *v.* Owen, 9 Dowl. 341.

(*x*) Barrett *v.* Wilson, 1 C. M. & R. 586, S. C. 3 Dowl. 220; Archer *v.* Owen, 9 Dowl. 341.

(*y*) Barton *v.* Ransom, 3 M. & W. 322; Wright *v.* Cromford Canal Co., 1 Q. B. 98; Bradbee *v.* Christ's Hospital, 4 M. & G. 757; Scott *v.* Van Sandau, 6 Q. B. 237.

(*z*) Harrison *v.* Lay, 13 C. B. N. S. 528.

(*a*) Lancaster *v.* Hemington, 4 A. & E. 345; Teale *v.* Younge, M'I.el. & Y. 497.

PART II. CH. V. S. 8.

of the plaintiff; but if the court think the defendant entitled, then I award in favour of the defendant;" such an hypothetical finding would have been insufficient (*b*).

Arbitration Act, 1889, stating special case.

v. *Stating case under the Arbitration Act*, 1889.]—By the Arbitration Act, 1889 (*c*), s. 19, "Any referee, arbitrator, or umpire may, at any stage of the proceedings under a reference, and shall, if so directed by the court or a judge, state in the form of a special case for the opinion of the court any question of law arising in the course of the reference." And by s. 7 (b), the arbitrators or umpire, on a reference by consent out of court, shall, unless the submission expresses a contrary intention, have power "to state an award as to the whole or part thereof in the form of a special case for the opinion of the court."

It was not compulsory on the arbitrator on the demand of a party to state a case under the corresponding section (s. 5) of the Common Law Procedure Act, 1854 (*d*).

Referee under Judicature Acts.

By Order XXXVI. r. 52 (1883), "The referee may, before the conclusion of any trial before him, or by his report under the reference made to him, submit any question arising therein for the decision of the court, or state any facts specially, with power to the court to draw inferences therefrom, and in any such case the order to be made on such submission or statement shall be entered as the court may direct; and the court shall have power to require any explanation or reasons from the referee (*e*), and to remit the cause or matter, or any part thereof, for re-trial or further consideration to the same or any other referee; or the court may decide the question referred to any referee on the evidence taken before him, either with or without additional evidence, as the court may direct."

Arbitrator.

Under this rule a special referee has been appointed to settle a scheme for reducing the contracts of an insurance company (*f*). The rule 52 now applies to arbitrators to whom

(*b*) Wright and Cromford Canal Co., In re, 1 Q. B. 98; Anderson *v.* Fuller, 4 M. & W. 470.

(*c*) 52 & 53 Vict. c. 49.

(*d*) Gibbon *v.* Parker, 5 L. T. N. S. 584; Baguley *v.* Markwick, 30 L. J. C. P. 342, S. C. 10 C. B. N. S. 61; Holloway *v.* Francis, 9 C. B. N. S. 559.

(*e*) See Rust *v.* Victoria Graving Dock Co., 36 Ch. D. 777.

(*f*) Great Britain Mutual Life Assurance Society, In re, 19 Ch. D. 39.

has been referred any cause or matter or question therein, as well as to referees: Order XXXVI. r. 55 (c).

Appeal. Judgment on special case.

The judgment on a special case stated by an arbitrator in an action is for the purposes of appeal an interlocutory order, if after judgment either way the case must go back to the arbitrator, but a final order, if the judgment one way would be decisive (*g*).

Costs.

It would seem that where the costs of the award are not submitted to the arbitrator the judge who hears the case has power to order that the costs of the hearing shall follow the event (*h*).

If a party did not during the reference apply for a case, the courts will not refer back the award for the arbitrator to state a case afterwards, on his setting forth in a letter the wrong principles of law on which he had acted (*i*).

Arbitrators under Lands Clauses Consolidation Act.

It was held in the Court of Appeal (*k*), overruling previous cases (*l*), that arbitrators under the Lands Clauses Consolidation Act, 1845, might state a special case; for as the appointment of an arbitrator is by that statute to be deemed a submission, the reference is a reference by consent.

Local Government Board.

This does not authorise the Local Government Board, when appointed by statute to decide disputes between local authorities, to state a case, as that board are made judges not arbitrators by consent (*m*).

Building Societies Act.

The court can compel arbitrators under the Building Societies Act, 1874 (*n*), to state a case, because the provisions of that act are not so inconsistent with the Arbitration Act, 1889, that the Arbitration Act does not apply (see sect. 24). The inconsistency must be such that the old act would not work if the new act were applied (*o*).

(*g*) Collins *v.* Paddington Vestry, 5 Q. B. D. 368; Shubrook *v.* Tufnell, 46 L. T. N. S. 749, C. A.

(*h*) Portishead W. Co. *v.* Bristol and Portishead Co., W. N. (1887) 75. See now, too, the Supreme Court of Judicature Act, 1890 (52 & 53 Vict. c. 44), s. 5, giving enlarged powers to the court or judge over costs of "all proceedings in the Supreme Court."

(*i*) The London Dock Co. *v.* St. Paul's, Shadwell, 32 L. J. Q. B. 30.

(*k*) Rhodes *v.* Airedale Drainage Commissioners, 1 C. P. D. 402; Dare Valley Rail. Co., In re, L. R. 4 Ch. App. 554. See Isit *v.* Rail. Pass. Assurance Co., 22 Q. B. D. 504.

(*l*) Rhodes *v.* Airedale Drainage Commissioners, L. R. 9 C. P. 508; Newbold *v.* Metropolitan Rail. Co., 14 C. B. N. S. 405.

(*m*) Boxley *v.* West Kent M. S. B., 51 L. J. Q. B. D. 456.

(*n*) 37 & 38 Vict. c. 42.

(*o*) Knight *v.* Tabernacle Building Society, (1891) 2 Q. B. 63, C. A.

Appeal from decision on special case.

And though error would not lie to review the judgment of the court on a special case stated by an arbitrator under the Common Law Procedure Act, 1854 (*o*), the effect of the subsequent Judicature Acts, it seems, was to give a right of appeal (*p*). An appeal lies from a decision given by the Queen's Bench Division on a case stated by an umpire under the Lands Clauses Acts (*q*).

When compulsory to state case.

VI. *Duty of the arbitrator when empowered to raise a point of law.*]—If the terms of the submission be compulsory that the arbitrator *shall* state a case at the request of the parties, it is the duty of the arbitrator to set forth fully in his award all such facts as will raise all the questions of law on which the decision of the courts is desired, and it seems that the award will generally be bad if he fail to do so (*r*). To prevent any mistake, it is advisable for him to call upon the parties to furnish him with a written statement of the questions of law they require to be raised. But if by the terms of the order of reference the arbitrator "be *at liberty* to raise any point for the opinion of the court at the request of either of the parties," he is not bound to do so unless he think fit. The clause in the Common Law Procedure Act was also an enabling, not a compulsory one (*s*).

When arbitrator at liberty.

Arbitration Act, 1889.

Under the Arbitration Act, 1889, the parties do not seem to have in general the power of compelling the statement of a case. The court or judge, however, may direct it to be done (see sects. 7 and 19) (*t*).

Power as to evidence and points reserved as a judge at Nisi Prius.

Where the arbitrator has the same power as a judge at Nisi Prius to decide as to the admissibility of evidence, and to reserve points of law for the decision of the court, he takes a correct view of his duty if he refuse to pledge himself beforehand to raise on the face of his award all the objections a party may bring forward, retaining to himself a

(*o*) Gumm *v.* Fowler, 29 L. J. Q. B. 189; Jones *v.* Victoria Graving Dock Co., 2 Q. B. D. 314.

(*p*) Mirabita *v.* Imperial Ottoman Bank, 22 Sol. Journal, 237.

(*q*) Bidder *v.* North Staffordshire Rail. Co., 4 Q. B. D. 412.

(*r*) Bradbee *v.* Christ's Hospital, 4 M. & G. 714; Sheridan *v.* Nagle, 6 Ir. Rep. C. L. 110.

(*s*) Wood *v.* Hotham, 5 M. & W. 674. See Jay *v.* Byles, 3 M. & Sc. 86, where the provision, that the arbitrator "shall state points of law," seems to have been treated as enabling, not compulsory. See also Miller *v.* Shuttleworth, 7 C. B. 105.

(*t*) See ante, p. 318.

discretion on the subject (*u*). However, as the meaning of the above provision in the submission is, that the award is to be made subject to the exception as to evidence and the points reserved, according to the analogy of Nisi Prius those points which the award reserves the court will decide; and if any objections to the evidence be omitted which the party may think ought to have appeared, he will be free to avail himself of the stipulation in the order of reference, and call upon the court, if it sustain the objection, to set aside the verdict in consequence (*u*).

Arbitrator should set forth facts, not evidence.

When the arbitrator is at liberty, if he shall think fit, to report specially to the court, he does not duly exercise his power, if he set out in his award a long statement of the evidence, leaving the court to draw the inferences of fact. It is his duty to draw the necessary inferences from the facts (*x*).

Arbitrator should find positively.

It being a question in a cause whether the defendant, a pawnbroker, had made proper inquiries of a person coming to pledge goods, an arbitrator, to whom the cause was referred to state a case, stated that he was unable to say whether or not the defendant had made the proper inquiries; the court compelled the defendant to agree to another reference to the arbitrator, in order that the latter should find positively in the affirmative or in the negative (*y*).

Stating abstract legal propositions.

In one case, where there was a provision "that the arbitrator shall state on his award any point or points of law raised by either party," the arbitrator in his award set forth in terms certain abstract legal propositions contended for by the defendant as defeating the plaintiff's right to recover, and certified that he had overruled them, as upon consideration of the evidence it appeared to him none of the objections ought to prevail. The court refused to refer the award back to the arbitrator to set forth the facts on which the questions of law arose, or to set the award aside, the arbitrator having decided rightly the broad propositions of law set out in his award (*z*).

Point intended to

If it clearly appear from reading an award that an arbi-

(*u*) Scott *v.* Van Sandau, 1 Q. B. 102.

(*x*) Jephson *v.* Howkins, 2 M. & G. 366.

(*y*) Ferguson *v.* Norman, 4 Bing. N. C. 52.

(*z*) Jay *v.* Byles, 3 M. & Sc. 86.

trator who was empowered to raise points intended to leave a particular question of law open, the court will consider it, although in terms the arbitrator may in one part of his award have determined it (*a*).

be left open for the court.

Providing for the events of the court's decision.

It does not seem necessary for an arbitrator, when empowered to raise questions for the court, to make an adjudication himself on the points which he submits for the opinion of the court; and it is apprehended, that on a reference at Nisi Prius it is sufficient for him, after stating the facts of the case in his award, and either leaving it generally for the court to decide on them whether the action or defence can be maintained, or setting forth special questions only for their determination, to conclude by awarding that if the court shall be of opinion, on the facts stated or the questions raised, as the case may be, that the plaintiff is entitled to recover, then that the verdict which has been taken for the plaintiff do stand, with such damages as the arbitrator may think proper; but if the court shall be of opinion that the action is not maintainable, or that such and such questions raised ought to be decided in the defendant's favour, then that the verdict already entered for the plaintiff be set aside, and instead thereof a verdict be entered for the defendant (*b*). This form of awarding respecting the action is merely given to illustrate the principle involved, and cannot in itself be applicable to the infinite variety of cases that may occur; for of course the arbitrator ought to provide for the effect of every possible decision of the court on the points submitted, so far as they may affect the various issues in the cause, the amount of damages recoverable, or other rights and liabilities of the parties regulated by the provisions of the award.

Raising point as to validity of custom and judgment non obstante veredicto.

In one instance, where an arbitrator was empowered to direct that a nonsuit or a verdict should be entered for the plaintiff or the defendant, as he should think proper, and was, at the request of either party, to state any point of law upon the face of his award for the opinion of the court, it was held not incumbent on the arbitrator to decide finally as to the amount of damages to be recovered, and to direct how the judgment should be entered up, but that having by his award disposed of all the issues joined on the record, and

(*a*) Sherry *v.* Oke, 3 Dowl. 349.
(*b*) Richards *v.* Easto, 15 M. & W. 244; The Grocers' Co. *v.* Donne, 3 Bing. N. C. 34.

assessed damages separately in respect of each grievance in the declaration, and having referred to the court, at the request of the defendant, by a sufficient statement of facts, the question as to the right of the plaintiff to recover damages in respect of some of the grievances stated in the declaration, and, at the request of the plaintiff, the question as to the validity of a custom set out in a plea, and the allegations contained in it, and as to the plaintiff's right to judgment non obstante veredicto on the same plea, should the issue thereon be found for the defendant, he had properly discharged his duty, and was not bound to have definitely determined as to the validity of the custom (*c*).

Deciding case first, then raising point for the court.

Sometimes the arbitrator first finds the various issues in the cause referred himself, subject to the opinion of the court, and then, after setting forth the whole facts, states particular questions on which he requires the decision of the court, and concludes with awarding that if the court shall decide a particular question one way, then he awards in one way; if in another, then he awards in another (*d*).

Arbitrator should provide for the event of court differing from him.

It is advisable for the arbitrator, though he determine the matter himself, to make a provision for the event of the court differing from him in opinion, for if the arbitrator find for the plaintiff in the action referred, and then state facts for the opinion of the court which show that the plaintiff ought to have been nonsuited, the court cannot direct a nonsuit to be entered, but can only set the award aside (*e*), and thus all the litigation becomes fruitless; whereas, if he direct that in case the court differs from him the verdict shall be entered for the defendant, the decision of the court in favour of the latter will, according to many cases, entitle him to have the verdict entered for him (*f*).

Awarding hypothetically.

Doubts, however, as to the validity and utility of an hypothetical finding were in one case thrown out. The arbitrator had found positively for the complainant, and then stating facts, awarded that if the court should be of such an opinion,

(*c*) Bradbee *v.* Christ's Hospital, 4 M. & G. 714.

(*d*) Waller *v.* Lacy, 1 M. & G. 54; Arnold *v.* The Mayor of Poole, 4 M. & G. 860.

(*e*) Peters *v.* Anderson, 1 Marsh. 238.

(*f*) France *v.* White, 8 Dowl. 53; Waller *v.* Lacy, 1 M. & G. 54; Arnold *v.* Mayor of Poole, 4 M. & G. 860; Webb, In re, 8 Taunt. 443; Bradbee *v.* Christ's Hospital, 4 M. & G. 714.

then the sum to be paid should be increased to such another sum, and if of another opinion, that it should be reduced so much: the court, agreeing with the arbitrator, supported the award; but assuming the points of law to have been properly raised, Lord Denman, C.J., expressed a doubt whether, if the court had disagreed with the arbitrator, the hypothetical finding and assessment could have stood, or whether the award must not have been set aside altogether (*g*). There does not, however, seem to be any case in which the court, assenting to one of the views suggested by the arbitrator, have ever refused to enforce the hypothetical finding dependent on it, and instead thereof set the award aside.

Hypothetical finding good.

On the contrary, an hypothetical decision, providing for the different views the court may take, has, as will be seen from the cases previously cited on this subject, been either assumed or decided to be sufficiently final and certain, and acted on by the courts.

In the following case, where the submission provided that the arbitrator should have the same power as a judge at Nisi Prius to decide as to the admissibility of evidence and to reserve points of law for the decision of the court, and the arbitrator, after making a special statement of facts affecting the admissibility of certain depositions in evidence, awarded that the verdict should be reduced to 1,356*l.* if the court should be of opinion that the depositions of A. and B. were admissible, to 1,165*l.* if the court should think the depositions of A. only admissible, and to 579*l.* if the court should think neither of the depositions admissible; though the observations of Lord Denman, in *Wright* v. *Cromford Canal Company* (*h*), were cited, the court held the award to be final, and likened it to the finding of a jury in a special verdict; and they observed that there was a positive finding for the plaintiff for the smallest of the three sums, and that it was only necessary for him to come to the court in case he wanted a larger amount. The court, however, on motion, gave the plaintiff the benefit of one of the hypothetical findings, and directed the verdict to stand for 1,165*l.* (*i*).

(*g*) Wright *v.* Cromford Canal Co., 1 Q. B. 98.

(*h*) 1 Q. B. 98.

(*i*) Scott *v.* Van Sandau, 6 Q. B. 237.

SECTION IX.

THE AWARD THOUGH BAD IN PART, WHEN GOOD FOR THE REST.

Award bad in part may be good if all matters well decided.

1. *When the bad part of the award is separable.*]—Though before the time of King James the First, according to Holt, C.J., an award void in part was considered void altogether (*k*), it is now quite clear that an award bad in part may often be good for the rest. If, notwithstanding some portion of the award is clearly void, the remaining part contain a final and certain determination of every question submitted, the valid portion may frequently be maintained as the award, though the void part be rejected (*l*).

When bad part separable.

The bad portion, however, must be clearly separable in its nature, in order that the award may be good for the residue (*m*). When it is so divisible, the faulty direction will alone be set aside, or treated as null (*n*).

Award bad in part for excess.

This position is illustrated by the numerous cases in which an arbitrator has exceeded his authority by directing something to be done which he had no power to order, and therefore made an award clearly invalid as to the unauthorized direction (*o*).

Excess as to costs.

Thus, where the plaintiff seeks to enforce an award, which orders the defendant to pay him a specified sum, and also the amount of the costs of an action between them, or of the reference, or to pay them at a particular time, and the arbitrator has no such power over the costs as he assumes, and consequently the direction as to costs is void; yet if the latter be clearly separable from the other portion of the award, the court will compel the defendant to perform the rest of the award, and to pay the sum awarded (*p*).

(*k*) Furlong *v.* Thornigold, 12 Mod. 533.

(*l*) Stone *v.* Phillips, 4 Bing. N. C. 37; Buccleuch (Duke) *v.* Metropolitan Board of Works, L. R. 5 Ex., per Blackburn, J., 229.

(*m*) Tandy *v.* Tandy, 9 Dowl. 1044; Auriol *v.* Smith, 1 Turn. & R. 121; Watkins *v.* Phillpotts, M'Lel. & Y. 393; Nickels *v.* Hancock, 7 De G. M. & G. 300.

(*n*) Caledonian Rail. Co. *v.* Lockhart, 3 Macq. 808.

(*o*) Harrison *v.* Lay, C. P., 12 Feb. 1863, N. R. 437.

(*p*) Candler *v.* Fuller, Willes, 62; Aitcheson *v.* Cargey, 2 Bing. 199; Whitehead *v.* Firth, 12 East,

Excess as to entry of verdict.

If an arbitrator determine the cause referred by finding the issues properly, and then without authority direct a verdict to be entered, the court will not set aside the good part of the award, since the unauthorized direction as to the verdict is separable, and may be rejected alone (*q*).

Excess as to entry of judgment.

An arbitrator, who had no power to direct a judgment to be entered, awarded on an action of ejectment in the following terms:—"I award, order, and determine that judgment for the plaintiff be entered in the said action, with one shilling damages, and that the plaintiff do recover under the said judgment a plot or parcel of land,"—describing it. The court, setting aside the direction as to the entering of judgment, which had been entered up, refused to set aside the award, being of opinion that the direction as to the judgment might be rejected as surplusage, and that, if all mention of the judgment were struck out, there was a sufficient finding of the cause in the plaintiff's favour, and that it might be struck out without altering the intention of the award as to the matters within the arbitrator's jurisdiction (*r*).

Excess as to a stranger.

Where the award orders the defendant to pay one sum to the plaintiff and another to a stranger, or to execute a lease for life of certain lands to the plaintiff, with remainder in fee to a stranger, the defendant has been compelled to give the plaintiff what the award directs, though he is not bound to obey the arbitrator as far as regards the stranger (*s*). So likewise, if one party, a banker, be ordered to pay the other a sum out of a stranger's money in his hands, though clearly the arbitrator has no right to meddle with funds of third parties, the party to whom the payment is ordered to be made may sustain the award as to other parts, if they be not affected by the direction as to stranger's money (*t*).

Excess as to releases.

If the arbitrator order the parties to execute mutual releases of all matters in difference, when the submission is confined to particular differences; or of all differences up to

166; Strutt *v.* Rogers, 7 Taunt. 212; Boodle *v.* Davies, 3 A. & E. 200; Barker *v.* Tibson, 2 W. Bl. 953; Cockburn *v.* Newton, 9 Dowl. 676; Marder *v.* Cox, Cowp. 127; Firth *v.* Robinson, 1 B. & C. 277; Rees *v.* Waters, 16 M. & W. 263.

(*q*) Howett *v.* Clements, 1 C. B. 128; Hawkyard *v.* Stocks, 2 D. & L. 936.

(*r*) Doe d. Body *v.* Cox, 4 D. & L. 75.

(*s*) Bretton *v.* Prat, Cro. Eliz. 758; Bac. Ab. Arb. E. 1; Com. Dig. Arb. E. 14.

(*t*) Ingram *v.* Milnes, 8 East, 444.

the date of the award, the arbitrator having power only up to the date of the submission; though in one case it was considered that a release, being an entire instrument, could not be void in part and good in part (*u*), the courts have often held that this direction is good to compel the parties to execute releases as to the particular matters, and up to the date of the submission, but void as to the matters not referred, and as to differences arising subsequent to the reference (*x*).

Excess as to staying suits.

So, if on a submission respecting suits for tithes, the award order all suits between the parties to cease, there being suits for other things depending between the parties, the award is void as to the suits for the other things, and good as to the suit for tithes (*y*).

In like manner, when the costs of the action are to abide the event, if the arbitrator, after finding on all the issues, direct a stet processus, the direction is void, as being an excess of authority, but, being clearly separable, may be rejected without invalidating the rest of the award (*z*).

Excess as to directions what shall be done.

When the main question was, which of two parties jointly interested in a ship should pay the expenses incurred on account of it after a certain date, and the arbitrator directed one of them to pay them, and to give the other a bond of indemnity against the payment of them, the majority of the court held the award good in toto: and Maule, J., though he doubted as to the award of the bond, was yet of opinion, that even if that were invalid, the award would only be bad pro tanto (*a*).

Future repairs.

An arbitrator appointed to decide upon the method of draining certain lands, after ordering certain works, exceeded his authority by giving a direction respecting future repairs. The House of Lords held the award bad only for the excess, as by striking out that direction the rest of the award was not affected (*b*). So where the arbitrator who had power to

Hypothetical provision.

(*u*) Vanlore *v.* Tribb, Rolle Ab. Arb. N. 1, p. 258; S. C., 1 Rolle Rep. 437 contrà; Pickering *v.* Watson, 2 W. Bl. 1118 contrà.

(*x*) Doe d. Williams *v.* Richardson, 8 Taunt. 697; Lee *v.* Elkins, 12 Mod. 585; Squire *v.* Grevett, 2 Ld. Raym. 961; Hill *v.* Thorn, 2 Mod. 309; Abrahat *v.* Brandon, 10 Mod. 201; Anon., 12 Mod. 8; Hooper *v.* Pierce, 12 Mod. 116.

(*y*) Webb *v.* Ingram, Cro. Jac. 663.

(*z*) Ward *v.* Hall, 9 Dowl. 610.

(*a*) Brown *v.* Watson, 6 Bing. N. C. 118.

(*b*) Johnston *v.* Cheape, 5 Dow, 247.

PART II. CH. V. S. 9.

regulate the use of a stream of water flowing though certain ponds, after directing how it was to be used, added a provision concerning the flow of the stream in case the ponds should be filled up at any time, the court, inclining to think this hypothetical finding an excess of the arbitrator's authority, were clearly of opinion that it did not vitiate the other directions in the award (*c*).

Excess as to reserving authority.

An award to pay a certain amount for goods supplied contained a proviso that if he who was to pay could, before a certain day, disprove the receipt of the goods, or give better proof of the payment of some sums of money, he should be relieved from payment of all such portions of the amount as should be so disproved or proved respectively. In one report of this case it is stated that the court held the reservation void, but the award good, as an award to pay the whole amount, and that the provision respecting the proof of payment was simply void as surplusage, for that the authority of the arbitrator was at an end the moment the award was made (*d*). In another report of the same case it was said the court took time to consider whether the reservation should frustrate the whole award, or whether the award should stand, and only the reservation be void (*e*).

An arbitrator, to whom an action respecting a watercourse and all matters in difference was referred, directed a verdict for the plaintiff, and ordered certain works to be done by the defendant. He then added, that, as disputes might arise respecting the performance, the plaintiff if dissatisfied with it, might (on giving notice to the defendant) bring evidence before the arbitrator of the insufficiency of the work, and the defendant might also give evidence on his part, in order that a final award might be made concerning the matters in difference; but if no proceedings were taken by the plaintiff within two months after the work was done, the award then made should be final; and he enlarged the time for making his further and final award, if requested, to six months. The court held the latter part of the award bad, as it assumed to reserve a power over future differences, which was not authorised, but that the former part was good, as

(*c*) Winter *v.* Lethbridge, 13 Price, 533.

(*d*) Beckwith *v.* Warley, Rolle Ab. Arb. H. 9, p. 250.

(*e*) Warley *v.* Beckwith, Hob. 218.

being a final decision of all the matters in difference at the time of the submission, and that the clause as to making a further and final award was to be considered as having reference to prospective differences only, and so not to affect the valid part of the instrument (*f*).

Who may complain award wholly bad for excess.

It may be observed, with regard to the class of cases above cited, that although the courts have refused to allow the party who is ordered to do certain acts to object that the award is wholly void because the arbitrator has awarded something within his power and also something beyond, yet it by no means follows that in many of them the award would not have been set aside in toto, had the complaint come from the other party that he could not, by reason of the badness of the award in one particular, receive all the benefit that the arbitrator contemplated to give him (*g*).

Illegal matter.

Where an arbitrator directed payment to the defendant of a sum of money, as the balance of the general account, and also of another sum stated on the face of the award to be due to the defendant on account of illegal insurance partnership transactions between him and the plaintiff, the award was held bad as to the latter sum only (*h*).

Poor-rate and costs.

But where some farmers, conceiving themselves overrated to the poor-rate in proportion to other parishioners, entered into a submission with the churchwardens and overseers, by which the validity of the rate, the costs of preparing for an appeal to the sessions respecting it, and the costs of the reference, were left to the arbitrators, who awarded on each matter; the majority of the Court of Exchequer held, that as the chief subject-matter, namely, the rate, was one which could not lawfully be referred to arbitration, the award respecting it was void, and, being void as to the principal matter, it was void as to the costs also (*i*).

Excess in condition precedent.

Although the doing an act such as the executing mutual releases be made conditional upon payment of certain sums and certain costs, it has been held that, although the direction as to costs be void, it can be so far separated in some

(*f*) Manser *v.* Heaver, 3 B. & Ad. 295.

(*g*) Taylor *v.* Shuttleworth, 8 Dowl. 281.

(*h*) Aubert *v.* Maze, 2 B. & P. 371.

(*i*) Thorp *v.* Cole, 4 Dowl. 457.

cases as to permit of the award being sustained for the residue (*k*).

Where the costs were in effect to abide the event, and the arbitrator, after directing the defendant to pay the plaintiff a certain sum for the debt due, and another sum stated in the award to be the amount of the plaintiff's costs, had ordered that after payment of the several sums each party should execute a release to the other if required; it was objected, that as the arbitrator had exceeded his authority in ascertaining the amount of the costs, the direction as to that payment was invalid, and that as the defendant's obtaining a release was made conditional on payment of that sum among others, so that the defendant could not obtain the release without paying a sum the arbitrator had no right to impose, the whole award was void. But Coleridge, J., agreeing that the arbitrator had no authority to tax the amount of the costs, yet feeling himself bound by the decision of *Aitcheson* v. *Cargey* (*l*), sustained the award, holding the bad part separable, and that the defendant would probably entitle himself to the release on payment of the costs regularly taxed, and the amount of the debt (*m*).

Bad part separable though no excess.

Though the award be deficient as to a matter within the submission, if it be separable the rest of the award may often be supported. Thus, if the arbitrator, having power over the costs, order the defendant to pay the plaintiff a sum of money for debt or damages, and also the costs of the action, but the direction as to the costs be bad for uncertainty, as, for instance, if the amount of costs be not specified, and the action be in an inferior court, so that they cannot be taxed, and therefore the arbitrator ought to have fixed the sum, or if the arbitrator be specially directed to ascertain the amount himself, the court will hold the plaintiff may enforce the award as to the specified sum for the debt or damages (*n*).

Award uncertain as to part.

Alternative award.

We have previously seen that in the case of an alternative

(*k*) Aitcheson *v.* Cargey, 2 Bing. 199.

(*l*) 2 Bing. 199.

(*m*) Kendrick *v.* Davies, 5 Dowl. 693.

(*n*) Morgan *v.* Smith, 1 Dowl. N. S. 617; England *v.* Davison, 9 Dowl. 1052; Addison *v.* Gray, 2 Wils. 293; Bargrave *v.* Atkins, 3 Lev. 413; Pinkny *v.* Bullock, cited 3 Lev. 413; Addison *v.* Spittle, 18 L. J. Q. B. 151.

award, if the award be bad as to one alternative, or if it be impossible or uncertain, the award is good and absolute as to the other (*o*).

Bad part inseparable, award wholly void.

II. *When the bad part of the award is inseparable.*]—If the objectionable provisions in the award be inseparable from the rest, or not so clearly separable that it can be seen that the part of the award attempted to be supported is not at all affected by the faulty portion, the award will be altogether avoided (*p*).

The following cases are examples of the rule, and show in what instances a direction which the arbitrator has no power to make will vitiate the award.

Excess inseparable, award void.

Where an arbitrator, who had no power to order a verdict to be entered, made an award in these terms, "I award and direct that a verdict in this cause be finally entered for the plaintiff, with 284*l.* 12*s.* damages," the court, agreeing that if the faulty part had been contained in a distinct paragraph it might have been rejected, and the rest sustained, held the award bad in toto, since, the whole being comprised in one sentence, the clause containing the excess could not be divided from the rest (*q*).

Single sum including matters not referred.

If the arbitrator award collectively on matters within and matters not within the submission, so that the court cannot see how much of the adjudication applies to each, the award will be bad in toto. For example, if the arbitrator have no power to give interest beyond the submission, and he award one entire sum for principal and interest to a day subsequent to the submission, unless the court can separate the amount given for interest beyond the submission, the whole award must be set aside (*r*).

Lease for too long term.

By the terms of an agreement, a lease of a colliery was to be granted for sixty-three years, from the 1st May, 1801, the lessees to be allowed three years for winning the colliery rent free. An arbitrator, to whom it was referred "to give

(*o*) Simmons *v.* Swaine, 1 Taunt. 548; Wharton *v.* King, 2 B. & Ad. 528; ante, p. 280.

(*p*) Candler *v.* Fuller, Willes, 62; Storke *v.* De Smeth, Willes, 66; Bowes *v.* Fernie, 4 M. & C. 150; Buccleuch (Duke) *v.* Metropolitan Board of Works, L. R. 5 Ex., per Blackburn, J., 229.

(*q*) Jackson *v.* Clarke, M'Lel. & Y. 200.

(*r*) Watkins *v.* Phillpotts, M'Lel. & Y. 393.

PART II. CH. V. S. 9.

such directions as to a lease, according to the agreement, as he should think fit," having directed a lease for sixty-three years from the 1st May, 1804, was held to have exceeded his authority, as the sixty-three years were, by the agreement, to be counted from the 1st May, 1801, and he had no power to go beyond the agreement; and the award was held void altogether (*s*).

Price to be paid at a future day.

Where an arbitrator, appointed to determine the purchase price of an estate, exceeds his authority, after fixing a price, by directing payment at a future day, it seems the direction as to the future day of payment is not separable, so as to leave the award as to the price valid, for the court will not take upon itself to say that the time of payment has not some connexion with the amount awarded (*t*).

Costs as between attorney and client.

Where the arbitrators awarded, among other things, that the action should cease; that the defendant should pay the plaintiff 50*l.* towards the costs incurred in the cause and reference; that the plaintiff should pay his own costs of the cause and reference, and should also pay to the defendant the costs of the defendant in the cause and reference, the said costs to be taxed as between attorney and client; the court, holding that the arbitrators had exceeded their authority in awarding costs as between attorney and client, set aside the whole award, since the direction to tax the costs as between attorney and client was so connected with the benefit intended to be granted to the defendant, that they could not reject it and sustain the rest (*u*).

Unauthorised deductions.

On a reference, among other things respecting the defendant's bill of costs as an attorney, the arbitrator was to ascertain the balance between the parties, *but no question of liability was to be raised;* the court held that the arbitrator ought not to have made any deductions from the defendant's bill on account of his not having been admitted an attorney of one of the superior courts of Westminster; and, on it being shown by affidavits that he had made such deductions, they set aside the whole award (*x*).

In a case in equity, where the arbitrator (who by the

(*s*) Bonner *v.* Liddell, 1 B. & B. 80.

(*t*) Emery *v.* Wase, 8 Ves. 504a.

(*u*) Seckham *v.* Babb, 8 Dowl. 167, S. C. 6 M. & W. 129.

(*x*) Harries *v.* Thomas, 2 M. & W. 32.

submission had no authority to disallow a particular sum admitted by the defendants), after finding the general balance due from them, stated in his award that in the accounts he had not charged them with the sum in question, although the defendants, when the award was pronounced bad for the disallowance, offered to allow that sum in account against themselves, the Master of the Rolls held that the error could not be so cured, and set aside the whole award (*y*).

Direction depending on excess.

An award provided, that if the defendant, before a certain day, could show that he had delivered certain currants to the plaintiff, then the arbitrators or an umpire would make a further award, but if he could not show it, that the plaintiff should be free from any claim. The award then added, that the defendant should pay a certain sum to the plaintiff, unless the arbitrators or the umpire made a further award respecting the currants within a certain time. The court held the award void, though there was no further award made, as they considered the last clause, ordering the defendant to pay, had dependence on the first part, which was void as contemplating the making of a further award, a thing beyond the arbitrators' power (*z*).

Difficulty in separating bad from good part.

Where an arbitrator, who had to settle the terms of a lease, among other things ordered the premises to be put in repair, to the satisfaction of a third party named, this provision being void, as a delegation of authority, was held to render the whole award void, as being inseparable from the rest. In giving judgment, Lord Denman, C.J., made the following remark: "I always find a difficulty in separating the good part of an award from the bad. The arbitrator probably frames one part with a view to the other, and each may be varied by the view which he takes of the whole" (*a*).

This observation is worthy of attention, since it seems to embody the principle on which the courts will act at the present day, when they are called upon to decide whether an award clearly bad in part can be separated as to the remainder: for it must often happen that a direction, perfectly separable as far as the grammatical construction of the

(*y*) Skipworth *v.* Skipworth, 9 Beav. 135.

(*z*) Brown *v.* Dalton, Rolle Ab. Arb. H. 10, p. 250.

(*a*) Tomlin *v.* Mayor of Fordwich, 5 A. & E. 147.

award is concerned, is the ground on which the arbitrator has proceeded in making some equivalent provision affecting the other party.

Old rule, something well awarded to each.

In many of the old cases, the courts held that awards were to be sustained, whatever portions were struck out as improperly awarded, provided in the end there remained something awarded on each side, so as in a technical manner to satisfy the rule respecting mutuality, although the award so modified amounted to a very different measure of reciprocity from that which the arbitrator intended (*b*).

Bond with sureties.

Thus where the arbitrator ordered the defendant to execute a bond for the payment of money to the plaintiff, with two sureties, and that thereupon the plaintiff should execute a release, the court held the direction as to the sureties void, but good as to the defendant, and that the plaintiff would be bound to execute a release as soon as the defendant should deliver a bond signed by himself alone (*c*). The effect of the above decision, it will be seen, was to compel the plaintiff to accept a slighter security than the arbitrator designed, as an equivalent for his executing the release.

Modern rule, award bad if reciprocity altered.

A rule, however, more consonant to the principles of justice has long been adopted; for if by the nullity of the award in any part, one of the parties cannot have the benefit intended him as a recompense or consideration for that which he is to do to the other, the award will usually be treated as void in the whole (*d*).

Thus an award that one should pay the money due for task-work (without saying what sum), and that the other should pay 25*l.*, and that both should give general releases, being uncertain and void as to the task-work, is void as to the whole, although mutual releases were awarded; for the payment for the task-work, as well as the general release, was intended as a recompense for the 25*l.* on the other

(*b*) Joyce *v.* Haines, Hard. 399; Harris *v.* Knipe, 1 Lev. 58; Bargrave *v.* Atkins, 3 Lev. 413; Lindsey *v.* Aston, 2 Bulst. 38; Lee *v.* Elkins, 12 Mod. 585; Osborn's case, 10 Rep. 129 b; Bedell *v.* Moor, cited 10 Rep. 131 b.

(*c*) Thursby *v.* Helbert, Carth. 159, S. C. 1 Show. 82, 3 Mod. 272. See Norwich *v.* Norwich, 3 Leon. 62; Furlong *v.* Thornigold, 12 Mod. 533; Cooke *v.* Whorwood, 2 Saund. 337.

(*d*) Bac. Ab. Arb. E. 3; Rolle Ab. Arb. K. 8, p. 253; Com. Dig. Arb. E. 14; Winch *v.* Saunders, Cro. Jac. 584. See notes to Pope *v.* Brett, 2 Saund. 293 b.

side (*e*). So also an award that the defendant should have certain trees, and that he should give security to the plaintiff for the payment of a specified sum, is void; the latter direction is bad, for not stating with certainty what security, and, one part being void, the other part must be void too, or else there would be an advantage to one party only (*f*). So where the payment of a sum of money was directed to be made to A., on A., his wife and son, conveying an estate, as the wife and son were not parties to the submission, the direction as to them was void, and therefore the whole award was void, since the party could not enforce the intended equivalent for which his money was to be paid (*g*). When the costs of the cause were to abide the event, and the arbitrator without authority directed a verdict for the defendant, the court set the whole award aside; for if the direction as to the verdict were struck out, there would be no determination of the cause for the defendant so as to entitle him to his costs (*h*).

Costs affected by void part.

If the decision of the arbitrator beyond his powers has affected his determination as to the matters within his jurisdiction, the whole award should be set aside (*i*).

(*e*) Pope *v.* Brett, 2 Saund. 293 b; Com. Dig. Arb. E. 14.

(*f*) Bac. Ab. Arb. E. 3; Thinne *v.* Rigby, Cro. Jac. 314.

(*g*) Barney *v.* Fairchild, Rolle Ab. Arb. N. 9, p. 259.

(*h*) Hawkyard *v.* Stocks, 2 D. & L. 936.

(*i*) Marshall *v.* Dresser, 3 Q. B. 878.

CHAPTER VI.

THE DUTY OF THE ARBITRATOR IN AWARDING ON AN ACTION REFERRED.

Object and contents of the sixth chapter.

A VERY important branch of the arbitrator's duty consists in his determining by his award actions at law and equity. As these are referred at different stages, and subject to varying conditions, what is a sufficient determination under one submission will often be inadequate under another.

In this chapter, therefore, it is attempted to collect, how the arbitrator may best award on an action according to the particular case referred. The first section points out shortly the modes of disposing of an action without deciding it, when the submission (which is rarely the case) permits such a course. The second section shows the duty of deciding the action in favour of the party entitled to succeed, and of awarding on every issue joined in the cause, when the costs of the cause abide the event of the award. In the third section an investigation is made of the power of the arbitrator to direct a verdict to be entered in the action, of the manner in which, when empowered, he should perform his duty in this respect, and of the consequences of directing such an entry without authority. The duty of the arbitrator in awarding damages is laid down in section four; while section five examines, under what circumstances the arbitrator may direct judgment to be entered or arrested, or decide on the plaintiff's right to judgment non obstante veredicto. The sixth section treats of the determination of an action in the Chancery Division. The duty of an official or special referee with regard to an action is discussed in the seventh section.

SECTION I.

OF DISPOSING OF THE CAUSE WITHOUT DECIDING IT.

When disposing of cause without deciding it sufficient.

When the terms of the submission are such, that the award will be final and certain, without showing in whose favour the cause referred is decided (though that is rarely the case, and never when costs abide the event of the cause, and are to be taxed by the officer of the court), it is sufficient, if the arbitrator somehow dispose of the cause absolutely.

Awarding suits to cease.

It has been decided by the courts of common law, that an award that all suits now pending between the parties shall cease, is a final determination of the suits, for the meaning of such an award is, not that the party shall be non-suited or give over and begin again, but that the suit should cease absolutely for ever, so that the right itself is gone because the remedy is quite taken away, for if the suit fail the party has no remedy to come at his right (*a*). In one instance, however, in an old case, a direction that all manner of proceedings, if any, depending at law should be no further prosecuted, was held not to be final, or to prevent the plaintiff from bringing a suit, if he had not brought one, or if he had, from discontinuing that which he had brought, and bringing a new one (*b*).

Awarding nonsuit.

An award of a non-suit used not to be a good determination of the cause, for it was not final (*c*).

Directing a stet processus.

An award that each party should pay his costs of certain actions, and that the actions be discontinued, has been held final and good, and in effect an award of a stet processus (*d*).

Discontinuing action.

After an arbitrator appointed to state a special case has found nearly all the facts in favour of the defendant, the plaintiff will not be allowed to discontinue the action (*e*).

(*a*) Simon *v.* Gavil, 1 Salk. 74; Knight *v.* Burton, 1 Salk. 75. See Lord *v.* Hawkins, 2 H. & N. 55.

(*b*) Tipping *v.* Smith, 2 Stra. 1024.

(*c*) Knight *v.* Burton, 1 Salk. 75; Wild *v.* Holt, 9 M. & W. 161.

(*d*) Blanchard *v.* Lilly, 9 East, 497; Gray *v.* Gray, Cro. Jac. 525.

(*e*) Stahlschmidt *v.* Walford, 4 Q. B. D. 217.

SECTION II.

OF AWARDING ON THE CAUSE WHEN COSTS ABIDE THE EVENT.

Costs abide event.

1. *The arbitrator must decide the cause when costs abide the event.*]—The common provision that the costs of the cause are to abide the event, imposes on the arbitrator the necessity of peculiar strictness in properly deciding the cause in his award.

Award of a stet processus bad.

If by the submission the costs of the cause are to abide the event as to the cause, the arbitrator must determine the cause in favour of one party or the other, and not merely dispose of it: so that he will not be justified in awarding a stet processus, because by so doing he would be exercising a discretion as to the costs, over which he has no control: for the awarding a stet processus prevents either party having the costs, as they are to abide the *legal* event, and there is no *legal* event of the cause on which they can be taxed when there is no decision in favour of either party (*f*).

Not when issues also decided.

If, however, the arbitrator decide all the issues, and then direct that no further proceedings shall be taken in the action, though this award of a stet processus be void as an excess of authority, yet it will not vitiate the award, as, there being a decision on the issues, there is a legal event on which the officer of the court can tax the costs (*g*). So on the reference of an action of trover to which the defendant had pleaded not guilty and not possessed, where the costs were to abide the event, and the arbitrator awarded that the cause should cease and be no further prosecuted, and that the defendant should pay a certain sum to the plaintiff, Erle, J., held that the event was sufficiently determined (*h*).

Awarding cause to cease bad.

Merely directing the action to cease, either wholly or partially, is insufficient. Thus, where the arbitrator found

(*f*) Hunt *v.* Hunt, 5 Dowl. 442; Norris *v.* Daniel, 10 Bing. 507; Leeming & Fearnley, In re, 5 B. & Ad. 403.

(*g*) Ward *v.* Hall, 9 Dowl. 610.

(*h*) Hobson *v.* Stewart, 16 L. J. Q. B. 145, S. C., 4 D. & L. 589.

that the plaintiff had good cause of action on five out of eight counts, and ordered that the defendant should pay certain damages, and that no further proceedings should be had in the action, it was held that as there was no award as to three counts, and no event to authorise the taxation of costs on those counts, that consequently no part of the award could stand (*i*). But where the declaration contained eleven special counts for negligence, and also common counts for money paid, and there was a plea of the general issue, and the arbitrator found that the plaintiff had good cause of action for a specified sum, and directed a verdict to be entered for that sum, the award was considered sufficient, as a finding on all the counts (*k*).

Award of general verdict.

Directing that an action of replevin should cease and be no further prosecuted, that the rent agreed on was 14*l.*, and that 6*l.* was due for such rent at the time of the distress complained of, was not considered a sufficient determination of the action in the defendant's favour; since the rent for which the defendant avowed might have been a different rent from that awarded due, and so the award as to the rent was not necessarily a decision of the avowry in the defendant's favour (*l*).

Replevin finding as to rent.

II. *What a sufficient decision before the rules for taxing costs of issues.*]—It was sufficient, before the modern regulations in the courts of law about taxing the costs of particular issues for the party who succeeds on them, if, looking to the whole award, though there was no express termination of the cause, the court could see that the cause was determined in favour of either party, so as to make an event on which costs could be taxed.

Award on the whole showing cause decided.

Thus, on a reference of all matters in difference, including an action by a landlord against his tenant for breach of covenants in a lease, the award awarding that the plaintiff had no claim or demand on the defendant on account of any alleged breaches of covenant or otherwise, and that the defendant had no claim on the plaintiff, was held to be a

Neither party any claim.

(*i*) Norris *v.* Daniel, 10 Bing. 507. See Hancock *v.* Reid, 21 L. J. Q. B. 78.

(*k*) Dicas *v.* Jay, 5 Bing. 281; Gisborne *v.* Hart, 5 M. & W. 50.

(*l*) Leeming & Fearnley, In re, 5 B. & Ad. 403.

final decision and good (*m*). On a reference of a cause and all matters in difference, an award that "nothing is due to the plaintiff" has been held a sufficient finding that the plaintiff has no right to recover in the action referred (*n*).

Action for nuisance.

An action for a nuisance, to which a plea of the general issue was pleaded (before the modern rules for pleading), was referred, the costs to abide the event: the arbitrator awarded that the plaintiff had not proved that the defendant was the cause of the injury, and that the verdict taken for the plaintiff should be set aside and a nonsuit entered; but he also ordered that the defendant should remove the nuisance within a month. This was held to be substantially a finding in favour of the defendant, and to entitle him to the costs of all witnesses that could be material to him for any defence under the general issue (*o*).

Award plaintiff no cause of action.

An award in an action (in which 10*l.* had been paid into court) that the plaintiff had no cause of action except for 10*l.* lent by him to the defendant's wife when sole, and which had been brought into court, was held to be an award in favour of the defendant, and determined the event as to costs (*p*).

Defendant in ejectment to give up the premises.

On the reference of an action of ejectment before trial, the submission provided that if the arbitrator should award that the plaintiff had any cause of action, he should have costs as in a court of law; the award directed the defendant to give up the premises to the plaintiff, to pay the costs of the action, and to pay a specified sum for the loss of rent during the time he held over. The court considered this direction a sufficient decision, and enforced payment of the sum and costs by attachment, although the arbitrator had not in terms awarded that the plaintiff had any cause of action (*q*).

Cause referred before plea arbitrator need not decide each count.

III. *Deciding cause referred before issue joined.*]—When a cause was referred before plea, notwithstanding the declaration contained several counts, the arbitrator was not bound by the rules then in force for taxing the costs of the separate issues

(*m*) Jackson *v.* Yabsley, 5 B. & A. 848.
(*n*) Dickins *v.* Jarvis, 5 B. & C. 528.
(*o*) Radcliffe *v.* Hall, 3 Dowl. 802.
(*p*) Dawson *v.* Garrett, 2 Dowl. 624.
(*q*) Doe d. Williams *v.* Richardson, 8 Taunt. 697.

in favour of the party successful on each respectively (*r*) to find specifically on each count, though the costs of the cause abided the event, for before plea pleaded it was impossible to say what the issues would be (*s*). It was sufficient if he decided in whose favour the cause was determined.

Award of cause to cease and damages.

Thus an action of trespass, in which the declaration had been delivered, and an action of assumpsit, in which a writ only had been issued by the same plaintiff against the same defendant, having been referred with all matters in difference; although it was objected that the award, which ordered that all proceedings in the causes should cease and be no further prosecuted, and that the defendant should pay the plaintiff a sum of money "in full of all demands in the said causes," was not final, as it did not determine the causes, but only decided that on the whole the plaintiff was entitled to a balance, and did not show any event on which the costs of the causes could be ascertained; the court held the award good, as amounting to a determination of both causes in favour of the plaintiff; as they would reasonably import that the plaintiff was entitled to recover something in each of the actions, and that it was not necessary to specify how much the plaintiff was entitled to in each (*t*).

Cause to cease and payment of balance.

So where an action to recover a sum alleged to be due on a balance of accounts was referred with all matters in difference after appearance (the defendant claiming a set-off exceeding the plaintiff's claim), and the arbitrators awarded that the action should cease and be no further prosecuted, that on the balance of accounts a certain sum was due from the plaintiff to the defendant, which they directed the plaintiff to pay, the court, though deeming it incumbent on the arbitrators to show in whose favour the suit was determined, as well as to pronounce who was entitled on the balance of the accounts, held that the award was final, since the arbitrators had in fact determined the action in favour of the defendant by directing the action to cease, and awarding that on the balance of the accounts there was a sum due to the defendant (*u*).

(*r*) 1 Reg. Gen. H. T. 2 W. IV. r. 74; 3 B. & Ad. 385.

(*s*) Bearup *v.* Peacock, 2 D. & L. 850.

(*t*) Wynne *v.* Edwards, 12 M. & W. 708.

(*u*) Eardley *v.* Steer, 4 Dowl. 423, S. C., 2 C. M. & R. 237; Harding *v.* Forshaw, 1 M. & W. 415.

How to award on cause referred before plea.

When a cause was referred before plea, and the arbitrator had no power to order a verdict to be entered, the legal and proper form of deciding the action, if in favour of the plaintiff, was, to award that the plaintiff had a good cause of action against the defendant, and then to assess and direct payment of the amount to which the plaintiff was entitled in respect of the same; if in favour of the defendant, to award that the plaintiff had no cause of action against the defendant (*v*).

If a cause were referred after plea, but before issue joined, the arbitrator did not need to decide on the pleas (*x*).

Cause referred after issue joined, arbitrator must find on each.

IV. *Awarding on the issues since the rules as to costs of issues.*]—When a cause was referred after issue joined, and the costs of the cause were to abide the event of the award, it was incumbent on the arbitrator, whether he had to make an award or only a certificate, either to dispose specifically of each issue, or so to adjudicate, that it could be clearly inferred from the award or certificate in which way each of the issues had been determined, so as to have enabled the officer of the court to tax the costs for the party in whose favour each issue respectively was found (*y*).

Judicature Acts.

The change in the forms of pleadings effected by the Judicature Acts has not relieved the arbitrator from this duty (*z*).

Rule for taxing costs of separate issues.

This necessity of determining each issue, although the merits have been disposed of, arose from a rule of court, which provided that "no costs shall be allowed on taxation to a plaintiff on any counts or issues upon which he has not succeeded; and the costs of all issues found for the defendant shall be deducted from the plaintiff's costs" (*a*). It is evident that unless the arbitrator found distinctly on each issue, there was no legal event to authorize the taxation of

(*v*) Eardley *v.* Steer, 2 C. M. & R. 327, S. C., 4 Dowl. 423; Harding *v.* Forshaw, 1 M. & W. 415.

(*x*) Smith *v.* Reece, 6 D. & L. 520.

(*y*) Brooks *v.* Parsons, 1 D. & L. 691; Kilburn *v.* Kilburn, 13 M. & W. 671; Bourke *v.* Lloyd, 2 Dowl. N. S. 452; Hunt *v.* Hunt, 5 Dowl. 442; Stonehewer *v.* Farrar, 6 Q. B. 730; Armitage *v.* Coates, 4 Ex. 641; Humphreys *v.* Pearce, 7 Ex. 696.

(*z*) Ellis *v.* Desilva, 6 Q. B. D. 521.

(*a*) 1 Reg. Gen. H. T. 2 W. IV. r. 74; 3 B. & Ad. 385. Since repealed.

costs by the master, in accordance with the above rule (*b*). The rule now in force, R. S. C. 1883, Ord. LXV. r. 2, provides generally that the costs of the several issues, both in law and fact, shall, unless otherwise ordered, follow the event, and thus imposes a similar duty on the arbitrator, as the old rule.

No request necessary.

In one instance, the Court of Exchequer decided that where a finding on specific issues was material only with respect to costs, an award was not to be set aside for the omission to determine each issue, unless the arbitrator had been requested distinctly to find on each (*c*). The propriety of that decision was, however, first doubted (*d*), and afterwards denied, on the ground that when the submission places the very point under the arbitrator's view, neither notice nor request is necessary to make it his duty to decide upon it (*e*). It may now be considered as completely overruled. The case of *Duckworth* v. *Harrison* (*f*), which had been mistakenly supposed to support the doctrine of *Dibbin* v. *Marquis of Anglesea* (*g*), was explained by Lord Abinger, C.B., to mean merely this, that when the costs of the cause do not abide the event, in order to make it incumbent on the arbitrator to find on each issue, words should be introduced into the order of reference, calling upon him to decide on each (*h*).

Arbitrator must award on each issue.

As the issues must be specifically or substantially decided, if any issue be left undetermined, the award is bad.

Account stated.

Where a declaration contained two counts, one on a promissory note, and the other on an account stated, an award that the plaintiff had good cause of action for a certain sum, being the amount of the promissory note, was held bad, since it did not dispose of the issue on the account stated in favour of either party (*i*).

Defendant indebted.

So where there was a plea of non assumpsit to a declaration containing several counts, and the arbitrator found that the defendant was justly indebted to the plaintiff in a certain sum, this award was defective; since although it determined

(*b*) See Rennie *v.* Mills, 5 Bing. N. C. 249.
(*c*) Dibben *v.* Marq. Anglesey, 10 Bing. 568.
(*d*) Gisborne *v.* Hart, 5 M. & W. 57.
(*e*) England *v.* Davison, 9 Dowl. 1052.
(*f*) 4 M. & W. 432.
(*g*) 10 Bing. 568.
(*h*) Bourke *v.* Lloyd, 2 Dowl. N. S. 452, S. C. 10 M. & W. 550.
(*i*) Gisborne *v.* Hart, 5 M. & W. 50.

that on some one or more of the counts the defendant was liable, it did not necessarily determine the issues raised by that plea on each of the counts (*k*).

Sum due in respect of all matters referred.

But an award that a certain sum was due from the defendant to the plaintiff "*in respect of all the matters referred*" was treated by Wightman, J., as a finding on all of several counts in indebitatus assumpsit in the plaintiff's favour (*l*). So also an award that the plaintiff had good cause of action, "*as stated in the declaration*," was held to mean on the whole declaration (*m*).

Issue on non assumpsit.

But when to a declaration containing several of the ordinary indebitatus counts, the defendant pleaded, first non assumpsit, and also three other pleas, and the arbitrator found, "as to the issues, firstly, thirdly, and lastly joined," that the verdict should stand for the plaintiff, and on the second issue for the defendant, this was sufficient; since it amounted not merely to an award on the issue raised by the plea of non assumpsit on the first count in the declaration, but to a finding in the plaintiff's favour of all the sub-issues raised by the issue on the plea of non assumpsit on the whole declaration; and it was unnecessary for the award to show how much was due in respect of each count, as the object of the separate finding was only to dispose of the question of costs, which was determined sufficiently by the arbitrator's finding that the defendant owed something on each count (*n*).

Costs, issue joined but not made up.

Where after issue joined in an action of covenant, but before the issue was made up, all the matters in the suit, specified in the particulars, were referred by agreement, the costs of the suit to abide the event of the award, and the arbitrator found that the plaintiff had sustained certain damages on one of the breaches specified, but that in respect of the other matters he had no cause of action, the court held that though the cause were not strictly at issue, yet that the defendant was, according to the Reg. Gen. H. T. 2 W. IV. r. 74, entitled to the costs of the issues substantially found for him (*o*).

(*k*) Kilburn *v.* Kilburn, 13 M. & W. 671; Morgan *v.* Thomas, 9 Jur. 92.

(*l*) Baker *v.* Cotterill, 7 D. & L. 20.

(*m*) Phillips *v.* Higgins, 20 L. J. Q. B. 357.

(*n*) Adam *v.* Rowe, 3 D. & L. 331, S. C. 10 Jur. 840.

(*o*) Daubuz *v.* Rickman, 4 Dowl. 129.

Ejectment.

For the like reason respecting costs, in ejectment, if there were several demises, the arbitrator was bound to find on which demise the plaintiff was entitled to recover, and to award for the defendant on the other demises; since the defendant was entitled to the costs of the issues on the demises found in his favour. Merely directing the general verdict taken for the plaintiff to stand was insufficient, and the award would have been bad for leaving it uncertain on which demise the plaintiff was entitled. The court would not presume one part of the land recoverable on one demise, and another part on another. If such were the fact, the arbitrator should have stated how the right was (*p*). But an award "in favour of the *lessors* of the plaintiff" was decided in the Court of Common Pleas to be a sufficient decision of both of two demises in ejectment for the plaintiff (*q*).

Should specify lands.

Though formerly, if the plaintiff proved his title to any portion of the lands claimed, the practice was to enter the verdict for him for the whole (possession, however, only being taken for the part on which he succeeded), yet, since it had been decided that the verdict in ejectment was distributable, the arbitrator, if he were of opinion that the plaintiff had made out his claim to a part of the lands only, with a view of entitling the defendant to costs on the issue raised by the plea of not guilty as to the residue of the lands, should have awarded for the defendant as to that portion, even where other provisions of the award might render such finding for the defendant immaterial for any other purposes than those of costs (*r*).

Finding on each plea.

The award will be bad if the arbitrator omit to decide all the issues raised on the pleadings. Thus where the arbitrator merely awarded that the plaintiff had no cause of action, and directed a verdict to be entered for the defendant, and neglected to decide the issues on the pleas, the court held that the award was bad, but that it was not to be set aside,

(*p*) Doe d. Madkins *v.* Horner, 8 A. & E. 235, S. C. 3 N. & P. 344; Doe d. Starling *v.* Hillen, 2 Dowl. N. S. 694; Harrison *v.* Creswick, 13 C. B. 399.

(*q*) Mays *v.* Cannell, 24 L. J. C. P. 41; Law *v.* Bluckburow, 14 C. B. 77.

(*r*) Doe d. Bowman *v.* Lewis, 13 M. & W. 241, S. C. 2 D. & L. 667.

provided the defendant would permit the costs of the issues on those pleas to be taxed for the plaintiff (*s*).

Whether substantial finding sufficient.

Where, on the reference of an action of debt for money lent, money paid, interest, and for money due on an account stated, to which the pleas were, nunquam indebitatus, and payment, the arbitrator awarded that the plaintiff had good cause of action against the defendant, and directed the defendant to pay the plaintiff a specified sum, the award was set aside for not deciding on each issue (*t*). It is to be observed that the award did not show on which count in the declaration the money was recovered, though it substantially decided the issue on the plea of payment. Relying on the above case of *Bourke* v. *Lloyd* (*u*), Patteson, J., held bad, for not specifically deciding each issue, the certificate of an arbitrator, who in an action of debt for work and labour, where the defendant had pleaded nunquam indebitatus, payment, and a set-off, had certified that a verdict should be entered for the plaintiff; though it was urged that by finding a verdict for the plaintiff for a sum certain, the arbitrator must have found the issues on the pleas of payment and set-off against the defendant, and so *substantially* decided each issue (*x*).

This view of the law, that such a substantial decision was quite sufficient, was adopted by the Court of Exchequer, in a case where both the above cases were brought before their notice (*y*). That it was enough, had indeed been previously laid down by the same judge, who decided the case of *Brooks* v. *Parsons* (*z*) just cited (*a*). The Court of Common Pleas also decided that a finding of the arbitrator, leading by necessary inference to the decision of the issue, is sufficient (*b*). More recently, it was decided that where an arbitrator found that the plaintiff had good cause of action in respect of a count to which several pleas were pleaded, each of which, if true, was a sufficient answer to the count,

(*s*) England *v.* Davison, 9 Dowl. 1052. See Williamson *v.* Locke, 2 D. & L. 782.

(*t*) Bourke *v.* Lloyd, 2 Dowl. N. S. 452, S. C. 10 M. & W. 550.

(*u*) 2 Dowl. N. S. 452.

(*x*) Brooks *v.* Parsons, 1 D. & L. 691. See Stonehewer *v.* Farrar, 6 Q. B. 730, per Patteson, J., 742.

(*y*) Kilburn *v.* Kilburn, 13 M. & W. 671.

(*z*) 1 D. & L. 691.

(*a*) Hunt *v.* Hunt, 5 Dowl. 442.

(*b*) Avelett *v.* Goddard, 11 L. J. C. P. 123.

as, for example, in trover, where the defendant pleaded not guilty and not possessed, such a finding amounted in fact to a distinct finding in the plaintiff's favour on each issue (*c*).

In a still later case, affirming the same principle, *Brooks* v. *Parsons* (*d*) is in terms expressly overruled (*e*).

Whether a general verdict a finding on each issue.

A question of importance arises here, whether directing a general verdict for either plaintiff or defendant can be treated as a finding on each issue. In one case (*f*), where there were several special inconsistent pleas, the court treated the awarding a general verdict for the defendant as a finding on all the issues in his favour; and in a more recent case, Parke, B., said that awarding a general verdict for the plaintiff means a verdict on all the issues (*g*). Such, however, was not the course pursued by the court in other cases, for in *England* v. *Davison* (*h*) it was held two issues were left undecided, though there was a direction to enter a general verdict for the defendant; and in *Doe* d. *Starling* v. *Hillen* (*i*) there was a general verdict for the plaintiff, yet it was not considered as a finding in his favour on each of the three demises.

Awarding verdict to stand, but damages to be reduced.

In indebitatus assumpsit where the defendant pleaded the general issue, payment, and set-off, and in trover where the pleas were not guilty and not possessed, and payment into court as to part, verdicts were taken by consent for the damages in the declaration subject to arbitration. The award in each case directed that the verdict found for the plaintiff should stand, but that the damages should be reduced. It was held in each case that the award sufficiently disposed of the issues (*k*).

In an action on the usual money counts, with pleas never indebted, Statute of Limitations, payment, set-off, accord, and satisfaction, an award that the defendant was not at the time of action indebted to the plaintiff, and finding a verdict for

(*c*) Hobson *v.* Stewart, 16 L. J. Q. B. 145, S. C. 4 D. & L. 589; Williamson *v.* Locke, 9 Jur. 349, S. C. 2 D. & L. 782.
(*d*) 1 D. & L. 691.
(*e*) Humphreys *v.* Pearce, 7 Ex. 696.
(*f*) Cooper *v.* Langdon, 9 M. & W. 60, S. C. 1 Dowl. N. S. 392.
(*g*) Dresser *v.* Stansfield, 14 M. & W. 822.
(*h*) 9 Dowl. 1052.
(*i*) 2 Dowl. N. S. 694.
(*k*) Wilcox *v.* Wilcox, 4 Ex. 500; Smith *v.* Reece, 6 D. & L. 520.

the defendant, was held sufficient by the Court of Common Pleas (*l*).

Proper mode of awarding on the issues.

Many nice questions may, however, be avoided, if the arbitrator adopt the course recommended by the Court of Queen's Bench, who laid it down that the best and most proper mode for an arbitrator to decide the issues was to give his award in the very terms of the issues themselves. And now, if any difficulty is felt under the present system of pleading about what the exact issue is, it would be prudent for the arbitrator to affirm or negative the propositions set forth in the statement of claim or defence in their very words. It is not necessary for him to set out the pleadings in his award, or to add any general statement that he decides in favour of the plaintiff or the defendant (*m*).

Awarding on pleas of set-off and payment.

Formerly, as pleas of set-off or payment (unless, when taken together with other pleas, they answered the whole of the plaintiff's demand intended to be covered by them) were not divisible in law, it was the arbitrator's duty, although the defendant were entitled to some set-off or had made some payment, to find the issues joined on such pleas for the plaintiff. He might, however, have given the defendant the benefit of any smaller counter claim, or part payment, in reduction of the plaintiff's damages (*n*): and a finding of part of such pleas for the defendant, and the other part for the plaintiff, was construed to be an informal award of damages for the portion or amount found in favour of the latter (*o*).

But by the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 75, "pleas of payment and set-off, and all other pleadings capable of being construed distributively, shall be taken distributively;" the arbitrator, therefore, ought, it seems, to have found for the defendant in respect of so much of the cause of action as should be answered by such pleas, and for the plaintiff in respect of so much of the causes of action as should not be answered.

(*l*) Holland *v.* Judd, 3 C. B. N. S. 826.

(*m*) Stonehewer *v.* Farrar, 9 Jur. 203, S. C. 6 Q. B. 730; Allen *v.* Lowe, 4 Q. B. 66; Clarke *v.* Owen, 2 H. & W. 324.

(*n*) Moore *v.* Butlin, 7 A. & E. 595; King *v.* Earl of Dundonald, 5 Dowl. 589; Tuck *v.* Tuck, 7 Dowl. 373, S. C. 5 M. & W. 109.

(*o*) King *v.* Earl of Dundonald, 5 Dowl. 589.

Though an award deciding every issue was strictly sufficient, yet as a single count in assumpsit or debt under the old forms often contained a number of independent claims, it was advisable for the arbitrator, if he found for the plaintiff on one or two only of these demands, to specify which they were, and to find against him as to the rest; for if he did not thus limit the finding the master would be obliged to allow the plaintiff his costs, applicable to every one of the separate claims included in the count, however unfounded the majority of them might be (*p*). The award cannot be set aside for a general finding for the plaintiff (*q*), but may sometimes be referred back to him to give him liberty to find separately on the separate claims (*p*).

Finding on specific claims in a general count.

So with reference to the distribution of costs on a statement of defence containing many defences, the arbitrator may often with propriety find one defence proved and the others not proved (*r*).

On one defence in a double plea.

Sometimes, by agreement of parties, the arbitrator is relieved from the necessity of finding on each issue, although the costs are to abide the event. Thus, where the arbitrator was to settle the cause and all matters in difference, and the submission contained a stipulation, that if the arbitrator should find the plaintiff not entitled to recover any debt or damages, then a verdict was to be entered for the defendant, and the arbitrator awarded that the plaintiff was not entitled to recover in the action, the court put the construction that the arbitrator was not called upon by the submission to find on each issue, but that on such a finding the parties had agreed that a verdict was to be entered for the defendant on all the issues (*s*).

When arbitrator need not find on the issues.

Instances were so frequently occurring of awards being held bad for the neglect of the arbitrator to decide on each issue, that it was suggested by the Court of Exchequer as advisable to introduce into the order of reference a condition that it should be sufficient for the arbitrator to award in favour of the plaintiff or defendant generally, unless either party should request him to find on some particular issue or issues (*t*).

Clause in submission relieving him.

(*p*) Gore *v.* Baker, 4 E. & B. 470.
(*q*) Crawshaw *v.* York and North Midland Rail. Co., 21 L. J. Q. B. 274.
(*r*) Reynolds *v.* Harris, 28 L. J. C. P. 26.
(*s*) Waddle *v.* Downman, 1 D. & L. 560.
(*t*) Morgan *v.* Thomas, 9 Jur. 92.

PART II. CH. VI. S. 2.

Pursuant to this recommendation, a clause to the above effect is very generally inserted in orders of reference.

No finding on issues necessary when arbitrator to tax costs.

On a reference of a cause and all matters in difference, all costs to abide the event and to be taxed by the arbitrator, he need not decide the issues separately, or the cause separately, from the other matters in difference, or state the amount of the costs separately, but directing one party to pay the other a specified sum is a sufficient decision of all matters (*x*).

Duty of arbitrator when costs of cause do not abide event.

Where on the reference of a cause the costs of the cause do not abide the event of the award, but only the costs of the reference and award abide that event, it is not necessary for the arbitrator to find on each specific issue, unless specially called upon to do so by the order of reference, for the costs of the reference and award are determined by the general event of the action. Thus where to an action of debt referred, subject to the above-mentioned provision as to costs, the general issue and a set-off were pleaded, and the arbitrator found that the plaintiff was not entitled to recover in the action, the award was held final, though he determined nothing respecting the set-off (*y*).

Reference limited to specific matters.

Where a verdict is taken subject to a reference to an arbitrator who is to award on some specified matters only, he need not find on the issues, or do more than decide on the particular questions (*z*).

SECTION III.

OF AWARDING AN ENTRY OF A VERDICT.

PART II. CH. VI. S. 3.

No implied power to direct a verdict to be entered.

1. *When arbitrator empowered to award a verdict.*]—When a cause is referred before trial, the arbitrator has no power to direct a verdict to be entered, unless it be conferred on him by the submission in express terms (*a*). A submission of a cause, the subject-matter thereof, the issue therein, and the costs, does not enable the arbitrator to order such

(*x*) Bradley *v.* Phelps, 1 Ex. 897.
(*y*) Duckworth *v.* Harrison, 4 M. & W. 432; Bourke *v.* Lloyd, 2 Dowl. N. S. 452.
(*z*) Sowdon *v.* Mills, 30 L. J. Q. B. 175.
(*a*) Angus *v.* Redford, 11 M. & W. 69, S. C. 2 Dowl. N. S. 735.

an entry (*b*). A reference of an action and all matters in difference, is equally insufficient (*c*).

Reference on the trial, but no verdict taken.

Where the reference takes place at Nisi Prius, if no verdict be taken subject to the award, the arbitrator has no power to order a verdict to be entered up, unless the submission give it him, not even where it directs that final judgment shall be entered for the plaintiff or defendant according to the award (*d*). Even a clause enabling the arbitrator to amend the record, and to direct what he shall think fit to be done by and between the parties, will not, it seems, give him the power in question (*e*).

Usual clause giving power.

On a reference at Nisi Prius, however, it frequently happens that a verdict is taken for the plaintiff at a specified amount of damages, subject to the award, and that the arbitrator is expressly empowered to direct that a verdict shall be entered for the plaintiff or the defendant, as he shall think proper. Though no verdict be taken, but the cause be referred before trial, the judge's order or the agreement referring it often contains a similar provision, and confers equal authority on the arbitrator (*f*).

Verdict taken, with power to settle the cause.

If a verdict be taken on the trial for a specified amount of damages, subject to a reference, and the arbitrator has power to settle the cause, but no express authority be given him to alter the verdict, he is nevertheless at liberty to direct the verdict to be entered for the plaintiff at any amount of damages not exceeding the specified amount (*g*).

Power over the issues.

So it was decided that an arbitrator empowered by order of Nisi Prius to certify for whom and for what amount, if any, a verdict should be entered in the cause referred, had the same authority as a jury of directing a verdict to be entered on the several issues, and ought to do so, and was not bound to order a general verdict (*h*). Though no order of Nisi Prius be drawn up, or rule of court obtained on the verdict taken subject to the reference, the parol consent of the parties is a

(*b*) Hutchinson *v.* Blackwell, 8 Bing. 331.
(*c*) Eardley *v.* Steer, 4 Dowl. 423.
(*d*) Harding *v.* Forshaw, 1 M. & W. 415.
(*e*) Hayward *v.* Phillips, 6 A. & E. 119.
(*f*) Hawkins *v.* Benton, 2 D. & L. 465, S. C. 8 Q. B. 479; Angus *v.* Redford, 11 M. & W. 69, S. C. 2 Dowl. N. S. 735.
(*g*) Taylor *v.* Shuttleworth, 6 Bing. N. C. 277.
(*h*) Woof *v.* Hooper, 4 Bing. N. C. 449; Williams *v.* Mousdale, 7 M. & W. 134.

sufficient authority for the arbitrator to certify that a verdict should be entered, and a verdict entered pursuant to his certificate is good (*i*).

Verdict taken on one issue only.

If there be a verdict taken on one issue, with specified damages, subject to the reference, and the cause and all matters in difference be referred, it is an excess of authority for the arbitrator to direct a verdict to be entered for the plaintiff for a sum composed of the amount of the specified damages, and the damages which he assesses to be due to the plaintiff on the other issues in the cause. Nor can such a direction be construed as an order to pay the money, but the award is bad in toto (*k*).

Power in one cause gives no implied power in another.

Where at Nisi Prius a verdict was taken subject to a reference, and the arbitrator was empowered to direct a verdict to be entered for the plaintiff or the defendant, as he might think proper, and the cause, and also another cause between the same parties, and all matters of difference, were referred, the arbitrator was not held authorized to direct the entry of a verdict in the second cause (*l*).

Substantial decision sufficient direction.

II. *Duty of the arbitrator in awarding a verdict.*]—A strictly formal exercise of the power to direct the entry of a verdict will not be necessary to authorize the entry; though of course the clearer the language used the better. A substantial decision in favour of either party will be sufficient.

For instance, if the arbitrator by his certificate direct that a verdict be entered for the plaintiff on the first issue, and on the other, which goes to the whole cause of action, for the defendant, it is not necessary that the arbitrator should expressly direct that the verdict for the agreed amount of damages should be vacated, as the direction to enter a verdict for the defendant on the second issue is inconsistent with, and consequently supersedes, the verdict taken at the trial (*m*). Where in an action of assumpsit, to which the defendant pleaded non assumpsit and set-off, and the arbitrator awarded that the plaintiff was entitled to 90*l.*

(*i*) Tomes *v.* Hawkes, 10 A. & E. 32.

(*k*) Hayward *v.* Phillips, 6 A. & E. 119.

(*l*) Howett *v.* Clements, 1 C. B. 128.

(*m*) Nalder *v.* Batts, 1 D. & L. 700.

in respect of the causes of action in the declaration, and that the defendant was entitled to a set-off of 35*l.*, this was held sufficient to justify the plaintiff entering a verdict for the 55*l.*, the balance, although the arbitrator had not in terms vacated the verdict or reduced the damages, or ascertained any balance as being due from the defendant to the plaintiff (*n*). So also the certificate of a referee respecting an action for work done, "I hereby certify that 74*l.* 7*s.* is a fair and proper sum to be paid by the defendant to the plaintiff" (the defendant having pleaded payment before action of 30*l.*, and payment into court of the further sum of 45*l.*, and the plaintiff having replied damages ultra), was held by the court to amount to a verdict for the defendant; as they construed the certificate to mean that the 74*l.* 7*s.* comprehended all that was due from the defendant to the plaintiff (*o*).

Awarding as to the 40*s.* costs.

A verdict is often taken for the damages named in the declaration, costs 40*s.*, subject to the award. If the arbitrator think the plaintiff entitled to only nominal damages, it is advisable for him to get rid of the 40*s.* costs to avoid questions. Directing "the amount found by the jury" to be reduced to one farthing, is better perhaps than directing the "damages" only to be reduced (*p*).

Awarding verdict in ejectment.

On the reference of an action of ejectment, if the arbitrator were of opinion that the lessor of the plaintiff was entitled to recover only a portion of the land which he claimed, he should have taken care to confine his award in the plaintiff's favour to that portion, for if under a power to direct a verdict to be entered in an ejectment brought to recover closes A. and B., he awarded generally that a verdict be entered for the plaintiff, the postea could not be amended by the court so as to confine the verdict to close A.; although it appeared on the face of the award that the arbitrator had decided in the defendant's favour a plea setting up the defendant's title to close B., in an action of trespass brought for that close between the same parties, and referred with the action of ejectment, and that the arbitrator, in a written paper delivered with the award, had stated his

(*n*) Platt *v.* Hall, 2 M. & W. 391.

(*o*) Salter *v.* Yeates, 2 M. & W. 67, S. C. 5 Dowl. 291.

(*p*) Cooper *v.* Pegg, 24 L. J. C. P. 167.

opinion that the lessor of the plaintiff had no title to close B. (*q*).

Specifying lands by metes and bounds.

If the arbitrator decided that the lessor of the plaintiff was entitled to part of the lands, which he set out by metes and bounds, it was better that he should have awarded the residue to the defendant, or at least to have awarded that the plaintiff had no title to it, for fear of the award not being considered final. Omitting all mention of the remainder has been held not tantamount to finding that the plaintiff had no title to it, and it was said that it was advisable, though perhaps not absolutely necessary, to set out the defendant's residue by metes or bounds, or other particular description (*r*). But great doubt was thrown on the above case in the Exchequer Chamber; and probably an award in ejectment that found that the plaintiff was entitled to recover a specified portion only of the lands, would have been deemed final (*s*).

Awarding verdict subject to opinion of the court.

To what extent an arbitrator is bound to award on points raised in the cause, and how far in general a hypothetical or alternative finding of a verdict subject to the opinion of the court is good, when he is empowered to raise points of law for their consideration, has been treated of in a previous portion of this work (*t*).

Unauthorised award of a verdict bad.

III. *Effect of an unauthorised award of a verdict.*]—Though it was in one case laid down that an unauthorised direction that a verdict should be entered for the plaintiff at a specified sum amounted to a direction that the defendant should pay that sum to the plaintiff, and as such might be enforced by attachment (*u*), yet on a subsequent occasion it was held not to be equivalent to an order to pay, and an attachment was refused, and the preceding case was expressly overruled, with the concurrence of the judge who decided it. (*x*). In an old case, referred before issue joined, it was held that no action would lie on an award containing only such an unauthorised direction to enter a verdict for a certain sum (*y*).

Not equivalent to a direction to pay.

(*q*) Doe d. Oxenden *v.* Cropper, 10 A. & E. 197.

(*r*) Doe d. Madkins *v.* Horner, 8 A. & E. 235.

(*s*) Harrison *v.* Creswick, 13 C. B. 399.

(*t*) See P. II. ch. 5, s. 4, d. 1, p. 261, and s. 4, d. 9, p. 280.

(*u*) Cartwright *v.* Blackworth, 1 Dowl. 482.

(*x*) Donlan *v.* Brett, 2 A. & E. 344.

(*y*) Jackson *v.* Clarke, M'Lel. & R. 200, S. C. 13 Price, 208.

The Court of Exchequer, in a later instance, refused to enforce by attachment or to set aside a similar award, inclining, however, to think an action might be supported, saying that at any rate it was not quite a clear point that the award was void (*z*); but the Court of Queen's Bench considered the question settled by the decision in *Donlan* v. *Brett* (*a*), and set the award aside in more instances than one (*b*).

The like distinction was taken more recently by the Court of Exchequer. For where on a reference, after issue joined, by judge's order, the arbitrator said, "I award that there should be a verdict for the plaintiff," that court held that an action would lie on the award, as the language was not a precise direction to enter a verdict, but was merely an expression of the arbitrator's opinion in favour of the plaintiff (*c*), and Martin, B., then said that *Jackson* v. *Clarke* (*d*) was substantially overruled in *Law* v. *Blackburow* (*e*).

Direction to enter verdict for lessor of plaintiff.

In that case the Court of Common Pleas showed themselves anxious to evade those harsh decisions which overturn an award upon a merely formal objection, though the intention of the arbitrator is clear: for where an arbitrator to whom an action of ejectment was referred, without power to direct the entry of a verdict, awarded "that the verdict in the said cause shall be entered for the lessors of the plaintiff," the court supported the award, holding, with the exception of Williams, J., that they were not concluded by the former authorities, as the arbitrator's words were not a precise and formal direction to enter a verdict, as a verdict could not be entered in any case for the *lessors* of the plaintiff, and that therefore they were at liberty to look upon them as an intimation of his decision in favour of the lessors of the said plaintiff (*f*).

When direction rejected as surplusage.

If the award contain a sufficient determination of the matters submitted, without looking to the clause directing the entry of a verdict, and that clause can be rejected without altering the sense of the remaining parts of the award, the

(*z*) Cock *v.* Gent, 13 M. & W. 364; 3 D. & L. 271.
(*a*) 2 A. & E. 344.
(*b*) Hayward *v.* Phillips, 6 A. & E. 119; Hawkyard *v.* Stocks, 2 D. & L. 936.
(*c*) Everest *v.* Ritchie, 31 L. J. Ex. 350; S. C. 7 H. & N. 698.
(*d*) M'Lel. & Y. 200.
(*e*) 14 C. B. 77, S. C. 23 L. J. C. P. 28.
(*f*) Law *v.* Blackburow, 14 C. B. 77; Mays *v.* Cannell, 24 L. J. C. P. 41.

PART II. CH. VI. S. 3.

excess of authority will not vitiate the award, but the faulty direction will be rejected as surplusage. Hence, if the award as to the cause be, that the defendant is not guilty of the grievances laid to his charge, and that a verdict be entered for the defendant, the first part is a sufficient determination of the issue, and the unauthorised direction as to the verdict is simply useless (*g*).

SECTION IV.

OF THE DUTY OF THE ARBITRATOR IN AWARDING DAMAGES.

PART II. CH. VI. S. 4.

Arbitrator finding for plaintiff should award damages.

If the arbitrator find for the plaintiff on any portion of the statement of claim not covered by any defence, on which the issue is found for the defendant, the arbitrator must in general proceed to assess damages for the plaintiff, or the award will not be final. But if the statements of defence found for the defendant completely answer the plaintiff's claim, it is more proper not to assess any damages on the issues found for the plaintiff (*h*); and if there be an assessment of damages in such a case, the assessment is merely surplusage, and will not affect the right to costs (*i*).

Where a verdict for 1,000*l.* was taken subject to a reference, and the arbitrator directed that the verdict should be entered for the plaintiff, but assessed no damages, and the plaintiff entered up judgment for the 1,000*l.*, the court reduced the damages to one shilling (*k*).

When plea immaterial.

But where the plea, though pleaded to the whole declaration, raised an immaterial defence, so that the plaintiff would be entitled to judgment non obstante veredicto, it was the duty of the arbitrator, according to the Court of Queen's Bench, to assess damages notwithstanding the plea, and they

(*g*) Howett *v.* Clements, 1 C. B. 128; Hawkyard *v.* Stocks, 2 D. & L. 936.

(*h*) Warwick *v.* Cox, 1 D. & L. 986; Wood *v.* Duncan, 7 Dowl. 91.

(*i*) Ross *v.* Cliffton, 2 Dowl. N. S. 983; Benett *v.* Coster, 1 B. & B. 465, S. C. 4 Moore, 110; Savage *v.* Ashwin, 4 M. & W. 530; Frankum *v.* Earl of Falmouth, 2 A. & E. 452.

(*k*) Brown *v.* Somerset and Dorset Rail. Co., 34 L. J. Ex. 152.

held that the award would be bad if he failed to do so (*l*). The Court of Common Pleas, however, having come to a decision that when a cause in which issues of fact only were joined was referred at Nisi Prius on the usual terms, neither the court nor the arbitrator could direct judgment to be entered non obstante veredicto, practically held that such an assessment of damages was unnecessary, and could not benefit the plaintiff (*m*).

Damages on new assignment.

When an action of trespass was taken down to the assizes for the trial of the issues, and also for the assessment of damages on a new assignment, on which the plaintiff had signed judgment for want of a plea, the arbitrator was bound to be careful to assess damages for the plaintiff on the new assignment, however he might determine the issues. If he omitted to do so the error would have been incurable, and the award might have been set aside (*n*).

Contingent damages on demurrer.

So where there were several pleas, on some of which the plaintiff had taken issue, but demurred to others, and the cause, so far as related to the issues in fact, was referred at the trial, the arbitrator, if he found for the plaintiff, ought to have assessed contingent damages on the demurrer, though such course did not seem absolutely necessary, when he determined in the defendant's favour the issue on a plea going to the whole cause of action. In one instance, where neither party requested him to assess contingent damages, but acted as if the matter had not been submitted, the court construed the conduct of the parties to amount to a new parol submission that the arbitrator need not determine the question of contingent damages (*o*).

General damages on all issues.

It was considered a little inaccurate to assess general damages on all the issues for the plaintiff, where one of the issues found for him was an issue on a plea of set-off, but it is perfectly intelligible and valid, for an award of damages on all the issues means on all on which damages can be assessed (*p*).

(*l*) Grenfell *v.* Edgcome, 7 Q. B. 661.

(*m*) Toby *v.* Lovibond, 5 C. B. 770, S. C. 17 L. J. C. P. 201. See s. 5 of this chapter as to directing an entry of judgment non obstante veredicto.

(*n*) Wykes *v.* Shipton, 8 A. & E. 246.

(*o*) Cooper *v.* Langdon, 9 M. & W. 60.

(*p*) Hobdell *v.* Miller, 6 Bing. N. C. 292.

One breach, damages on several issues.

In an action of covenant, where there was only one breach, directing a verdict to be entered for the plaintiff on each of the two issues raised by the pleas, with separate damages on each, was considered sufficiently certain as to the damages, as the verdict might be entered for the sum of the two separate amounts, but that finding an entire amount of damages on the single breach was the more correct method (*q*).

Damages not to exceed amount taken on the verdict.

The arbitrator cannot direct a verdict to be entered for a sum exceeding the damages taken subject to the reference. His discretion is limited by the amount of damages nominally found by the jury, as the verdict of a jury was limited by those laid in the declaration. And if he direct the entry of a verdict for a larger sum, the award seems to be bad in toto; and the courts, in one instance, decided that they would not permit a verdict to be entered for an amount reduced to the amount of the specified damages, on the ground that they had nothing to guide their discretion in cutting down the sum awarded (*r*).

Where the cause and all matters in difference were referred, and the Nisi Prius order directed that the verdict should be entered for such sum only (if any) as the arbitrator should find to be due (not saying in the cause) from the defendant to the plaintiff, the court held that the arbitrator could not award that there was due from the defendant to the plaintiff a larger sum than the amount of the damages taken on the verdict (*s*). From the terms of the above submission it would seem probable that the verdict was intended to stand as a security for the amount found to be due, whether in respect of matters in the cause or out of it.

No limit of damages as to matters out of cause.

Generally, however, when a cause and all matters in difference are referred at Nisi Prius, the verdict stands as a security only for the damages found due in the cause, and the damages taken on the reference only limit the amount the arbitrator can give in the cause; but there is no limit to the amount the arbitrator may award in respect of the other

(*q*) Smith *v.* Festiniog Rail. Co., 4 Bing. N. C. 23.

(*r*) Bonner *v.* Charlton, 5 East, 139; Prentice *v.* Reed, 1 Taunt. 151; Taylor *v.* Shuttleworth, 6 Bing. N. C. 277; Annan *v.* Job, 10 Jur. 1083.

(*s*) Bonner *v.* Charlton, 5 East, 139.

matters in difference (*t*). The arbitrator, therefore, should assess the damages in the cause separately from those out of it, and take care not to exceed the assigned limit in respect of the former (*u*).

Limiting damages by plaintiff's particulars.

It seems, also, that the amount of damages the arbitrator might award was still further limited by the sum claimed in the plaintiff's particulars of demand, if the defendant brought the particulars before the arbitrator's notice (*x*).

Where it was agreed by the order of reference, that in case the arbitrator should give damages to the plaintiff, the party against whom the action was really brought, though he was not the defendant on the record, should be allowed to retain a certain sum, and the plaintiff should be paid only the balance; and the award directed that the verdict should be altered to a sum exceeding the amount of the damages taken by consent, but less than that amount when a deduction for the sum to be retained was made; the court gave their opinion that the judgment which had been entered for the sum awarded, pursuant to the verdict, should be reduced to the sum originally taken by consent, and that the plaintiff should be entitled to sue out execution for the real balance awarded due to him (*y*). In the above case, as the submission empowered the arbitrator to settle all matters in difference between the parties, and to determine what he should think fit to be done by either of them respecting the matters in dispute, Mansfield C.J., threw out a suggestion that the arbitrator might have directed that an application should be made to the court to enlarge the verdict to a greater amount of damages, and that the defendant should consent to the enlargement (*z*).

Motion to increase damages.

Where an action for damages generally was brought on an agreement, which provided that in case of breach the sum of 100*l.* shall be recovered as a stipulated debt binding on each party as to the amount, and not as a penalty or in the nature of a penalty, and the arbitrator awarded a less amount to the plaintiff, it was held that the award should not be set aside,

Stipulated debt as damages.

(*t*) Pearse *v.* Cameron, 1 M. & S. 675.

(*u*) Taylor *v.* Shuttleworth, 6 Bing. N. C. 277; Tayler *v.* Marling, 2 M. & G. 55.

(*x*) Kendrick *v.* Phillips, 7 M. & W. 415.

(*y*) Prentice *v.* Reed, 1 Taunt. 151.

(*z*) Prentice *v.* Reed, 1 Taunt. 151.

at least unless the clause was pointed out to the arbitrator's attention, and he was required to act upon it (*a*).

Amount not specified in debt on bond.

In an action of debt on a money bond, to which the defendant pleaded payment by a co-obligor, the arbitrator directed a verdict to be entered for the plaintiff generally, not mentioning any amount. It was objected to the award that the arbitrator ought to have directed for what sum the verdict should have been entered and execution taken out, but the court held the award sufficient, as it did not appear that there was any question how much was due on the bond, and drew a distinction between actions of assumpsit and actions of debt on bonds (*b*). The principle of this decision seems capable of a very general application.

Fixing day of payment.

It seems very questionable whether the arbitrator may appoint any particular day or place for the payment of the damages for which the verdict is to be entered, though when the submission clothed him with the powers of a judge of Nisi Prius, he might award speedy execution; but merely fixing a day for the payment earlier than that on which the plaintiff would have been enabled to recover the same in due course of law, does not amount to an award of speedy execution (*c*).

Awarding joint damages to plaintiff and party added.

Where a cause was referred by a judge's order with consent of the parties and of one Cole, and the arbitrator was empowered to direct for whom and for what sum the verdict should be finally entered, and to settle all matters in difference between the parties to the action and between the defendants and Cole, and to determine what he should think fit to be done by either party, and the arbitrator awarded that all further proceedings in the action should cease, that the plaintiff had good cause of action against the defendants in the cause, and was entitled to a verdict therein; and then awarded certain damages "to be paid by the defendants to the plaintiff and Cole, who consented to become a party in the cause;" on an objection being made that under this submission the arbitrator was not entitled to treat Cole as a plaintiff and award damages to him and the original plaintiff jointly, the court refused to grant a rule to order the amount

(*a*) Pinkerton *v.* Caslon, 2 B. & A. 704.

(*b*) Cayme *v.* Watts, 3 D. & R. 224.

(*c*) Rees *v.* Waters, 16 M. & W. 263, S. C. 4 D. & L. 567.

to be paid, considering the sufficiency of the award doubtful (*d*); but an action of debt being afterwards brought on the award by Cole and the plaintiff jointly, the court on demurrer sustained the award as valid, Patteson, J., saying, "It cannot be said the arbitrator has not determined the action, as he gives a verdict for the plaintiff with 40*s*. damages. He might afterwards say that Cole should have a joint interest in those damages" (*e*).

Special damages in ejectment.

Where all matters in difference in an action of ejectment were, after issue joined, referred by a judge's order, which provided "that the costs of the suit, the reference, and award, were to abide the event of the award; that if the award should be in favour of the plaintiff he should be at liberty to sign judgment against the defendants in the same manner as if the cause had been tried at Nisi Prius, and to issue a writ or writs of possession thereon, and also to proceed in the usual way for costs on such judgment; and that if the award should be in favour of the defendants they should be at liberty to sign judgment as if the cause had been tried at Nisi Prius;" Coleridge, J., intimated a doubt whether the arbitrator could expressly award damages, though he thought that the plaintiff, in signing judgment, might enter it for a shilling damages (*f*).

Entering nominal damages.

A verdict was taken subject to a reference to a valuer to say whether the plaintiff had suffered damage by reason of certain matters. The valuer found that the plaintiff had suffered no damage beyond a sum paid into court. The valuer had no power to direct a verdict for the defendant. It was held that on this finding the verdict might be entered for the plaintiff for nominal damages (*g*).

Cause only referred, no award of money to defendant.

All matters in difference in a cause and nothing beyond being referred, the arbitrator, before the Judicature Acts, had no authority to order the plaintiff to pay the defendant any sum of money (*h*); though when the submission was of the cause and all matters in difference, the arbitrator ought even

(*d*) Hawkins *v.* Benton, 2 D. & L. 465.

(*e*) Hawkins *v.* Benton, 15 L. J. Q. B. 139, S. C. 8 Q. B. 479.

(*f*) Doe d. Madkins *v.* Horner, 8 A. & E. 235.

(*g*) Sowdon *v.* Mills, 30 L. J. Q. B. 175.

(*h*) Poyner *v.* Hatton, 7 M. & W. 211.

PART II. CH. VI. S. 4.

then to have ascertained the amount of the defendant's claim, and if it exceeded the plaintiff's demand, to have directed the plaintiff to pay the balance (*i*).

SECTION V.

OF AWARDING JUDGMENT.

PART II. CH. VI. S. 5.

1. *Power to direct entry or arrest of judgment.*]—On a reference of a cause, in which there were only issues of fact to be determined, the arbitrator under the old law had no implied power to direct judgment to be entered up for either party, even though the submission empowered him to direct the entry of a verdict, and to determine what he should think fit to be done by either of the parties (*k*).

No implied power to direct entry of judgment under old law.

Unauthorised award of judgment surplusage.

In an action of ejectment the arbitrator awarded as follows:—"I award, order, and determine, that judgment for the plaintiff be entered in the said action with one shilling damages, and that the plaintiff do recover under the said judgment a plot or parcel of land,"—describing it. The court, entertaining no doubt that in directing judgment to be signed the arbitrator had exceeded his authority, set aside that portion of the award, but refused to set it aside wholly, being of opinion that if all mention of the judgment were struck out, there was a sufficient finding of the cause in the plaintiff's favour (*l*).

Award of judgment on a demurrer.

But when the determination of the cause required that the arbitrator should find upon issues of law as well as of fact, it would seem he might order judgment to be entered on the issues in law (*m*). Thus where, pending a demurrer to one of the pleas, the cause and all matters in difference were referred, and the arbitrator decided the demurrer by directing judgment to be entered thereon for the defendant; on a

(*i*) Maloney *v.* Stockley, 2 Dowl. N. S. 122; S. C. 4 M. & G. 647; Williams *v.* Moulsdale, 7 M. & W. 134. See Macarthur *v.* Campbell, 2 A. & E. 52.

(*k*) Angus *v.* Redford, 11 M. & W. 69, S. C. 2 Dowl. N. S. 735; Allen *v.* Lowe, 4 Q. B. 66; Toby *v.* Lovibond, 5 C. B. 770, S. C. 17 L. J. C. P. 201.

(*l*) Doe d. Body *v.* Cox, 4 D. & L. 75.

(*m*) Angus *v.* Redford, 11 M. & W. 69, per Ld. Abinger, p. 74.

motion to set aside the award on account of this direction, the court refused the rule, and seemed to think that the parties had, by referring the question of law, authorised him to decide as he had done (*n*).

Clause empowering arbitrator to award judgment.

Where the submission respecting several actions authorised the arbitrators "to discontinue or order the determination of the actions, or to make or give any orders, or regulations, or directions, which they shall think proper as to the time and terms of such discontinuance, or any other matter or thing in anywise relating to the said several actions," Coleridge, J., seemed to be of opinion that these powers were large enough to justify the arbitrators in ordering judgment to be entered (*o*).

Award not specifying kind of judgment.

A judge's order empowered the arbitrator "to order that final judgment, or judgment as in case of a nonsuit, be signed in this action by the plaintiff or defendants, as the case may be, or in such manner, or upon such terms as may be decided," by his certificate: he by that document directed that final judgment should be signed for the defendants. This was held sufficient, though it did not specify the kind of judgment (*p*).

Whether arbitrator can award judgment non obstante veredicto.

Previous to a decision in the Common Pleas, an arbitrator, acting under an old order of Nisi Prius on the usual terms referring a cause and all matters in difference, might have felt himself warranted in supposing that after deciding in favour of the defendant the issue raised on a plea, he was at liberty to entertain a question as to the sufficiency of such a plea as a defence to the action.

Awarding damages non obstante veredicto.

For though there is no actual decision in the Queen's Bench on the point, the opinion of that court, as gathered from the cases, seems to be,—that the arbitrator had authority to decide in effect whether the plaintiff were entitled to judgment non obstante veredicto, and if the question were raised by the pleadings, and brought before the arbitrator by the parties, that the latter ought to decide it in his award, and to assess damages to the plaintiff in case he determined the plea to be insufficient in law to bar the action (*q*).

(*n*) Mathew *v.* Davis, 1 Dowl. N. S. 679.

(*o*) Jones *v.* Powell, 6 Dowl. 483.

(*p*) Smith *v.* Reece, 6 D. & L. 520.

(*q*) Allen *v.* Lowe, 4 Q. B. 66.

Thus where the plaintiff declared in case, alleging that he was entitled to the reversion in a close, that a person named Hearn had wrongfully erected incumbrances thereon, and that the defendant wrongfully kept and continued them; and the defendant pleaded not guilty, and secondly that Hearn did not erect the incumbrances; and the arbitrator awarded that the verdict should stand for the plaintiff on the first issue, but without damages, and that the verdict should be entered for the defendant on the second issue; the court expressed an opinion that the award was defective for not giving damages on the first issue for the plaintiff, which the arbitrator, they said, ought to have done, as the issue on the second plea was immaterial, and ought to have been disregarded by him (*r*).

A statement of Patteson, J., in one of the cases just cited, that the Court of Queen's Bench would not set aside an award for not determining a question as to the validity of the pleadings, unless the point as to the plaintiff's right to judgment non obstante veredicto were raised before the arbitrator, assumes that it was the duty of the arbitrator to have decided the question (*s*).

Court will not entertain motion for judgment non obstante veredicto.

On motions by plaintiffs for leave to enter judgment non obstante veredicto, after the award made, the courts on several occasions have refused the applications, on the ground that the arbitrator had the same power which the court would have had in the matter, and that his award put an end to the proceedings (*t*).

Where three pleas were pleaded in bar to a declaration in trespass containing only one count, and issues were joined on them, the arbitrator, having directed a verdict for the plaintiff on the first two issues, and for the defendant on the third, added, that if there had not been the third issue he should have awarded a shilling damages to the plaintiff on the other issues: the court held it not competent for the plaintiff to move for judgment non obstante veredicto on the third issue (*u*).

Held in C. P. arbitrator no

The Court of Common Pleas, however, held that on a

(*r*) Grenfell *v.* Edgcombe, 7 Q. B. 661.

(*s*) Allen *v.* Lowe, 4 Q. B. 66.

(*t*) See P. II. ch. 2, s. 1, p. 126, as to whether issues in law are referred on the reference of a cause.

(*u*) Steeple *v.* Bonsall, 4 A. & E. 950; Britt *v.* Pashley, 16 L. J. Ex. 240, S. C. 1 Ex. R. 64.

reference of a cause and all matters in difference by order of Nisi Prius, an arbitrator could not, without special power, decide on a question as to the plaintiff's right to judgment non obstante veredicto, on the ground that the question was not a matter in difference at the time of the reference (*x*).

power to decide as to right to judgment non obstante veredicto.

It is to be noticed that neither *Allen* v. *Lowe* (*y*), nor *Grenfell* v. *Edgcombe* (*z*), were cited before the court in this case.

More recently the Court of Exchequer expressly decided that an arbitrator had no power to award judgment non obstante veredicto, unless the terms of the submission directly empowered him to dispose of questions on the validity of the pleadings (*a*).

Raising point as to the right on face of award.

An arbitrator, who was bound to state points of law at the request of either party, was requested to raise on the face of his award the question as to the validity of a custom set forth in a plea, and if the custom were bad, whether the plaintiff was not entitled to judgment non obstante veredicto; the award was held sufficiently final, which raised the points for the opinion of the court, though the arbitrator did not express any positive determination of his own respecting them (*b*).

No power to award arrest of judgment.

As an arbitrator could not direct judgment to be entered, so it was equally beyond his authority to direct the judgment to be arrested, even where on the reference an objection was taken to the validity of the declaration, and he was requested to direct an arrest of the judgment in the cause (*c*).

Power of arbitrator to direct judgment since the Judicature Acts.

11. *Power to direct judgment since the Judicature Acts.*]— Before the Judicature Acts, the party in whose favour a verdict was given, either by the finding of a jury or of an arbitrator, could sign judgment without coming to the court for any permission to do so. But the Judicature Acts and the rules thereunder have ordered that before the entering any judgment after verdict a direction must be obtained from the court or judge. Order XXXVI. rr. 50, 52 (a), and 55 (c)

(*x*) Toby *v.* Lovibond, 5 C. B. 770.
(*y*) 4 Q. B. 66.
(*z*) 7 Q. B. 661.
(*a*) Linegar *v.* Pearce, 9 Ex. 417.
(*b*) Bradbee *v.* Christ's Hospital, 4 M. & G. 714.
(*c*) Angus *v.* Redford, 11 M. & W. 69, S. C. 2 Dowl. N. S. 735.

PART II. CH. VI. S. 5.

now give powers to arbitrators, official and special referees, to direct a judgment to be entered for any or either party as a judge of the High Court.

Motion where arbitrator abstains.

If the arbitrators or referees abstain from directing a judgment, Order XL. rr. 2 and 6 (a) empowers the parties to move for judgment, and rules 6 and 6 (a) to move to set aside the judgment directed by the arbitrator.

Official referee.

An official referee before these orders had no power to direct judgment (though the rules under Order XL. (1875) assumed that he had the power) (*d*).

SECTION VI.

OF AWARDING ON AN ACTION IN EQUITY.

PART II. CH. VI. S. 6.

Dismissing suit final.

An award that a suit in Chancery should be dismissed was held a sufficiently final determination of the suit, for it intended a substantial dismissal and perpetual cessation of the suit, and was a conclusive decision of the rights of the parties with respect to all matters which were the subject of the suit (*e*). Where a Chancery suit, in which the plaintiffs prayed to be decreed entitled to a sum of money which the defendant claimed as a gift, was referred with all matters in difference, the award ordering the bill to be dismissed, and each party to pay his own costs, was held to be a sufficient decision of the suit, and also of the title of the defendant to the sum of money the subject of it (*f*).

Determining subject of suit.

If on the reference of an action in equity to rescind an agreement, it be referred to the arbitrator to determine whether the agreement should be rescinded and the suit put an end to, and the arbitrator award that the agreement shall be rescinded, and that each party shall pay his own costs, this, it seems, is a sufficient determination of the suit (*g*).

(*d*) Longman *v.* East, 3 C. P. D. 142. See also Lloyd *v.* Lewis, 2 Ex. D. 7, S. C. 46 L. J. Ex. 81.

(*e*) Knight *v.* Burton, 1 Salk. 75.

(*f*) Pearse *v.* Pearse, 9 B. & C. 484.

(*g*) Tribe *v.* Upperton, In re, 3 A. & E. 295.

Duty of arbitrator when only as the master.

When an arbitrator was appointed by an order of Chancery made in a suit to take the accounts as the master, he, being merely substituted for the master, was bound to make an award like a master's report, and it would have been open to similar exceptions. It would not, therefore, in such a case, it is apprehended, have been sufficient for him to state a general balance only, but he ought, it seems, like the master, to have set forth a schedule of the items of the separate accounts, showing which he allowed and which he disallowed, and to state a balance of each account (*h*).

SECTION VII.

DUTY OF REFEREE UNDER ARBITRATION ACT, 1889.

It has been thought convenient to note in this section some points of practice relating to the reports of referees and proceedings connected therewith.

Arbitration Act, 1889. Reference to report.

By the Arbitration Act, 1889, sect. 13 (1) (set out ante, p. 87), the court or a judge are empowered to refer "any question arising in any cause (*i*) or matter" for inquiry or report to any official or special referee.

Sub-section (2) is as follows:—

Report adopted wholly or partially.

"The report of an official or special referee may be adopted wholly or partially by the court or a judge, and if so adopted may be enforced as a judgment or order to the same effect."

Duty of referee in reporting.

It was held that when any question arising in a cause was referred to an official referee under the similar section to this, namely, sect. 56 of the Judicature Act, 1873, the referee was not to dispose of the action, nor, according to Bramwell, L. J., to determine any matter in issue between the parties, but to examine and report upon the disputed facts for the assistance of the court; and per Brett, L. J., that his report stood in much the same position as the report on a reference to chambers under the old practice of Chancery (*k*).

(*h*) Dick *v.* Milligan, 2 Ves. Jr. 23; 4 Bro. C. C. 117, 536.

(*i*) See Weed *v.* Ward, 40 Ch. D. 555; ante, p. 89.

(*k*) Longman *v.* East, and Pontifex *v.* Severn, 3 C. P. D. 142.

Accounts.

And when the court directed the accounts between the plaintiff and defendant to be taken before an official referee under section 56, that officer ought not to have confined himself to stating the amount due to either party as the result on the balance of the matters, but should set out the items of the accounts (*l*).

Administration action.

When the official referee has taken the accounts in an administration action in a very reasonable manner under the circumstances, it is no objection to his report that he has not had them vouched in the strict way usual before a chief clerk in chambers (*m*).

Conduct of reference.

With the view of making his report, the referee may hold a judicial inquiry and take evidence (*n*).

By Order XXXVI. r. 53, R. S. C. 1883—

Notice of referee's report.

"Whenever a report shall be made by a referee, he shall, on the same day, cause notice thereof to be given to all the parties to the trial or the reference before him, by prepaid post letter directed to the address for service of each party, who shall, in due course of post, be deemed to have notice of such report."

Rule 54 of Order XXXVI., as amended by r. 55 (a) of the same Order, reads thus—

Moving to adopt or vary or remit report under sect. 13, when further consideration adjourned.

"Where, under sect. 13 of the Arbitration Act, 1889, the report of the referee has been made in a cause or matter, the further consideration of which has been adjourned, it shall be lawful for any party, on the hearing of such further consideration, without notice of motion or summons, to apply to the court or judge to adopt the report, or without leave of the court or a judge to give not less than four days' notice of motion, to come on with the further consideration, to vary the report, or to remit the cause or matter, or any part thereof, for rehearing or further consideration to the same or any other referee."

And r. 55 of the same Order as amended is as follows—

Moving when further consideration not adjourned.

"Where, under sect. 13 of the Arbitration Act, 1889, the report of the referee has been made in a cause or matter

(*l*) Burrard *v.* Calisher, 51 L. J. Ch. 223. See Birmingham Corporation *v.* Allen, 6 Ch. D. 284. As to old practice, see Deacon *v.* Dolby, 30 W. R. 317; Sykes *v.* Brook, 50 L. J. Ch. 744; Wood *v.* Barnicott, W. N. (1878) 25; Graves *v.* Taylor, 27 W. R. 412.

(*m*) Turpin *v.* Pain, 62 L. T. 754; 59 L. J. Ch. 803.

(*n*) Wenlock (Baroness) *v.* River Dee Co., 19 Q. B. D. 155.

the further consideration of which has not been adjourned, it shall be lawful for any party by an eight days' notice of motion to apply to the court to adopt and carry into effect the report of the referee, or to vary the report, or to remit the cause or matter or any part thereof for rehearing or further consideration to the same or any other referee."

Court.

Under sect. 56 of the Judicature Act and this rule "the court" alone has power to deal with the report, and it was doubtful if "court" for this purpose included judge (*o*). It is now expressly provided that the report "may be adopted wholly or partially by the court or a judge."

Court or judge.

Rules to apply to arbitrator.

By Order XXXVI. r. 55 c (1889), rules 48 to 55 of Order XXXVI., and rule 55 b, apply where any cause or matter, or any question or issue of fact therein, is referred to an officer of the court or to a special referee or arbitrator.

A motion, under Order XL. r. 7, for judgment dismissing the action was held to be rightly made when the referee had reported against the plaintiff (*p*).

In a recent case of a reference to a special referee under sect. 56 of the Judicature Act to report as to amount of damages, the referee was called upon to answer interrogatories by both parties, and to make a second report, in writing, to the judge. He was further called upon in the Court of Appeal to give a verbal explanation respecting the grounds of his findings, and ultimately the matter was remitted to him with directions from the court for a further report (*q*). If the referee is required to answer any question on his report, it is stated that, as he is in a quasi-judicial position, he need not be sworn (*r*).

Explanation by referee.

Reference for trial. Judicature Acts.

When the reference was under sect. 57 of the Judicature Act, 1873, the referee was not merely to report, but to try and determine the questions and issues of fact and questions of account referred to him. He should not have set forth the evidence, nor stated his reasons, but should have found separately on each issue, so that the court might give the proper judgment on the findings (*s*); and the proper course

(*o*) Cooke *v.* Newcastle, &c. Co., 10 Q. B. D. 332.

(*p*) Larkin *v.* Lloyd, W. N. (1891) 71.

(*q*) Rust *v.* Victoria Graving Dock Co., 36 Ch. D. 113.

(*r*) Brodie *v.* Saillard, W. N. (1876) 116.

(*s*) Miller *v.* Pilling, 51 L. J. Ch. D. 481, C. A.; Longman *v.* East, 3 C. P. D. 142.

was for the party interested to move for judgment (*t*). Under this section it was not intended that mixed questions of fact and law should be decided by the official referee (*u*). Only questions of fact could be referred compulsorily, and not the whole action (*x*).

Arbitration Act, 1889. Cause referred.

Now, however, by sect. 14 of the Arbitration Act, 1889 (*y*), which is set out p. 87, and substituted practically for sect. 57 of the Judicature Act, 1873, now repealed, the whole cause can be referred whenever the court can compel a reference.

Report equivalent to verdict.

The Arbitration Act, 1889, s. 15 (2), dealing with references under an order of court, or of a judge, provides that the report or award of any official or special referee or arbitrator shall be equivalent to the verdict of a jury.

This does not mean that an award of an arbitrator appointed voluntarily may be set aside on the same grounds that a verdict may be, but the expression refers rather to the mode of enforcement. The court, therefore, on a motion to set aside the award, will not investigate the evidence afresh to see whether the arbitrator's decision on a voluntary reference is according to law (*z*).

Not so in respect of appeals.

Moreover, the award of an official referee, though stated to be equivalent to the verdict of a jury, is not so for the purposes of appeal under "Finlay's Act" (52 & 53 Vict. c. 44, s. 5), which provides that appeals in cases tried by a jury shall go to the Court of Appeal (*a*).

Referee submitting question to court.

If the referee feels a difficulty as to the making his report, Ord. XXXVI. r. 52, enables him to submit any question for the decision of the court. The same rule enables the court, when the report is made, if they feel any difficulty, to require explanations or reasons from the referee. These are as likely to be required when no preliminary questions are raised as when they are. In such a case the court may, on motion by either party, require explanations from the referee, and may remit the matter to the same or any other referee, or may

Parties questioning report.

(*t*) Munro *v.* Rendall, W. N. (1878) 41; Walker *v.* Bunkell, 22 Ch. D. 722; Cooke *v.* Newcastle, &c. Co., 10 Q. B. D. 332.

(*u*) Cardinall *v.* Cardinall, 25 Ch. D. 772.

(*x*) Dawes *v.* Fountain, 3 T. L. R. 347.

(*y*) 52 & 53 Vict. c. 49.

(*z*) Darlington Wagon, &c. Co. *v.* Harding, (1891) 1 Q. B. 245, S. C. 7 T. L. R. 20 and 106; S. C. 39 W. R. 167.

(*a*) Glasbrook *v.* Owen, 7 Times L. R. 62; Gower *v.* Tobitt, W. N. (1891) 6.

decide the question referred on the evidence taken before the referee with or without additional evidence. The latter part of the rule does not deal with a difficulty felt by the referee, but by the court (*b*).

Referee may direct judgment.

Where the referee or arbitrator has the cause referred to him, he may direct judgment to be entered under Ord. XXXVI. r. 50; and he has the same discretion as to costs as the court or judge. (Ord. XXXVI. rr. 55 (b) and (c).)

Motion when arbitrator abstains.

When the referee or arbitrator abstains from directing judgment, either party may move for judgment. (Ord. XL. rr. 2 and 6 (a).)

Time for appeal from official referee.

An appeal from the official referee's report may be made under Ord. XXXVI. r. 52, at any time before judgment (*c*); and on an application under this rule the Divisional Court can set aside a judgment entered for one party by direction of the referee, and enter judgment for the other when they differ from the referee on the findings (*d*).

Reversing judgment.

Chancery Division.

In the Chancery Division an appeal against the findings of a referee and the judgment entered thereon is to the Court of Appeal, and not to the court of first instance (*e*).

Appeal against award made on compulsory reference.

A power of appeal in compulsory references is expressly provided in Ord. LIX. r. 3, which says that any party to a compulsory reference may appeal upon any question of law, and that the Divisional Court—to whom the appeal must be made—may set aside the award on any ground on which the court might set aside the verdict of a jury. It is open to appeal, therefore, whether improper evidence has been received by the official referee, or whether, in considering the facts, he has, so to speak, misdirected himself (*f*). In other words, the decision of an official referee is subject to the same rules as to appeal as the decision of a judge trying a case without a jury (*g*); and the court can set aside the finding of the official referee if they consider that the finding is against the evidence.

(*b*) Dyke *v.* Cannell, 11 Q. B. D. 182.

(*c*) Dyke *v.* Cannell, 11 Q. B. D. 180; discussing Sullivan *v.* Rivington, 28 W. R. 372; Bedborough *v.* Army and Navy Hotel, 53 L. J. Ch. 658.

(*d*) Clark *v.* Sonnenschein, 25 Q. B. D. 226 and 464, S. C. 59 L. J. Q. B. D. 561.

(*e*) Serle *v.* Fardell, 44 Ch. D. 299; Bannister *v.* Macdonald, W. N. (1890) 50.

(*f*) Longman *v.* East, 3 C. P. D. 142.

(*g*) Per Lord Esher, M. R., in Clark *v.* Sonnenschein, 25 Q. B. D. 464.

On a motion to set aside or vary the judgment in a case tried by an official referee, on the ground that the decision was against the evidence, it was said, in the Queen's Bench Division, that the counsel for a party could not move on his own statement of what happened, but must produce an affidavit or some other evidence of what took place at the trial (*h*).

It may be advisable to procure a copy of the referee's notes, if possible.

Motion to set aside judgment as wrongly entered.

When the referee or arbitrator has directed any judgment to be entered, any party may move to set it aside on the ground that, upon the findings as entered, the judgment so directed is wrong: Provided that in the Queen's Bench Division such motion shall be made to a Divisional Court. (Ord. XL. rr. 6 and 6 (a) 1883.)

Case remitted after judgment.

A case in which the official referee made a statement as to the basis on which he had assessed damages for failure to repair, which basis was held to be wrong, was treated as coming within this rule, and the Court of Appeal affirmed the order of the Queen's Bench Division, remitting the case to the referee after judgment entered (*i*).

Appeal against order by referee.

Referee refusing to allow defence.

Referee refusing to adjourn.

On one occasion an appeal from a decision of an official referee, who was held to have power to add a third party, refusing to allow such third party to put in a defence in the action, was heard by the Divisional Court (*k*). But where a referee had refused to adjourn the hearing, the court intimated that the matter should be dealt with by the judge in chambers (*l*).

(*h*) Stubbs *v.* Boyle, 2 Q. B. D. 124, S. C. 46 L. J. Q. B. 136.

(*i*) Proudfoot *v.* Hart, 25 Q. B. D. 42.

(*k*) Byrne *v.* Brown, 37 W. R. 592, S. C. 22 Q. B. D. 657.

(*l*) Richard *v.* Talbot, 38 W. R. 478.

CHAPTER VII.

THE DUTY OF THE ARBITRATOR IN AWARDING AS TO COSTS.

Scope and contents of the seventh chapter.

As the question of costs necessarily arises on every reference, it has been thought fit to devote a separate chapter to the consideration of the duty of the arbitrator in respect of costs under the various forms of submissions.

The first section points out what power he has over costs, and how he may exercise it, and the effect of awarding payment of the costs of the cause.

The second section considers what are the arbitrator's powers and duty, when costs abide the event of the award; and examines what event of the award is meant in respective instances, whether the separate event of the award as to a particular matter, or the general event of the whole award.

Section three shows the convenience of giving the arbitrator power to certify for costs, and specifies the proper mode of executing such a power.

SECTION I.

OF THE ARBITRATOR'S POWER AND DUTY IN AWARDING COSTS.

What costs are costs in the cause.

1. *What are costs of the cause, reference, and award.*]— It may be of use to note the distinction between costs of the cause, costs of the reference, and costs of the award.

And first as to costs of the cause. When an award, and not merely a certificate, is to be made, the costs of the cause comprise the costs incurred in the cause up to the time of the submission, the costs of the order of reference, and of making it a rule of court, and the costs of ulterior proceedings in the

cause, if any, after the award (*a*). It includes, also, the costs of witnesses present at the trial ready to be examined, but not the costs of a witness who was subpœnaed, but who did not arrive until after the cause was referred, though he was examined the same day before the arbitrator (*b*). When the arbitrator has only to make a certificate, or an award in the nature of a certificate, it will be seen a little further on that the costs of the reference are considered costs of the cause.

When arbitrator to certify only.

Costs of special case.

If a verdict be taken by consent, subject to a special case to be stated by A. B., who, in the event of the court deciding in favour of the plaintiff, is empowered to direct for what amount the verdict is to be entered, and to whom the action and all matters in difference, subject to the special case, are referred, all costs up to the judgment of the court on the special case are costs in the action (*c*).

What costs of the reference.

Next, as to the cost of the reference. Ordinarily, the expense incurred by the parties of the whole inquiry before the arbitrator, whether with respect to the matters in the cause or the matters out of it, are costs of the reference. They are taxed usually as between party and party (*d*). They include the costs of witnesses and the costs of a brief in the cause referred, prepared after the reference for the purposes of the arbitration. This is the case even if the arbitrator expressly find that there are no matters in difference except in the cause (*e*). But if the arbitrator has to make a *certificate*, as he is merely substituted for the jury out of court, and there is no award, and nothing but the verdict, all the costs of arriving at that verdict, which therefore necessarily include the costs of the proceedings before the arbitrator, are costs in the cause (*f*).

When certificate made.

Costs of drawing submission after stay.

Where on an action being stayed, as being contrary to an agreement to refer, the parties then prepared and executed a further submission, under which the arbitration took place, it was held that the costs of and incidental to the further submission were part of the costs of the reference (*g*).

(*a*) Ex relatione of a Master. See Goodall *v.* Ray, 4 Dowl. 1.

(*b*) Fryer *v.* Sturt, 24 L. J. C. P. 154.

(*c*) Edwards *v.* The Great Western Rail. Co., 12 C. B. 419.

(*d*) Eccles *v.* Blackburn, 30 L. J. Ex. 358.

(*e*) Brown *v.* Nelson, 13 M. & W. 397; Utting *v.* Evans, M'Lel. 12.

(*f*) Brown *v.* Nelson, 13 M. & W. 397; Mackintosh *v.* Blyth, 1 Bing. 269; Deere *v.* Kirkhouse, 20 L. J. Q. B. 195.

(*g*) Autothreptic, &c. Co., In re,

Accountant.

The costs of an accountant employed by the arbitrator, by consent of parties, to examine the defendant's book, and of the attendance of the plaintiff's solicitor with the accountant, may be costs of the reference (*h*).

What costs of award.

The costs of the award are the amount of the arbitrator's charges, which are usually paid to him when the award is taken up. As between the parties, if the arbitrator's demand be excessive, the costs of the award are such amount only as on taxation the master deems the arbitrator entitled to have claimed (*i*). In general the master passes the arbitrator's charges without question, especially if he be a barrister. In *Smith* v. *Troup* (*k*), Wilde, C. J., said, "The master has no control over the arbitrator's charge." Even in the case of a lay arbitrator, the practice in the Court of Queen's Bench used to be not to review the charges without a judge's order, giving the master liberty to do so (*l*). Such an order is not now required, and the masters in all the courts do, with the approval of the courts, of their own authority, inquire into the propriety of arbitrators' charges when a serious objection is made to them (*m*).

Arbitrator's charges.

Scale.

It was said that there was no particular scale of fees allowed for Queen's counsel when acting as arbitrators (*n*); but ten guineas a day seems the sum usually allowed by the masters (*o*).

Under Arbitration Act, 1889.

Now by sect. 15 (3) of the Arbitration Act, 1889, where any matter is referred to any special referee or arbitrator under an order, his remuneration shall be determined by the court or judge.

Costs of umpirage.

When an award is made by an umpire on the disagreement of the arbitrators, or on their failing to award, he is entitled to charge the fees due to the arbitrators as part of the costs of the umpirage (*p*). If the umpire fails to charge

21 Q. B. D. 182, S. C. 57 L. J. Q. B. D. 488.

(*h*) Hawkins *v.* Rigby, 29 L. J. C. P. 228, S. C. 8 C. B. N. S. 271.

(*i*) Brazier *v.* Bryant, 2 Dowl. 600.

(*k*) 7 C. B. p. 762.

(*l*) Ex relatione of a Master of the Court of Queen's Bench; Threlfall *v.* Fanshawe, 19 L. J. Q. B. 334; Fitzgerald *v.* Graves, 5 Taunt. 341.

(*m*) See Webb *v.* Wyatt, 3 Jur. N. S. 496; Barnes *v.* Hayward, 1 H. & N. 742. See note (*m*); Westwood, &c. *v.* Cape of Good Hope, 2 T. L. R. 667.

(*n*) Sinclair *v.* Great Eastern Rail. Co., 39 L. J. C. P. 165, S. C. L. R. 5 C. P. 135.

(*o*) Westwood, &c. *v.* Cape of Good Hope, 2 T. L. R. 667.

(*p*) Ellison *v.* Ackroyd, 20 L. J. Q. B. 193.

them, the party who has paid the arbitrator's fees will be entitled to have the amount allowed him among the other costs of the reference (*q*).

When costs of reference costs of cause.

Under some circumstances, as has before been stated, the costs of the reference have been considered costs in the cause, even when there has been an award made. A plaintiff who had recovered a verdict in trover with large damages consented to take back the goods in reduction of the damages, upon its being referred to an arbitrator, by order of Nisi Prius, to ascertain the amount of deterioration, if any, which amount, with the costs of the cause, were to be paid to the plaintiff. The order of Nisi Prius was silent as to the costs of the reference. The arbitrator made a formal award, finding the amount of the deterioration, and awarded a sum accordingly, but said nothing about costs. The court held that, under the peculiar circumstances of the case, the whole proceedings being for the ease of the defendant, the costs of the reference were costs in the cause, to which the plaintiff was entitled (*r*).

So where a verdict was taken at Nisi Prius for the amount claimed, "to be reduced to such amount as J. S., on a reference to him, should determine and award" (nothing being said about costs), and the arbitrator simply awarded that the verdict should be reduced, the court held the plaintiff entitled to the costs of the reference as costs in the cause (*s*).

Compulsory reference.

On a compulsory reference of a cause under the Common Law Procedure Act, 1854, the costs of the reference and award seem to have been part of the costs of the cause (*t*).

Costs of showing cause against rule to set aside award.

The costs of showing cause against a rule for setting aside an award in a cause, are costs in the cause, and the party who ultimately had the verdict in his favour was entitled to have them taxed for him, even where the award stated a case, and the court reduced the damages (*u*). But where, after a rule for setting aside an inquisition before the sheriff for excessive damages, the question of amount was referred, nothing being said about the costs of the application, the

(*q*) Whitmore *v.* Friend, C. P. Dec. 1855, per Crowder, J., at Chambers.

(*r*) Tregoning *v.* Attenborough, 7 Bing. 733; Taylor *v.* Lady Gordon, 9 Bing. 570.

(*s*) Sim *v.* Edwards, 25 L. J. C. P. 175, S. C. 17 C. B. 527.

(*t*) Forshaw *v.* De Wette, L. R. 6 Ex. 200.

(*u*) Goodall *v.* Ray, 4 Dowl. 1; Clarke *v.* Owen, 2 H. & W. 324.

arbitrator having by his award reduced the damages, it was held that the plaintiff was not entitled to the costs of showing cause (*x*).

The subjects, what are costs of the cause, reference, and award, are further considered in the section on taxation of costs (*y*).

Arbitrator has implied power over costs of cause.

II. *The power of the arbitrator over costs.*]—When a cause alone or a cause and all matters in difference are referred, and nothing is said in the submission respecting costs, the arbitrator has an implied authority to adjudicate respecting the costs of the cause, but not of the reference or award (*z*), and each party must bear his own expenses of the reference, and is liable to half the costs of the award (*a*).

But not of the reference or award.

Following this principle it was held that when "all matters in difference between the parties" were referred, the "costs of the said cause and the costs of the reference and award" to be "costs in the cause," the arbitrator had power to deal with them all (*b*).

Power over costs includes costs of cause and reference.

On a reference of a cause and all matters in difference, if there be an express clause giving the arbitrator power over costs, and there appear nothing in the context to limit the generality of the power, the costs of the reference and award, as well as of the cause, seem to be submitted to his award (*c*).

Power over costs of reference.

A reference by agreement giving power over the costs of the reference gives authority to direct as to the costs of the award (*d*).

Costs of indictment.

A reference, concerning all costs, charges, and expenses, incident to an indictment for assault, and the subsequent proceedings thereon, gives the arbitrator power to award costs

(*x*) Lewis *v.* Harris, 2 B. & C. 620.

(*y*) P. III. ch. 8, s. 2.

(*z*) Firth *v.* Robinson, 1 B. & C. 277; Taylor *v.* Lady Gordon, 9 Bing. 570; Strutt *v.* Rogers, 7 Taunt. 214; Stratton *v.* Green, 8 Bing. 437; Roe d. Wood *v.* Doe, 2 T. R. 644; Candler *v.* Fuller, Willes, 62; Bracher *v.* Cotton, Barnes, 123; Hartnell *v.* Hill, Forrest, 73; Massey *v.* Hall, Rolle Ab. Arb. K. 14; Carpenter *v.* Joynes, Pract. Reg. 45, contrà.

(*a*) Taylor *v.* Lady Gordon, 9 Bing. 570; Grove *v.* Cox, 1 Taunt. 165; Bell *v.* Benson, 2 Chitt. 157; 2 Tidd, 6th ed. 874, 9th ed. 831.

(*b*) Hayward *v.* Moss, 49 J. P. 248.

(*c*) Strutt *v.* Rogers, 7 Taunt. 214; Wood *v.* O'Kelly, 9 East, 436; see R. *v.* Moate, 3 B. & Ad. 237; Bradley *v.* Tunstow, 1 B. & P. 34.

(*d*) Walker *v.* Brown, 51 L. J. Q. B. D. 424.

in respect of the previous as well as subsequent proceedings in the indictment, such as the costs of going before the grand jury (*d*).

Power as to costs by Arbitration Act, 1889.

Under the Arbitration Act (*e*), a submission, unless a contrary intention is expressed therein, is deemed to include this provision of the Schedule: "The costs of the reference and award shall be in the discretion of the arbitrators or umpire, who may direct to and by whom and in what manner those costs, or any part thereof, shall be paid, and may tax or settle the amount of costs to be so paid or any part thereof, and may award costs to be paid as between solicitor and client."

The act is to apply to any "arbitration" commenced after the commencement of this act under an agreement made before the commencement (s. 25). This provision as to costs is deemed to be included in submissions made before the act (*f*).

By sect. 20 of the Arbitration Act, 1889 (*e*), it is provided as follows: "Any order made under this act may be made on such terms as to costs, or otherwise, as the authority making the order thinks just."

Powers of official referee when whole cause referred.

By Ord. XXXVI. r. 55 (b), "where the whole of any cause or matter is referred to an official referee under an order of court, he may, subject to any directions in the order, exercise the same discretion as to costs as a court or judge could have exercised."

Special referee or arbitrator.

By r. 55 (c), the provisions of rules 48 to 55 and 55 (b), shall apply where any cause or matter, or any question or issue of fact therein, is referred to an officer of the court, or to a special referee or arbitrator.

Power to give costs annulled by County Court Act.

It was decided that an authority to the master on a compulsory reference to give costs of the reference became nugatory if he awarded the plaintiff less than 20*l.* in an action, within the stat. 13 & 14 Vict. c. 61, s. 11, which provided that the plaintiff should recover such sum only, and no costs (*g*); but the propriety of that decision has been doubted in the Court of Appeal (*h*).

(*d*) Baker *v.* Townsend, 7 Taunt. 422.

(*e*) 52 & 53 Vict. c. 49, s. 2.

(*f*) Williams *v.* Stepney, W. N. (1891) 111; reversing (1891) 1 Q. B. 700. See as to the Common Law Procedure Act, Wilmhurst *v.* Barrow, &c. Co., 2 Q. B. D. 385; Bell *v.* Postlethwaite, 25 L. J. Q. B. 63.

(*g*) Moore *v.* Watson, 36 L. J. C. P. 122.

(*h*) Galatti *v.* Wakefield, 4 Ex. D. 249. See Bedwell *v.* Wood, 2 Q. B. D. 626.

But where a verdict was taken subject to a reference by consent, or an order made by consent referring the action, and the costs of the cause were to abide the event, the costs of the reference and award to be in the arbitrator's discretion, his power to award on the costs of the reference and award remained, although the County Court Act deprived the plaintiff of the costs of the cause (*i*).

Costs on County Court scale.

On a reference of a cause and other matters in difference, the award found that there was due to the plaintiff 40*l.* in the cause, and 14*l.* beyond it. It was held that having recovered in the action less than 50*l.* the plaintiff was entitled to County Court costs only, under Order LXV. r. 12 (*k*).

No costs. Award for less than 20*l.*

Where the plaintiffs on an action for more than 50*l.* were awarded a sum less than 20*l.*, it was held that they were deprived by the County Court Act of all costs, notwithstanding that the defendant was awarded 63*l.* on his counter claim (*l*).

Costs under the Lands Clauses Act.

In references under the Lands Clauses Consolidation Act, 1845, of disputes respecting the compensation to be paid for lands taken for the purposes of an undertaking authorised by statute, by s. 34, "all the costs of any such arbitration and incident thereto, to be settled by the arbitrators, shall be borne by the promoters of the undertaking, unless the arbitrators shall award the same or a less sum than shall have been offered by the promoters of the undertaking, in which case each party shall bear his own costs incident to the arbitration, and the costs of the arbitrators shall be borne by the parties in equal proportions" (*m*).

By the Lands Clauses Consolidation Act, 1869, the costs of the reference and award are now to be taxed by the master if either party require it (*n*).

Costs under the Railways Clauses Act.

In references under the Railways Clauses Consolidation Act, 1845 (*o*), by s. 135, "Except where by this or the special act, or any act incorporated therewith, it shall be otherwise provided, the costs of and attending every such

(*i*) Forshaw *v.* De Wette, L. R. 6 Ex. 200; Galatti *v.* Wakefield, 4 Ex. D. 249.

(*k*) Emmett *v.* Heyes, 36 W. R. 237.

(*l*) Ahrbecker *v.* Frost, 17 Q. B. D. 606.

(*m*) See P. II. ch. 9, as to awarding under the Lands Clauses Act. See also R. *v.* JJ. York, 1 A. & E. 828, as to what costs are costs of inquiry. See also ss. 51, 52 of the Lands Clauses Act.

(*n*) 32 & 33 Vict. c. 18, s. 1.

(*o*) 8 & 9 Vict. c. 20. See the Appendix of Statutes.

PART II. CH. VII. S. 1.

arbitration to be determined by the arbitrators, shall be in the discretion of the arbitrators."

Costs under the Companies Clauses Act.

The Companies Clauses Consolidation Act, 1845 (*p*), has in s. 133 a similar enactment, verbatim, adding, however, the words, "or their umpires as the case may be."

Railway Companies Arbitration Act, 1859.

By the Railway Companies Arbitration Act, 1859, subject to agreement of the companies, the costs of the arbitration and award are in the discretion of the arbitrators, and so far as the award does not determine them, the costs of the arbitration and award are to be borne by the companies in equal shares, and in other respects the companies are to bear their own costs (*q*).

Public Health Act, 1875.

In arbitrations under the Public Health Act, 1875 (*r*), s. 180 (13), the costs of and consequent upon the reference, are in the discretion of the arbitrator or umpire.

Allotments Act, 1887.

Under the Allotments Act, 1887, the arbitrator has to determine the amount of costs (*s*).

Costs of reference at Quarter Sessions.

When an order of reference of an appeal at Quarter Sessions is silent as to costs, the arbitrator cannot adjudge the costs of the appeal (*t*), nor any subsequent Court of Quarter Sessions those of the reference or of the appeal, even though the appeal have been respited from sessions to sessions, the respiting being a nugatory step, though making the entry on the record more regular (*u*).

Award silent as to costs, costs of cause follow verdict.

III. *Duty of the arbitrator in awarding costs*].—In general, when a cause was referred, the arbitrator needed not, unless he pleased, give any direction respecting the costs of the cause. The result, if the award were silent on the question of costs, was, that, as a rule, the costs of the cause followed the verdict; and the plaintiff was entitled to them, if the verdict awarded were in his favour, even though the award as to the other matters directed the plaintiff to pay the defendant a large sum (*x*). Order LXV. should now be consulted.

(*p*) 8 & 9 Vict. c. 16. See the Appendix of Statutes.

(*q*) 22 & 23 Vict. c. 59, ss. 27, 28. See Appendix of Statutes.

(*r*) 38 & 39 Vict. c. 55.

(*s*) 50 & 51 Vict. c. 48, s. 3, (4), (c).

(*t*) West London Extension Rail. Co. *v.* Fulham, L. R. 5 Q. B. 361, S. C. 39 L. J. Q. B. 168; R. *v.* Justices of Middlesex, L. R. 6 Q. B. 220.

(*u*) R. *v.* West Riding Justices, 34 L. J. N. S. M. C. 142; R. *v.* Justices of Middlesex, L. R. 6 Q. B. 220.

(*x*) Young *v.* Gye, 10 Moore, 198; Mackintosh *v.* Blyth, 1 Bing. 269.

Costs of reference and award.

When the costs of the cause, or of the reference or award, are stated by the submission to be in the discretion of the arbitrator, it is important as a matter of prudence that the arbitrator should always take care to give some direction respecting each of such costs, as in many cases it is probable that the courts may say that the award is not final unless the arbitrator decides something respecting them.

Arbitrator to fix amount.

When the costs are in the discretion of the arbitrator, "who *shall* ascertain the same," it would seem that the arbitrator is bound to give some costs, and to fix their amount (*y*).

So also where it was provided that the costs of the submission, reference, and award, should be in the discretion of the arbitrator, and "shall be defrayed as he shall direct" (*z*).

Arbitration Act, 1889.

In the schedule to the Arbitration Act, 1889 (*a*), the clause giving to the arbitrators power over costs seems to be permissive.

Fixing amount of costs in award.

When the arbitrator thinks fit to exercise his power over the costs, his discretion is subject to few limitations. He may (if the submission make no provision for the costs being taxed) award a gross sum to be paid for costs, and the court will not review his discretion as to the amount, unless the sum be so excessive as to afford evidence of partiality (*b*). Instead of ascertaining the amount himself (if the reference be of a cause in one of the superior courts, or under a submission which can be made a rule of court), he may award that one of the parties shall pay to the other the costs to be taxed by the master (*c*), or costs generally, without saying who is to ascertain the amount, in which case the officer of the court will tax them (*d*).

Special clause, arbitrator to fix amount.

But if the submission provide that the costs of the reference and award are to be in the discretion of the arbitrator, "*who shall ascertain the same*,"

(*y*) Morgan *v.* Smith, 1 Dowl. N. S. 617, S. C. 9 M. & W. 427; Angus *v.* Redford, 2 Dowl. N. S. 735, S. C. 11 M. & W. 69, per Parke, B.; Grenfell *v.* Edgcome, 7 Q. B. 661, per Williams, J.

(*z*) Richardson *v.* Worsley, 5 Ex. 613.

(*a*) 52 & 53 Vict. c. 49, sched. 1, (i). See ante, p. 378.

(*b*) Shephard *v.* Brand, Cas. temp. Hardw. 53, S. C. 2 Barnard, 463; Anon. 1 Chitt. 38; Turner *v.* Rose, 1 Ld. Kenyon, 393.

(*c*) Winter *v.* Garlick, 6 Mod. 195, S. C. 1 Salk. 75; Pedley *v.* Goddard, 7 T. R. 73; Pratt *v.* Salt, Cas. temp. Hardw. 161; Tidd's Pract. 832, 9th ed.

(*d*) Browne *v.* Marsden, 1 H. Bl. 223; Stokes *v.* Lewis, 2 Smith, 12; Dudley *v.* Nettlefold, 2 Stra. 737; Thorp *v.* Cole, 4 Dowl. 457; Stephenson *v.* Browning, Barnes, 56.

and he order a party to pay the costs, the award is bad, unless he ascertains their amount himself in the award, and the master's taxation will not supply the omission (*d*).

Awarding costs of submission to be paid by party disobeying award.

Where the costs of the submission, reference, award, and of making the submission a rule of court, were in the discretion of the arbitrator, and he awarded that the costs of the submission, reference, and award should be borne by the parties in equal proportions, and that the costs of making the submission a rule of court should be paid by the parties disobeying the award and obliging the submission to be made a rule of court, the award was held uncertain and not final as to the costs of making the submission a rule of court, for the award only provided for the case of disobedience to the award by a single party, and not for the case of disobedience by several parties, or where there was no disobedience at all; and it was necessary in all cases to make the submission a rule of court, with a view to the taxation of costs (*e*).

An award was held by Coleridge, J., insufficient which ordered "that the costs of making the submission a rule of court should be paid and borne by the party rendering it necessary or desirable" (*f*).

Cause in inferior court.

If the cause referred be in an inferior court, as there is no authorised officer to tax the costs of such a court recognised by the superior courts, the arbitrator must take care to assess them himself, or the award will be deficient (*g*). So also if the reference be by parol or by submission which cannot be or have the effect of being made an order of court, so that the court has no jurisdiction over the matter, the master cannot tax the costs of the reference; and therefore the arbitrator, if he give them, must fix the sum in the award (*h*).

Reference out of court.

Arbitrator may apportion costs.

When he has power over the costs, he may apportion them as he thinks right; he may order either the plaintiff or the defendant to pay the whole amount of them, or that each shall pay in certain proportions (*i*). He may direct an infant party to the reference, or a person who, though not a party to any cause referred, has made himself a party to the

(*d*) Morgan *v.* Smith, 1 Dowl. N. S. 617.

(*e*) Williams *v.* Wilson, 9 Ex. 90; Smith *v.* Wilson, 2 Ex. 327.

(*f*) Morris *v.* Morris, 25 L. J. Q. B. 261.

(*g*) Addison *v.* Gray, 2 Wils. 293; Fox *v.* Smith, 2 Wils. 267.

(*h*) Thorp *v.* Cole, 4 Dowl. 457; Roulstone *v.* Alliance Insurance Co., 4 L. R. Irish, 547.

(*i*) Cargey *v.* Aitcheson, 2 B. & C. 170.

reference, to pay the whole costs (*k*). He may make the successful party pay all costs (*l*).

Where the costs of the reference and award were "in the discretion of the arbitrators or of any two of them, who shall by their award order and direct by whom, to whom, and in what proportions and manner the same shall be paid," the two arbitrators ordered that the three parties, A., B., and C., should each pay for the attendance of their own witnesses, and that the other costs of the reference and award should be paid by A., B., and C., in equal proportions; it was held that this award sufficiently disposed of the costs, as it showed that each of these parties were to pay one-third of the latter costs to the arbitrators, or to either of them (*m*).

Awarding each to pay moiety of costs of reference inconvenient.

It is not unusual for an arbitrator, when he does not wish to give a preference to either party, to award that one moiety of the costs of the reference and award be paid and borne by the plaintiff, and the other moiety thereof by the defendant. But this mode of deciding is often very inconvenient, for in order to see what each has to pay, it is necessary that the costs incurred by each in the reference be examined, contested, and settled by the master, and also that the costs of the award be taxed. On the whole amount thus thrown together into hotchpot each party will have to bear a moiety. Unless there be some especial reason for thus awarding, it is better to say that each party shall bear his own costs of the reference, and pay half the costs of the award. This will save the delay and trouble of taxing the costs of the parties. The amount of the costs of the award is seldom a matter of dispute (*n*).

Costs as between solicitor and client.

The arbitrator could not, on a reference at common law, unless specially authorised, award any other than common costs as between party and party; he had no implied power to order the costs either of the cause or reference to be taxed as between solicitor and client (*o*). But he will generally

(*k*) Proudfoot *v.* Poile, 3 D. & L. 524.

(*l*) Fearon *v.* Flinn, L. R. 5 C. P. 34.

(*m*) Young *v.* Bulman, 13 C. B. 63.

(*n*) Bates *v.* Townley, 2 Ex. R. 152.

(*o*) Pratt *v.* Salt, Cas. temp. Hardw. 161; Bartle *v.* Musgrave, 1 Dowl. N. S. 325; Broadhurst *v.* Darlington, 2 Dowl. 38; Marder *v.* Cox, Cowp. 127; Seckham *v.* Babb, 8 Dowl. 167; Turner *v.* Rose, 1 Ld. Kenyon, 393; Whitehead *v.* Firth, 12 East, 166; Browne *v.* Marsden, 1 H. Bl. 223.

Arbitration Act, 1889.

now have the power under submissions out of court by the Arbitration Act, 1889, Sched. I. (i). An arbitrator who has made an award in 1890, on a submission entered into before the act, would seem also to have power by virtue of this to give such costs (*p*). In one old case, where the reference was by agreement out of court, and the arbitrator awarded costs in the cause, as between attorney and client, the court thought such costs might be given (*q*).

In equity.

In equity, however, where on the reference of a suit the costs of the suit, reference, and award are in the arbitrator's discretion, the arbitrator has jurisdiction to order the costs to be paid as between solicitor and client (*r*).

Costs of special jury.

It was held, on an order of reference, by which the costs of the cause were to abide the event, and the costs of the reference and of the special jury, which had been obtained on the motion of the defendant, were left in the arbitrator's discretion, that the arbitrator had only the power of allowing the costs of the special jury, as costs in the cause, if the party who moved for the same had succeeded, and that the arbitrator had exceeded his authority, after directing a verdict for the plaintiff, in ordering him to pay the costs of the special jury (*s*).

Costs of deeds, costs of reference.

When an arbitrator has power over the costs of the reference and award, and he orders the parties to execute certain deeds, he may impose on one party the whole burden of paying the costs of the deeds (*t*).

Setting off costs in cross actions.

When two actions in the common law courts were included in one submission, the arbitrator could not order the costs of one to be set off against the costs and damages in the other, so as to affect the lien of the solicitors. The set-off was subject to the lien (*u*). It is not clear that this rule applied to the Chancery Division (*x*).

Who to get the costs taxed.

If the arbitrator direct the defendant, on a specified day, to pay the plaintiff his costs to be taxed by the master, it is

(*p*) Williams *v.* Stepney, W. N. (1891) 111; reversing (1891) 1 Q. B. 700.

(*q*) Hartnell *v.* Hill, Forrest, 73.

(*r*) Mordue *v.* Palmer, L. R. 6 Chan. 22.

(*s*) Finlayson *v.* M'Leod, 1 B. & A. 663.

(*t*) Boyes *v.* Bluck, 13 C. B. 652, 669.

(*u*) Cowell *v.* Betteley, 10 Bing. 432; Figes *v.* Adams, 4 Taunt. 632; Caddel *v.* Smart, 4 Dowl. 760; Reg. Gen. H. T. 2 W. IV. 93, 3 B. & Ad. 388.

(*x*) Pringle *v.* Gloag, 10 Ch. D. 676. See now Order LXV. r. 14, 1883.

no excuse for non-payment by the day that the plaintiff has not had them taxed, for it is incumbent on the defendant to procure them to be taxed in time, so that he may ascertain the amount, and have the money ready for the plaintiff according to the award (*y*).

Arbitrator awarding fee to himself.

Though the costs of the reference and award are left in the arbitrator's discretion, and we have seen that he may, if he please, ascertain in his award the amount of the costs of the reference, yet he should not in general award to himself any definite sum, by way of fee or compensation for his trouble, though such a course is sometimes unadvisedly pursued (*z*). He is not authorised to award a definite sum to be paid into his hands, including in it an indefinite allowance to himself (*a*). If he fix in the award the amount of the costs of the award, that portion of the award, if objected to on good and sufficient reasons showing an excessive charge, will, when the court has jurisdiction, be set aside; for it is contrary to reason to allow an arbitrator to be judge in his own cause, and without control to determine the amount of what is to be paid to himself. The better course is for the arbitrator simply to direct which party is to pay the costs of the award, without naming any sum in his award, and the officer of the court who taxes the costs will, if directed by the court (and, it seems, without such direction, if objection be made), examine into the arbitrator's claim, or what the party has had to pay on taking up the award, and determine as between the parties the proper amount to be allowed for the arbitrator's fees and charges (*b*). The arbitrator usually notifies to the parties the amount of his charges, and takes care to have them paid before he delivers up his award. In one case, when the arbitrator ordered the defendant to pay the costs of the award, and specified their amount in the award, Coleridge, J., compelled the defendant by attachment to pay them, holding that it was no valid objection that the

Arbitrator notifies his charges.

(*y*) Candler *v.* Fuller, Willes, 62; Bigland *v.* Skelton, 12 East, 436.

(*z*) Seccombe *v.* Babb, 6 M. & W. 129; Daubuz *v.* Rickman, 4 Dowl. 129; Kendrick *v.* Davies, 5 Dowl. 693.

(*a*) Robinson *v.* Henderson, 6 M. & S. 276.

(*b*) George *v.* Lousley, 8 East, 13; Miller *v.* Robe, 3 Taunt. 461; Fitzgerald *v.* Graves, 5 Taunt. 341; Barrett *v.* Parry, 4 Taunt. 657; Brazier *v.* Bryant, 2 Dowl. 600; Moore *v.* Darley, 1 C. B. 445. See ante, p. 375. In re Coombs, 4 Ex. 839.

arbitrator had named the amount in the award, and that it was the business of the party affected, if he had objected to the amount, to have proceeded with due diligence to complain, and to have procured their taxation (*c*). More recently, however, under similar circumstances, Blackburn, J., after consulting other judges, declined to act on that decision, and refused to order payment of the amount (*d*). But the courts will not set aside or refer back an award because the arbitrator has stated the amount in the award, unless there be an affidavit that the sum is excessive (*e*).

Arbitration Act, 1889. Arbitrator's remuneration.

By the Arbitration Act, 1889 (*f*), s. 15 (3), "the remuneration to be paid to any special referee or arbitrator to whom any matter is referred under order of the Court or a judge shall be determined by the Court or judge." It is not clear to what arbitrations this provision is limited.

If the award direct the parties to pay the costs of the award to a solicitor or other person on the plaintiff's behalf, it does not seem open to objection in point of law (*g*). But it is better not to do so in the award.

If the arbitrator be by the submission specially directed to ascertain the amount of the costs of the award, he should do so in the award (*h*); and if the reference be one over which the courts have no jurisdiction, so that the costs cannot be taxed by the taxing officer, it would seem, if he has power to give costs of the award, he must, in order properly to exercise it, fix the amount himself, lest the award be defective for want of certainty (*i*).

Arbitrator paying himself as receiver.

H. was appointed by A. and the executrix of B. to act as attorney in completing the dissolution of the trade partnership between A. and B., and as receiver in respect of their law partnership estate and effects, and as arbitrator in respect of all differences arising as to both partnerships. H. was empowered to dispose of the estate, money, and effects of the law partnership in such manner as he should

(*c*) Threlfall *v.* Fanshawe, 19 L. J. Q. B. 334. See Fernley *v.* Branson, 20 L. J. Q. B. 178.

(*d*) Parkinson *v.* Smith, 30 L. J. Q. B. 178.

(*e*) Rose *v.* Redfern, 10 W. R. 91.

(*f*) 52 & 53 Vict. c. 49.

(*g*) Parkinson *v.* Smith, 30 L. J. Q. B. 178.

(*h*) Morgan *v.* Smith, 1 Dowl. N. S. 617; Gillon *v.* Mersey and Clyde Navigation Co., 3 B. & Ad. 493; Barnes *v.* Hayward, 1 H. & N. 742.

(*i*) See P. II. ch. 11, s. 1, as to the arbitrator's right to remuneration.

think best for the interests of A. and of the executrix. H. was also authorised to make one or more awards, and the costs of the reference and awards were left in his discretion. H. made an award, stating that he had received and disposed of the estate and effects of the law partnership in such manner as he thought best for the interests of A. and of the executrix, and awarded a sum of money to be paid by the executrix to A., and that each party should pay their own costs of the reference; and he stated in the award that he had deducted and retained to himself the costs of his award out of the moneys he had received as receiver. It was held by a majority of the judges in the Exchequer Chamber, reversing the judgment of the Common Pleas, that the award was good, although the award did not state what the amount of the costs of the award were, or which party H. had charged with them (*k*).

The proper mode of awarding costs in references under the Lands Clauses Consolidation Act, 1845, is discussed in a subsequent chapter (*l*).

Costs of cause awarded same as on a verdict.

IV. *Effect of awarding payment of the costs of the cause.*] —When an arbitrator, having authority, directs one party to pay the other the costs of the cause, this direction, unless the context prevent it, will generally be understood to give a right to such costs, and such only, as the party would in the ordinary course of law have been entitled to, had the event of the cause been determined as it was, by the court or a jury instead of by the arbitrator. Thus after a verdict for the defendants, and a rule for a new trial obtained, the cause being referred, an award that the plaintiffs were entitled to recover, and that the defendants should pay the costs of the cause, was held not to entitle the plaintiffs to the costs of the first trial, for they would not have had a right to them had the cause been tried a second time, and a verdict found in their favour (*m*). So where the arbitrator was to hear and decide on the costs of the cause, as if a plea which had been withdrawn by consent had remained, and the arbi-

(*k*) Roberts *v.* Eberhardt, 3 C. B. N. S. 482; S. C. 27 L. J. C. P. 70; reversed in Ex. Ch. 28 L. J. C. P. 74.

(*l*) See P. II. ch. 9.

(*m*) Rigby *v.* Okell, 7 B. & C. 57.

trator, after finding two issues for the plaintiff, and one which went to the whole merits for the defendants, directed the plaintiff to pay the defendants their costs in the cause, the court held that the plaintiff was entitled to the costs of the two issues found for him, and the defendants to the costs of the third; and that as nothing was said in the award respecting the costs of the issue on the plea which had been withdrawn, the arbitrator was not to be considered as having included them in the costs of the cause, or meant to give them to either party, consequently that each party would have to bear his own costs of that issue (*n*).

Award of costs in the action.

An award to the plaintiff of "the costs sustained in the action" does not give him the costs of the reference (*o*).

As cases decided on the construction of a direction in the submission to pay costs illustrate what would be the effect of similar words in an award, the two following cases are cited here.

Not include costs of reference.

By a judge's order referring a cause, the plaintiff was to be at liberty to enter up judgment and sue out execution for the sum awarded due, together with his costs; it was decided by the Court of Common Pleas, in accordance with what was reported to be the practice of the King's Bench, that this submission did not entitle the plaintiff to the costs of the reference (*p*).

Costs of special jury.

Where an indictment, removed into the King's Bench by the defendant, and made a special jury cause by the prosecutor, was referred by an order of reference, which stated that if the arbitrator should be of opinion that the defendant was guilty, and the prosecutor entitled to costs, the defendant agreed to pay the costs, and the arbitrator did so find; it was held that the prosecutor could not recover the costs of the special jury, since the judge had not certified pursuant to the statute 6 Geo. IV. c. 50, s. 34, and the order of reference did not expressly give a power of doing so to the arbitrator, and that the general term "costs," in this order did not include those of the reference and award (*q*).

(*n*) Allenby *v.* Proudlock, 4 A. & E. 326.

(*o*) Browne *v.* Marsden, 1 H. Bl. 223.

(*p*) Bradley *v.* Tunstow, 1 B. & P. 34.

(*q*) R. *v.* Moate, 3 B. & Ad. 237.

SECTION II.

OF THE POWER AND DUTY OF THE ARBITRATOR WHEN COSTS ABIDE THE EVENT.

Costs abide event.

1. *Power of arbitrator when costs abide the event.*]—Instead of leaving the costs in the discretion of the arbitrator, the submission often provides *that they shall abide the event.*

"The costs."

When the submission provides that "*the costs*" are to abide the event of the award, that includes the costs both of the reference and of the cause (*r*).

Arbitrator no power on costs abiding event.

When costs are to abide the event, the arbitrator has no control over them, and the award should be silent respecting them. It is an excess of authority on his part to ascertain their amount in the award (*s*), or to order the costs of the cause to be set off against the other party's damages and costs in another action (*t*), or to direct that they shall be paid at any particular time or place (*u*).

Awarding speedy execution.

Sometimes, however, he has an indirect power of affecting them. For it would seem from the observations of Parke, B., that when the arbitrator had all the powers of a judge of Nisi Prius, he might award speedy execution of the costs and damages in the cause, and thus compel an earlier payment than the ordinary course of law would impose (*x*).

Awarding injunction.

In another instance, a cause and all matters in difference, including a suit in equity by the defendants in law against the plaintiffs in law, praying for an injunction to restrain the plaintiffs in law from proceeding in the action, were referred, and the costs of the action, and of the suit in equity, were directed to abide the event of the award. On some of the issues in the action, the arbitrator found for the plaintiffs with damages, but as to so much of the suit in equity as regarded them, he awarded that the plaintiffs should be restrained, and should not proceed to recover the damages found for them, nor costs.

(*r*) Wood *v.* O'Kelly, 9 East, 436.

(*s*) Kendrick *v.* Davies, 5 Dowl. 693; Hemsworth *v.* Brian, 1 C. B. 131.

(*t*) Unsted *v.* Kidd, 1 Chitt. 526.

(*u*) Cockburn *v.* Newton, 9 Dowl. 676; Clarke *v.* Owen, 2 H. & W. 324.

(*x*) Rees *v.* Waters, 16 M. & W. 263; S. C. 4 D. & L. 567.

This course was complained of as an unauthorised interference with the costs of the cause, which it was contended were to follow the event of the cause. But the court were of opinion that the arbitrator had not exceeded his authority, as the event of the award, which the costs were to abide, meant the ultimate and general event, and not that of each particular part, and that as the suit in equity prayed an injunction, the arbitrator clearly had power to restrain on equitable grounds the plaintiffs from recovering that to which on legal grounds they were entitled, although it was true that he thus exercised an indirect jurisdiction over the costs at law (*y*).

What the event of the award.

II. *What the event, when the costs of the cause only abide the event.*]—From the somewhat ambiguous provision ordinarily inserted in a submission, referring a cause and all matters in difference, "that the costs of the cause shall abide the event of the award," it is not always easy to say on what event the costs of the cause are to depend, whether on the event of the award as to the cause, or on the general event of the whole award (*z*).

Costs of cause abiding event of cause.

If the costs of the cause, or of all matters in difference in the cause, be to abide the event of the award, and the submission be silent as to the costs of the reference, or leave them in the arbitrator's discretion, the event construed to be meant will be the event of the award as to the cause, and not the general event of the award, even although the event of the whole award be in favour of the party who fails in the action (*a*).

Reference before pleading.

Where the question in the action (no pleadings having been delivered) was, whether the sum paid into court by defendant was sufficient to answer the plaintiff's claim, and the arbitrator found that it was, the defendant was held entitled to the whole costs of the action, on the ground that the event was in his favour (*b*).

(*y*) Reeves *v.* Macgregor, 9 A. & E. 576.

(*z*) See Cooper *v.* Pegg, 24 L. J. C. P. 167.

(*a*) Lund *v.* Hudson, 1 D. & L. 236; Crosbie *v.* Holmes, 3 D. & L. 566; Highgate Archway Co. *v.* Nash, 2 B. & A. 597; Pearson *v.* Archbold, 11 M. & W. 477; Matlock Gas Light Co. *v.* Peters, 25 L. J. Q. B. 273; S. C. 6 E. & B. 215; Reynolds *v.* Harris, 28 L. J. C. P. 26; S. C. 3 C. B. N. S. 267.

(*b*) Langridge *v.* Campbell, 2 Ex. D. 281.

Event where claim and counter-claim successful.

On the reference of an action for 417*l.* when the costs of the cause were to abide the event, and the defendant before the reference had paid 175*l.* into court and counter-claimed; the award decided that the plaintiff was entitled to 7*l.* more than the amount paid into court, and the defendant to 18*l.* on his counter-claim; it was held that the plaintiff was the party substantially successful in the action, that the event was in his favour, and that, therefore, he was entitled to the general costs of the action, and the defendant to the costs of the issues on the counter-claim (*c*).

Costs of cause abiding event of reference.

On a reference of a cause and all matters in difference, the costs of the cause to abide the event of the reference, the award found a verdict for the plaintiff for 259*l.* in the action, and that the defendant was entitled to 242*l.* on the matters beyond the cause: the plaintiff was held entitled to the costs of the action (*d*).

Arbitrator must decide cause separately.

The arbitrator, therefore, in such case, is not justified in making a general award, but he must decide the cause separately from the other matters in difference, in order that there may be an event of the cause on which the costs of the cause can be taxed. And for this end it is necessary that the cause should not merely be disposed of, but determined in favour of one of the parties (*e*). The proper manner of deciding a cause, the duty of finding on every issue joined, the powers and duties of the arbitrator as to the verdict, damages, and judgment, have been fully discussed in the previous chapter (*f*).

Separate damages in cause.

An award of a gross sum in favour of either party is insufficient, because it leaves quite uncertain in whose favour the cause has been decided, since it is impossible to collect from it whether the sum is to be paid in respect of the action, or of any other matters in difference, so that there is no determination of the event on which the costs of the cause depend (*g*); and even if, when a verdict has been taken, the issues are specifically decided, the finding is still defective,

To allow taxing costs on the verdict.

(*c*) Waring *v.* Pearman, 50 L.T. 633.

(*d*) Stevens *v.* Chapman, L. R. 6 Ex. 213.

(*e*) Leeming *v.* Fearnley, In re, 5 B. & Ad. 403.

(*f*) P. II. ch. 6, p. 338.

(*g*) Pearson *v.* Archbold, 11 M. & W. 477; Crosbie *v.* Holmes, 3 D. & L. 566; S. C. 15 L. J. Q. B. 125. See Nicholson *v.* Sykes, 9 Ex. 357.

because, as there are no specific damages in the cause, the costs of the cause cannot be taxed on the verdict (*h*).

To determine right to costs.

And the arbitrator was bound to assess the true amount of debt or damages in the cause separately; for in trespass and case the right to costs often depended upon the damages amounting to forty shillings (*i*). And in actions on contract for a demand in the nature of a debt, the scale at which the costs of the cause were taxed depended upon whether the plaintiff recovered a sum exceeding 20*l.* (*k*).

And scale of taxation.

Costs of distributive pleadings.

When a declaration or plea contained, as was very commonly the case, several claims or several defences, it was the duty of the arbitrator to consider whether it might not be right for him to find for a party on some specific matters, and against him as to the others, as such finding might materially affect the distribution of the costs (*l*).

What sufficient award when arbitrator to tax costs.

Where, however, a cause and all matters in difference were referred, the costs of the cause, reference, and award, and all other costs to abide the event of the award, and to be taxed by the arbitrator, an award that a certain sum was due from the defendant to the plaintiff, and directing payment, was held sufficient, though it did not show how the arbitrator had decided the cause, what amount was given in respect of the matters in difference, or what portion of the sum the arbitrator had assessed for costs (*m*).

Costs of cause and reference abiding event.

III. *What the event, when the costs of cause and reference abide the event.*]—When the "costs of the cause, and reference, and award" abide the event, the word event must now, it is clear, be construed distributively. And where the award was that the plaintiff was entitled to recover 129*l.* beyond the amount paid into court, and the defendant to recover 66*l.* on his counter-claim, it was held that the plaintiff was entitled to the general costs of the action, and the

Event to be construed distributively.

(*h*) Taylor *v.* Shuttleworth, 8 Dowl. 281; Tayler *v.* Marling, 2 M. & G. 55.

(*i*) Spain *v.* Cadell, 8 M. & W. 129.

(*k*) Elleman *v.* Williams, 2 D. & L. 46. See P. III. ch. 8, s. 2, as to taxing the costs of the cause. See also Rule *v.* Bryde, 1 Ex. R. 151.

(*l*) Reynolds *v.* Harris, 28 L. J. C. P. 26; S. C. 3 C. B. N. S. 267; Gore *v.* Baker, 4 E. & B. 470; Crawshaw *v.* The York and North Midland Rail. Co., 21 L. J. Q. B. 274; Kelcey *v.* Stupples, 32 L. J. Ex. 6; S. C. 1 H. & C. 576.

(*m*) Bradley *v.* Phelps, 6 Ex. 897.

defendant to the costs of the counter-claim, notwithstanding that the subject-matter of the claim and counter-claim was the same (*n*).

Claim and counter-claim successful.

Where the award found in favour of the plaintiff's claim in the action, and also in favour of the defendants' counter-claim, but to a larger amount, it was held that the defendants were entitled to the general costs of the action, reference, and award, and to the costs of issues found in their favour, but that the plaintiff was entitled to the costs of the issues found in his favour (*o*). So where there was no counter-claim, but the defendant paid money into court, which the award found sufficient (*p*).

Larger sum on counter-claim.

Money paid into court.

So where an action and all matters in difference were referred, with a similar clause as to the costs, and the award found a money payment was due to the plaintiff in the action, but found for the defendant on certain matters in difference, it was held that the plaintiff was entitled to the costs of the action, and the defendant was entitled to the costs of the matters in difference on which he had succeeded (*q*).

But a different rule prevailed in old times.

When on a reference of a cause and all matters in difference, the submission provided that the costs of the cause and of the reference were to abide the event of the award, that, as a general rule, according to the authorities then in force, was construed to mean the general event of the award, and that each party would have to pay his own costs, unless everything were decided in favour of one party (*r*).

Hence, where the costs of the action, submission, reference, and award, and all other matters in anywise relating thereto, were directed to abide the event of the award, and to be paid at such time or times as the arbitrator should direct, and the award found some matters in favour of each party, the arbitrator was held to have exceeded his authority in giving any directions respecting the payment of the costs (*s*).

No costs, award finding part for each.

(*n*) Pearson *v.* Ripley, 50 L. T. 629.

(*o*) Lund *v.* Campbell, 14 Q. B. D. 821.

(*p*) Goutard *v.* Carr, 53 L. J. Q. B. D. 55.

(*q*) Hawke *v.* Brear, 14 Q. B. D. 841. See Ellis *v.* De Silva, 6 Q. B. D. 521.

(*r*) Boodle *v.* Davies, 3 A. & E. 200; Jones *v.* Powell, 6 Dowl. 483; Gribble *v.* Buchanan, 26 L. J. C. P. 24; S. C. 18 C. B. Rep. 691; Reynolds *v.* Harris, 28 L. J. C. P. 26; S. C. 3 C. B. N. S. 267.

(*s*) Boodle *v.* Davies, 3 A. & E. 200.

So where the costs of the action were to abide the event of the action, and the costs of the reference and award to abide the event of the award, and the arbitrator found for the plaintiff in the action for 80*l.*, and for the defendant as to the matters in difference beyond the action for 6*l.*, and ordered the defendant to pay the balance to the plaintiff, each party had to bear their own costs of the reference (*t*).

Costs following balance.

Where there were several accounts between two merchants, and they agreed that the whole accounts should be referred to an arbitrator, the costs to abide the result of the award, and the arbitrator found the balance upon some of the accounts in favour of one party, and upon others in favour of the other, but the final balance of the whole amount in favour of one of the two, the result on which the right to costs depended was the final determination of the whole matters in dispute, and the costs followed the balance: and this it seems was the case, although an action had been commenced in respect of some of the matters in account, and the cause and all matters in difference were referred, the costs of the cause, reference, and award, to abide the result of the award, and the arbitrator had determined that in the action the plaintiff was entitled to recover a certain amount, but that on the balance of all the accounts, taking into consideration the sum found due in the action, the plaintiff was indebted to the defendant (*u*).

Costs divided.

On a like reference the award found 37*l.* due on the money counts from defendant to plaintiff, a like sum and 2*l.* 10*s.* due from plaintiff to defendant on a set-off, on a count for trover 40*l.* damages against the defendant. The court held the plaintiff entitled to the costs of the action, the defendant to the costs of proving the set-off, but neither party to the costs of the reference or award (*x*).

Costs not distributive.

On a claim by a contractor for making seven separate portions of a railway under seven distinct contracts, the action and all matters being referred, the costs of the cause and reference to abide the event, it was held that the arbitrator need not award separately as to each portion,

(*t*) Gribble *v.* Buchanan, 26 L. J. C. P. 24; S. C. 18 C. B. Rep. 691.

(*u*) Hemsworth *v.* Brian, 1 C. B. 131; Dunhill *v.* Ford, 37 L. J. C. P. 32; S. C. L. R. 3 C. P. 36.

(*x*) Woodhams *v.* Woodhams, 25 L. T. 460.

the costs not being distributive according to the result of each (*y*).

When costs follow general event, whether arbitrator need decide cause.

Where an action of trover for corn was referred, the costs to abide the event of the award, and the arbitrator awarded to the plaintiff a right of entering into the defendant's barn, but did not decide the action, it was held that as the event was substantially in the plaintiff's favour, the plaintiff was entitled to his costs, and the court noticed the distinction that the costs were to abide the event "*of the award*," and not "*of the action*" (*z*).

Awarding action to cease.

When the costs of the suit, reference, and award, were to abide the event of the award, and, independently of the cause, the award was partly in favour of the plaintiff, and partly of the defendant, as the event of the award as to costs was already determined by this finding to be, that each party should pay his own, it was not incumbent on the arbitrator to make a legal termination of the cause in favour of either party. On this ground, where an action for the price of some flints sold and delivered, and also for the use and occupation of a gravel pit, was referred, with all matters in difference, the costs of the suit, reference, and award, being to abide the event of the award, the court supported the award, which directed the defendant to deliver a certain quantity of flints to the plaintiff, and the plaintiff to pay the defendant a specified sum, upon payment of which the award ordered that all proceedings in the action should cease, and that each party should give the other a general release, the arbitrator expressing no opinion respecting the merits of the action (*a*).

Costs of cause abiding event of cause.

But although it may not be absolutely necessary, it is advisable in all cases, if possible, to decide on the merits of the cause separately, for in some cases where the costs of the cause, and of the reference and award, were to abide the event of the award, the court have construed the submission to mean that the costs of the cause were to depend on the event of the award as to the cause (*b*), and in one instance,

(*y*) Crawshaw *v.* The York and North Midland Rail. Co., 21 L. J. Q. B. 274. See the preceding division of this section as to the advantage and effect of distributive findings, p. 392.

(*z*) Anon., 1 Smith, 426.

(*a*) Yates *v.* Knight, 2 Bing. N. C. 277.

(*b*) Eardley *v.* Steer, 2 C. M. & R. 327.

when the cause was decided for the defendant, and the general event of the reference was for the plaintiff, directed the master to tax the defendant his costs of suit, and give the plaintiff the costs of the reference (*c*).

Costs of causes abiding event of each.

From the peculiar terms of the submission, and the nature of the subject-matter, the direction that costs are to abide the event of the award has been in particular cases construed to mean that the costs of each matter are to abide the decision on that matter. An action of replevin, and two actions of ejectment were referred, together with the subject-matters thereof, in one submission, and it was also agreed "that the costs of the said several actions, and of all matters and things relating thereto, shall abide the event of the award, and be borne and paid by the parties at such time and in such manner as the same shall be thereby ordered to be paid, and that the costs and charges of the submission, reference and award, shall be in the discretion of the arbitrators." The arbitrators found two actions in favour of one party, and one in favour of the other, and then directed the costs of each action severally to be paid by the losing party in each on a particular day. It was objected that the arbitrators had no power over the costs, as the event of the award was not wholly one way; but the court held the arbitrators right in their direction, as in substance several actions, and nothing more, being referred, the agreement that the costs of the actions should abide the event of the award, meant the event of the award as to each action distributively (*d*).

Costs of cause and suit abiding general event.

But where an action and a suit to restrain the plaintiff at law from proceeding with the action were referred, the costs of the action and suit to abide the event of the award, the court held that the event which the costs were to abide meant the ultimate and general event, and not that of each particular part (*e*).

Costs of reference to include costs of action.

By the agreement of reference between M. and W. referring all matters in difference, it was provided that an action by M. against W. should be discontinued, and that the costs of the reference and award, including the costs of the action,

(*c*) Chittenden *v.* Walker, 3 A. & E. 691.
(*d*) Jones *v.* Powell, 6 Dowl. 483.
(*e*) Reeves *v.* Macgregor, 9 A. & E. 576.

should abide the event of the arbitration. The arbitrator found that W. was not guilty of the charges alleged in the action, but owed M. a certain sum. The Court of Queen's Bench held neither party entitled to costs (*f*). And it was subsequently decided by the Court of Exchequer, that the one party who had paid the umpire's charges in order to take up the award was entitled to recover half the amount by action from the other (*g*).

Costs of reference to be costs of cause.

Where a verdict was taken subject to a reference to an arbitrator to find the facts and state a case, the costs of the reference and arbitration, and special case, to be costs in the cause, and to abide the event thereof, and the court below gave judgment for the plaintiff, but that was reversed in the Exchequer Chamber; the court held that the event meant, not the ultimate event, but the event as if there had been a trial at law and no reference at all (*h*).

Award same effect as a verdict.

IV. *Effect of the award when costs abide the event.*]—When the costs of the cause are to abide the event of the award, the costs which are allowed are generally those costs only which would have followed the legal event had the conclusion arrived at by the award been obtained in the ordinary course of law.

Costs of first trial.

Thus, on a reference taking place after a verdict for the plaintiff and a rule for a new trial, the costs of the cause to abide the event, the arbitrator found for the defendant on all the issues; it was held that as, if there had been a second trial, neither party would have been entitled to the costs of the first trial, the finding of the arbitrator gave the defendant no claim to those costs (*i*). So where the costs of a cause referred at Nisi Prius were to abide the event, and the arbitrator awarded that there was not anything due to the plaintiffs, it was held that as the plaintiffs were suing as executors, they were not liable to pay costs to the defendant, as they would not have been liable had the cause been so decided by the verdict of a jury (*k*). So also where on a

Costs of executors plaintiffs.

(*f*) Marsack *v.* Webber, 29 L. J. Q. B. 109.

(*g*) Marsack *v.* Webber, 6 H. & N. 1.

(*h*) Whaley *v.* Laing, 5 H. & N. 480; S. C. 29 L. J. Ex. 313.

(*i*) Thomas *v.* Hawkes, 1 Dowl. N. S. 346; Summers *v.* Formby, 1 B. & C. 100.

(*k*) Highnam *v.* Hassell, cited in Swinglehurst *v.* Altham, 3 T. R. 138.

Damages under 40*s*.

similar reference the arbitrator awarded that the plaintiff's demand was thirty-seven shillings only, a sum under forty shillings, the court made absolute a rule referring it to the master to tax the defendant his costs of the action, since if a jury had arrived at a like result, they would have permitted a suggestion to have been entered to entitle the defendant to costs (*l*).

Reference before issue; finding for plaintiff on one of several matters in the cause.

In an action for breach of covenant in a farming lease, the declaration complained that the defendant had not paid for certain expenses, had not farmed his land in a proper manner, had not left proper fallows, and had carried off straw from the farm. After plea, the cause was by judge's order referred to arbitration, "the costs of the reference to abide the event." An award found for the plaintiff for sixteen shillings on the breach charging the defendant with removing straw; and that the plaintiff had sustained no damage by reason of any of the other alleged breaches. The Court of Exchequer held that the plaintiff was not entitled to the costs of the reference, and drew a distinction between a reference before issue joined, and one where a verdict has been taken subject to the reference; and Pollock, C. B., said, "In the latter case the plaintiff gets his costs on the issues on which he succeeds, and the defendant his on the issues on which he succeeds; and when on the whole, by gaining on the issues in the cause, the plaintiff succeeds, he gets the general costs of the cause. But when there is a reference of an action before issue joined, with an agreement, as here, that the costs are to abide the event, and the plaintiff succeeds as to a very small part of the claim for which he brings his action against the defendant, and fails as to the greater part of his claim, is he to be entitled to the costs of the reference against the defendant? I think not. If I am asked who has *succeeded* in the present case, I say the defendant" (*m*).

The attention of the court was there called to the case of *Wigens* v. *Cook* (*n*), which was a reference at Nisi Prius, the record being withdrawn, and the plaintiff, who had had awarded to him a farthing damages on one of many counts,

(*l*) Butler *v.* Grubb, cited in Swinglehurst *v.* Altham, 3 T. R. 138.

(*m*) Kelcey *v.* Stupples, 32 L. J. Ex. 6; S. C. 1 H. & C. 576. See P. III. ch. 8, s. 2, as to taxation of costs.

(*n*) Wigens *v.* Cook, 6 C. B. N. S. 784; S. C. 28 L. J. C. P. 312.

was held entitled by the Court of Common Pleas to the costs of the cause which were to abide the event of the award.

Costs, amount recovered by verdict.

Where, however, "all matters in difference in the cause" in an action on the case to try a right to a watercourse were, after issue joined, referred by a judge's order, the costs of the cause to abide the event of the award, but no power was given to the arbitrator to certify under the repealed statute 3 & 4 Vict. c. 24, s. 2, and the arbitrator found for the plaintiff on all the issues, with sixpence damages, Coleridge, J., remarking that the above-mentioned statute did not apply in terms, as the plaintiff did not recover his damages by the verdict of a jury, held the plaintiff entitled to full costs, construing the submission to mean that the payment of costs should follow the event of the award, namely, that he in whose favour the decision was, should be paid by the other party the costs of the suit (*o*). That decision has been followed in a case where the record was withdrawn, and the arbitrator, who had all the powers as to certifying as a judge at Nisi Prius, had on one count out of many awarded a farthing damages, but had not certified (*p*). So where a cause was referred before trial, the costs of the cause to abide the event, and the arbitrator awarded in the plaintiff's favour 3*l*., the court held that the plaintiff was entitled to the costs of the cause, and was not barred by the County Courts Act, 13 & 14 Vict. c. 61, s. 11 (*q*). So in an action of slander referred after issue joined, where the arbitrator found for the plaintiff on one of three counts and gave twenty shillings damages, the court held the plaintiff entitled to costs, the reference being before verdict (*r*). But, in more recent instances, where a *verdict* has been taken subject to the reference, an award for the plaintiff of less than forty shillings damages has been held to bar his right to costs, as amounting to a recovery by verdict of a jury within the above-mentioned statute, and *Griffiths* v. *Thomas* (*s*) was distinguished as being the case of a reference before

Reference before verdict.

Reference after verdict.

(*o*) Griffiths *v.* Thomas, 15 L. J. Q. B. 336; S. C. 4 D. & L. 109.

(*p*) Wigens *v.* Cook, 28 L. J. C. P. 312; S. C. 6 C. B. N. S. 784.

(*q*) Jones *v.* Jones, 29 L. J. C. P. 151; S. C. 7 C. B. N. S. 832.

(*r*) Fream *v.* Sargent, 32 L. J. Ex. 281; S. C. 2 H. & C. 293. See also Owens *v.* Vanhomrigh, 14 Irish C. L. R. Q. B. 362.

(*s*) 15 L. J. Q. B. 336; S. C. 4 D. & L. 109.

verdict (*t*). Though the cause and all matters be referred on a verdict taken subject to the reference, the same rule applies that the costs of the cause follow as on a verdict (*u*).

Of cause and all matters.

Compulsory reference.

On a compulsory reference to the master, "costs to abide the event," where the master certified for the plaintiff for 3*l.* 7*s.* 6*d.*, it being shown that the matter arose within the jurisdiction of the Sheriff's Court of London, it was held that the costs followed the legal event, and that the plaintiff was deprived of his costs by the London Small Debts Act, 15 & 16 Vict. c. lxxvii.; and the court distinguished the cases of *Wigens* v. *Cook* (*x*), and *Jones* v. *Jones* (*y*), as being references by consent before trial (*z*). It does not seem probable that any distinction will be made on this point between references by consent and compulsory references (*a*).

Verdict held immaterial.

The old rule, depending on whether the reference was before or after taking verdict, has been abandoned by the Court of Queen's Bench as unsound, and the true rule stated to be, that whenever the plaintiff is entitled to judgment in the action and gets damages in the action, and the case is such, that if there had been no reference the plaintiff would, by virtue of the County Courts Act, have lost his costs in the cause, so does he equally lose them, when there is a reference which fixes the amount, unless he gets the necessary certificate (*b*) for costs on the High Court scale. This certificate could be given by the court, notwithstanding that the cause was referred by consent, with judgment to be entered for the amount awarded (*c*). It would seem that when the whole cause is referred, the arbitrator, under Order XXXVI. r. 55 (b), has the power of allowing higher costs (*d*).

County Courts Act.

When defendant arrested for too large sum.

A determination of a cause by an arbitrator, where a verdict has been taken subject to the reference, has often been held equivalent to a trial, so as to entitle the defendant

(*t*) Cooper *v.* Pegg, 24 L. J. C. P. 167; Reid *v.* Ashby, 13 C. B. 897.

(*u*) Smith *v.* Edge, 33 L. J. Ex. 9; S. C. 2 H. & C. 659.

(*x*) 6 C. B. N. S. 784; S. C. 28 L. J. C. P. 312.

(*y*) 7 C. B. N. S. 832; S. C. 29 L. J. C. P. 151.

(*z*) Robertson *v.* Sterne, 31 L. J. C. P. 362.

(*a*) Smith *v.* Edge, 33 L. J. Ex. 9, per Bramwell, B. See Webb *v.* Sanderson, in notis, 2 H. & C. 984; Cowell *v.* Amman Aberdare Colliery Co., 12 L. T. N. S. 150.

(*b*) Cowell *v.* Amman Aberdare Colliery Co., 12 L. T. N. S. 150.

(*c*) Hyde *v.* Beardsley, 18 Q. B. D. 244.

(*d*) See ante, p. 378, where the rule is set out.

to costs under the 43 G. III. c. 46, s. 3, where the plaintiff does not recover the sum for which the defendant was arrested, and the arrest was made without reasonable and probable cause (*e*). A similar decision has been arrived at with regard to applications under the statute 12 & 13 Vict. c. 106, s. 86, where the plaintiff makes an affidavit as to the amount of the debt, without reasonable or probable grounds (*f*). Nor is he precluded from applying on the ground of other matters in difference being referred by the same submission, if the arbitrator have made a separate adjudication as to the cause (*g*). But where a cause was referred before trial, the costs to abide the event, and there was no award of a verdict, the defendant was held not entitled to costs under the 43 G. III. c. 46, s. 3, on the ground that the sum awarded the plaintiff was not money recovered in the action within the meaning of the statute (*h*), even when, by the submission, the costs were to abide the event in like manner as on a verdict (*i*).

Plaintiff recovering less than 20*l.*

Where in an action for 356*l.* the defendant A., after paying 319*l.* to the plaintiff, pleaded the nonjoinder of B. and C. as co-contractors, and the plaintiff thereupon added them as defendants, and the cause was referred at the trial, costs of the cause to abide the event of the award, and the arbitrator directed the verdict to stand for 3*l.*, and refused to certify for costs; it was held that the plaintiff, having in his action against the three defendants recovered less than 20*l.*, was not entitled to the costs of the cause even as against A. (*k*).

Where a cause and all matters in difference were referred, the costs of the cause to abide the event of the award, and the arbitrator found that at the commencement of the suit there was due from the defendant to the plaintiff 45*l.*, and that the plaintiff had no reasonable or probable cause for arresting the defendant (as he had done) for 179*l.*, and that

(*e*) Summers *v.* Grosvenor, 2 C. & M. 341; Summers *v.* Formby, 1 B. & C. 100; Silversides *v.* Bowley, 1 Moore, 92; Rowe *v.* Rhodes, 2 C. & M. 379; Reynolds *v.* Flower, 3 M. & Sc. 801; Payne *v.* Acton, 1 B. & B. 278; Watkins *v.* O'Gorman Mahon, 5 Dowl. 178.

(*f*) Deere *v.* Kirkhouse, 20 L. J. Q. B. 195; Hill *v.* Merritt, 26 L. J. Ex. 126; Foster *v.* Hanson, 1 H. & N. 755.

(*g*) Jones *v.* Jehu, 5 Dowl. 130.

(*h*) Keene *v.* Deeble, 3 B. & C. 491; Stevens *v.* Russell, 1 H. & N. 752.

(*i*) Holder *v.* Raitt, 2 A. & E. 445.

(*k*) Balmain *v.* Lickford, L. R. 10 C. P. 203.

the defendant, by means thereof, was entitled to compensation to the amount of 20*l.*; the court, in the exercise of their discretion, refused to allow the defendant costs under the 43 G. III. c. 46, inasmuch as by the terms of the submission the costs were to abide the event of the award, and that was in favour of the plaintiff (*i*).

Double costs in replevin.

Where a replevin suit not at issue was referred, the costs to abide the event, and the arbitrator awarded in favour of the defendant, it was held that the defendant was not entitled to double costs under the statute 11 G. II. c. 19, s. 22, as that act gave double costs against a plaintiff in replevin only in three cases, namely, when he was nonsuited, discontinued his action, or had judgment given against him; though had the arbitrator awarded a discontinuance it would perhaps have been different (*k*).

Costs in action for not setting out tithes.

An action to recover the treble value of tithes not set out under 2 & 3 E. VI. c. 13, having been referred after demurrer, and the arbitrator having awarded the single value to be less than 6*l.* 13*s.* 4*d.*, the plaintiff was held not entitled to costs on the counts for the penalty under the statute 8 & 9 W. III. c. 11, s. 5, the value not having been found by the jury (*l*); but full costs were given when there was a verdict taken subject to the reference, and the arbitrator directed a verdict to be entered for the treble value, 1*l.* 10*s.* (*m*).

Case within Court of Requests Act.

An award of less than 5*l.*, on the reference of a cause within the jurisdiction of the London Court of Requests, deprived the plaintiff of his right to costs (*n*), although there was no verdict (*o*).

Costs of compensation inquiry.

Where a party claiming compensation under a Railway Act agreed to refer his claim to arbitration, instead of taking the verdict of a jury under the provisions of the act, and the deed of reference and the award were silent about costs, the party was not held entitled, on account of an award in his favour, to claim the costs of the reference from the company, although, had a jury given him by their verdict a similar

(*i*) Thompson *v.* Atkinson, 6 B. & C. 193. See also Turner *v.* Prince, 2 M. & P. 305; Higginson *v.* Broadhurst, 1 D. & L. 490.

(*k*) Gurney *v.* Buller, 1 B. & A. 670.

(*l*) Barnard *v.* Moss, 1 H. Bl. 107.

(*m*) Pedley *v.* Frampton, 2 Chitt. 155.

(*n*) 39 & 40 Geo. 3, c. 104, s. 12, Local Act.

(*o*) Day *v.* Mearns, 2 Chitt. 157. See Holden *v.* Newman, 13 East, 160.

amount of compensation, he would, according to the statute, have been entitled to the costs of summoning the jury, the expenses of a bond which the party was bound to execute, and the expenses of witnesses (*p*).

Costs under Small Debts Act.

For the purposes of costs under the Small Debts Act, an award in a cause referred after issue joined, giving the plaintiff less than 20*l.*, seems to have stood on the same footing as a verdict (*q*).

Claim and counterclaim.

In an action in which a claim for debt and damages exceeded 100*l.*, and the counterclaim for debt and damages also exceeded 100*l.*, the award found that the plaintiff was entitled to 10*l.*, and 25*l.* damages, and that the defendant was entitled to 20*l.* damages. It was held that the plaintiff was entitled to the costs on his claim, and the defendant to the costs on his counterclaim (*r*).

County Court Act not apply to defendant.

Where the award on a compulsory reference found the plaintiff entitled to 16*l.*, but that the defendant was entitled on his counterclaim to 23*l.*, so that the defendant was entitled to 7*l.* balance, the defendant was held entitled to his costs, and that the County Courts Acts did not apply to deprive defendants of their costs (*s*).

Where the costs of the cause and counterclaim were to follow the event, and the arbitrator found the plaintiff entitled to 371*l.*, and the defendant entitled on his counterclaim to 375*l.*, and that the plaintiff should pay the defendant the balance of 4*l.*, the plaintiff had the costs of proving his claim from the defendant, and the defendant the costs of proving his counterclaim from the plaintiff (*t*).

Agreement. Costs to follow verdict.

Where the parties agreed in an action that the arbitrator was to award a lump sum if he found for the plaintiff, and that the costs of the action, arbitration and award were to follow the event of the verdict, and the arbitrator found for the plaintiff, but only gave one-fifth of the plaintiff's claim, it was held that the plaintiff was entitled to all costs (*u*).

(*p*) Reynal, Ex parte, 16 L. J. Q. B. 304.

(*q*) Morris *v.* Bosworth, 2 E. & B. 213.

(*r*) Stooke *v.* Taylor, 5 Q. B. D. 569.

(*s*) Chatfield *v.* Sedgwick, 4 C. P. D. 383; on appeal, 4 C. P. D. 459; Blake *v.* Appleyard, 3 Ex. D. 195.

(*t*) Cole *v.* Firth, 4 Ex. D. 301; Neale *v.* Clarke, 4 Ex. D. 286.

(*u*) O'Rourke *v.* Railway Commissioners, 59 L. J. P. C. 72.

PART II. CH. VII. S. 2.

Waiving right to costs.

v. *Supporting award defective as to costs.*]—The award, if defective in the finding as to costs, may in many cases be sustained as to the rest, if the party in whose favour it is desire it, by his consenting to waive his right to costs on the higher scale, or to costs of certain issues, or to all costs, or allowing costs undisposed of to his opponent, so that his opponent cannot be prejudiced by the omission of the arbitrator (*x*).

On a reference as to the amount of damages to be paid by the defendant, who was to pay all costs, the court granted a rule to compel him to pay the damages awarded, as they were separable from the direction as to costs, which was objected to by the defendant as insufficient, and no application was made for costs (*y*).

SECTION III.

OF THE DUTY OF THE ARBITRATOR WHEN EMPOWERED TO CERTIFY FOR COSTS.

PART II. CH. VII. S. 3.

Power to certify for costs should be given.

Hardship when not given.

By special provisions inserted in orders of reference the arbitrator is frequently authorized as a judge of Nisi Prius to grant various certificates affecting the right to costs or the amount of costs.

Care should be taken to see that such provisions are inserted in the submission, for cases of hardship often arise when the submission does not give the arbitrator such power. In an action of trespass referred, the costs to abide the event, the arbitrator awarded five shillings damages for an assault by the defendant in attempting to exercise a right of way negatived by the arbitrator: the court held the event meant the legal event, and that under the statute 22 & 23 C. II. c. 9, now repealed, the plaintiff could recover no more costs

(*x*) Morgan *v.* Smith, 1 Dowl. N. S. 617; England *v.* Davison, 9 Dowl. 1052; Taylor *v.* Shuttleworth, 8 Dowl. 281; Tayler *v.* Marling, 2 M. & G. 55; Smith *v.* Reece, 6 D. & L. 520; Leeming *v.* Fearnley, 5 B. & Ad. 403.

(*y*) Lloyd *v.* Spittle, 6 D. & L. 531.

than damages, as the arbitrator's award was not tantamount to a judge's certificate under that act, and such certificate was necessary to entitle the plaintiff to full costs (*z*). Even where the arbitrator, giving ten shillings damages for a trespass, awarded in terms that the trespass was wilful, the court held they could not give the plaintiff his full costs of suit, though they regretted that provision for supplying the want of the judge's certificate had not been made in the submission (*a*).

Costs of special jury.

So where an indictment removed by the defendant into the Queen's Bench, and made a special jury cause at the instance of the prosecutors, was on the trial referred, and the order of reference provided that if the arbitrator were of opinion that the defendant was guilty and the prosecutors entitled to costs, the defendant should pay the costs, and the arbitrator did so find, the court held that the prosecutor could not recover the costs of the special jury, since the judge had not certified for those costs pursuant to the 6 G. IV. c. 50, s. 34, and the order of reference gave no such power expressly to the arbitrator (*b*).

Certifying cause fit to be tried before a judge.

In many cases an express clause is very properly inserted in the submission empowering the arbitrator to certify that the cause was a fit one to be tried before a judge of the superior courts, so that if the plaintiff recover less than 20*l.* he may have his costs taxed for him on the higher scale, if the arbitrator think fit to grant a certificate (*c*).

Judge may certify at any time.

If the submission omit such a provision, the arbitrator's certificate will not be of any force of itself, but if the cause were referred at Nisi Prius, it may form the ground of an application to the judge before whom the cause was brought on for trial, who in the exercise of his discretion would probably, under the circumstances, grant a certificate to the same effect (*d*); for this certificate may be granted by the judge at any time (*e*), though it cannot be made by the court after the judge's death (*f*).

(*z*) Swinglehurst *v.* Altham, 3 T. R. 138; Willis *v.* Osborne, 1 Chitt. 183.

(*a*) Ward *v.* Mallinder, 5 East, 489.

(*b*) R. *v.* Moate, 3 B. & Ad. 237. See Finlayson *v.* M'Leod, 1 B. & A. 663.

(*c*) Hallen *v.* Smith, 7 Dowl. 394; Smith *v.* Hailey, 27 L. T. 426.

(*d*) Nokes *v.* Frazer, 3 Dowl. 339; Broggref *v.* Hawke, 6 Dowl. 67.

(*e*) Ivey *v.* Young, 5 Dowl. 450.

(*f*) Astley *v.* Joy, 9 A. & E. 702.

Power transferred from judge to arbitrator.

If the arbitrator have a power to certify, and omit to exercise it, the judge before whom the cause came on for trial cannot, it seems, grant a certificate, his power being transferred by the submission to the arbitrator (*g*).

But a power given to the arbitrator to certify as a judge at Nisi Prius did not prevent a judge at chambers afterwards certifying under the stat. 13 & 14 Vict. c. 61, s. 13, that the county court and superior court had concurrent jurisdiction (*h*).

Arbitrator must certify in award for costs of special jury.

Although the statute 6 G. IV. c. 50, s. 34, provides that the judge shall, immediately after the verdict, certify *on the back of the record* that the cause was proper to be tried by a special jury, the arbitrator, when clothed by the submission with the same powers as the judge of Nisi Prius, must embody his certificate in his award, for as soon as he has once awarded his power is at an end; so that if, after making his award, he indorse on the back of the record a certificate that the cause was proper to be tried by a special jury, such certificate is of no avail to entitle the successful party to the costs of the special jury (*i*).

Certifying no distinct matter of complaint on each count.

After an application to a judge to strike out the first or second counts in the declaration, as founded on the same subject-matter, had been dismissed (the judge being satisfied that a distinct claim was intended to be made under each), the cause was referred. The arbitrator who was empowered to certify for a special jury, and to certify as a judge of Nisi Prius might have done, "that no distinct subject-matter of complaint was bonâ fide intended to be established in respect of each count," awarded for the plaintiff on the second count, and for the defendant on the first and third counts, and certified "that the cause was fit to be tried by a special jury;" and also "that no distinct subject-matter of complaint was bonâ fide intended to be established in respect of *either of the counts on which the plaintiff had failed.*" The court held this latter certificate ineffectual to deprive the plaintiff of his costs of the cause, as it did not show with sufficient clearness that the subject-matter of the second

(*g*) Richardson *v.* Kensitt, 6 M. & G. 712.

(*h*) Sharp *v.* Eveleigh, 20 L. J. Ex. 282.

(*i*) Geeve *v.* Gorton, 3 D. & L. 481. See Spain *v.* Cadell, 8 M. & W. 129.

count was not distinct from that of the first, which was the question before the judge. Had the latter certificate been valid, the plaintiff though losing the costs of the cause, would not, it seems have been deprived of the costs of the special jury (*k*).

Certifying action brought to try a right.

When the submission gave the arbitrator power to "certify for the purpose of costs in the same manner as a judge at Nisi Prius," he had authority to certify under the repealed statute 3 & 4 Vict. c. 24, s. 2, that the action was brought to try a right other than the mere right to damages (*l*). He had the same power as a judge and his discretion was open to review only when that of a judge could be questioned (*m*). It was not necessary that he should state in his award what right the action was brought to try (*n*).

Limit on power of certifying.

When an arbitrator has all the powers as to certifying as a judge at Nisi Prius, and the order of reference, no verdict being taken, provides that the costs of the cause shall abide the event of the award, it is not clear how far he can affect the costs by any certificate which he may give, for the parties have specially by agreement provided as to them (*o*).

Arbitrator must certify in the award.

In giving the certificate, the arbitrator should have followed as far as possible the rules laid down in the statute 3 & 4 Vict. c. 24, for the guidance of the judge; but as it was impossible that he could follow the provisions literally, it was sufficient if he did so cy près, by inserting his certificate in his award (*p*).

Compulsory reference.

It has been held that a master to whom a cause was compulsorily referred under the Common Law Procedure Act, 1854, with all the powers of certifying as a judge at Nisi Prius, must have exercised the powers in his award. A certificate that the cause was proper to be brought in the superior courts, given after the award had been published, was of no effect (*q*).

(*k*) Dewar *v.* Swabey, 11 A. & E. 913.

(*l*) Spain *v.* Cadell, 8 M. & W. 129, S. C. 9 Dowl. 745.

(*m*) Bury *v.* Dunn, 1 D. & L. 141.

(*n*) Angus *v.* Redford, 2 Dowl. N. S. 735, S. C. 11 M. & W. 69.

(*o*) Wigens *v.* Cook, 28 L. J. C. P. 312, S. C. 6 C. B. N. S. 784.

(*p*) Spain *v.* Cadell, 8 M. & W. 129, S. C. 9 Dowl. 745. See Geeve *v.* Gorton, 3 D. & L. 481, ante, p. 406.

(*q*) Bedwell *v.* Wood, 2 Q. B. D. 626.

When an arbitrator has omitted to certify for costs, the award will sometimes be referred back to him to enable him to do so (*r*).

The mode of certifying for the costs of a reference under the Lands Clauses Consolidation Act, 1854, is considered in a subsequent chapter (*s*).

(*r*) Harland *v.* Mayor of Newcastle, 39 L. J. Q. B. 69, S. C. L. R. 5 Q. B. 47.

(*s*) See post, ch. 9 of this Part.

CHAPTER VIII.

WHAT DIRECTIONS MAY BE GIVEN IN THE AWARD.

Scope and contents of the eighth chapter.

AFTER deciding the matters in difference, and framing his award upon them according to the principles and rules laid down in the three preceding chapters, the arbitrator will often feel that his award is but an unsatisfactory decision in his own mind, and does incomplete justice, unless he be at liberty to add some further provisions respecting the conduct of the parties, or the disposal of the property concerning which the inquiry has taken place. Yet the fear of exceeding his authority, and of thereby vitiating his award, may frequently restrain him from inserting a most beneficial regulation. On the other hand, numerous instances have been already cited in this work, of arbitrators assuming a power not intrusted to them, with fatal effect on their whole decision. It therefore becomes a point of great importance to consider, what directions an arbitrator is justified in giving in his award.

An attempt, in consequence, is made in this chapter to extract, as far as may be, from recorded cases, an exposition of the powers which belong to the arbitrator under circumstances of ordinary occurrence, and of the best method of carrying those powers into execution. It is true that the directions which may be given must vary infinitely with the special nature of each reference, and the peculiar terms of respective submissions; but the principles to be deduced from the cases cited in the succeeding pages will, it is hoped, throw a useful light in cases of difficulty.

In the first section it is endeavoured to classify under separate divisions the principal directions which the arbitrator may give in his award by virtue of the implied powers vested in him on a general reference. This includes a consideration of the nature of the satisfaction which he may

PART II. CH. VIII.

appoint; the extent of his power in directing payment of money or interest; the modes in which he may deal with the joint interests of contending partners; his right to order one party to indemnify the other against particular contingencies; and how he should prescribe respecting the giving releases, and the execution of conveyances.

The second section treats of the provision very frequently inserted in submissions, empowering the arbitrator to say what shall be done by the parties respecting the matters in dispute: and illustrates the proper mode of awarding pursuant to it, by examples both of valid and invalid directions under it.

It has been thought useful to collect in the next section some observations on the duties of arbitrators or commissioners in making allotment or partition of lands, which usually takes place under the powers of an act of parliament.

The fourth section examines into the effect of directions in the award, which affect other than the parties to the submission; showing when a direction to pay money to a stranger, or an order on a stranger to do an act, is valid; and the consequences of laying down regulations in the award, which impose on a party the necessity of intermeddling with a stranger's property.

SECTION I.

OF DIRECTIONS UNDER THE GENERAL POWERS OF THE ARBITRATOR.

PART II. CH. VIII. S. 1.

Arbitrator has no implied power over person or land.

1. *What kind of satisfaction may be directed.*]—An arbitrator cannot bind a man's liberty or right to real property when only personal things are submitted to his decision; and, therefore, if he award that one party shall serve the other for a certain number of years (*a*), or order a release of the right to lands (*b*), in satisfaction for a trespass, this will

(*a*) Rolle Ab. Arb. B. 12, p. 243. (*b*) Rolle Ab. Arb. B. 13, p. 243.

be void, for nobody, it is said, can be supposed to submit more than his personal estate to answer a personal injury, for that only might be taken in execution for it at common law.

Over personal estate only.

An award that an apprentice shall be assigned is void (*c*), but an apprenticeship may be put an end to by an award (*d*).

Over apprentice.

It seems that an arbitrator who has to ascertain what sum is due for advances by a trustee to his cestui que trust has no implied power to give the trustee a lien on the lands of the latter, or to direct them to be sold to pay the amount awarded (*e*).

No power to award lien on land.

An award that two shall intermarry is a void award, for marriage ought to depend upon the parties' choice; and the bodies of the parties are not submitted to the power of the arbitrator (*f*).

No power to award marriage.

It is, however, necessarily implied in the submission that satisfaction is to be given out of the parties' personal estate, for this is necessary for quieting the differences between the parties. The arbitrator, therefore, is justified in awarding as a satisfaction a sum of money, and, it is said, in some cases, other chattels, as a horse or a quart of wine (*g*). But, according to other authorities, he cannot award a chattel other than money (which is the measure of all things), by way of damages, unless there be a controversy between the parties respecting the chattel (*h*).

Whether arbitrator may award satisfaction other than money.

Awarding chattel.

On one occasion, however, an action having been brought for the non-delivery of some goods shipped on board the defendants' vessel, the arbitrator, who was empowered finally to settle the differences between the parties, after awarding compensation to the plaintiff for the non-delivery, was held authorized in directing that the defendants might keep the goods which they found to be in their possession (*i*). It is to be observed that here the arbitrator was "finally to settle

Awarding defendant to keep plaintiff's goods.

(*c*) Horne *v.* Blake, 2 Str. 1267.
(*d*) Green *v.* Waring, 1 W. Black. 475.
(*e*) Coppard, Ex parte, 4 Deac. & Ch. 102.
(*f*) Bac. Ab. Arb. E. 3; Rolle Ab. Arb. I. 10, p. 252.
(*g*) Bac. Ab. Arb. E.; Purslow *v.* Baily, 2 Ld. Raym. 1039, S. C. 1 Salk. 76; 6 Mod. 221.
(*h*) Rolle Ab. Arb. B. 10, 11, p. 243; Hemsworth *v.* Brian, 1 C. B. 131.
(*i*) Gillon *v.* Mersey Navigation Co., In re, 3 B. & Ad. 493. See Hemsworth *v.* Brian, 1 C. B. 131; Baillie *v.* Edinburgh Oil Gas Co., 3 C. & F. 639.

the differences." Such a provision, it is apprehended, gave him more than the ordinary powers in awarding satisfaction.

Awarding as to salvage of goods burnt.

The plaintiff's goods, which were insured, having been burnt, it was agreed between him and the insurance office that as to the goods in a certain list he should be satisfied by payment of a sum expressed to be the value of the goods, and referred to arbitration the question what should be paid him respecting other goods. It was held that the arbitrator was not justified in awarding that the plaintiff was entitled to the salvage of the goods in the first list (*k*).

Bond to be delivered up.

In an old authority it is laid down that on a reference of all controversies to the time of the submission, the award may direct one of the parties, by way of satisfaction, to deliver up an obligation made since the submission (*l*).

Awarding begging pardon.

So it may be gathered that an arbitrator may award as a satisfaction that one party shall beg the other's pardon, but that the award will be uncertain if he leave the injured party to determine on the time and place where he is to receive this satisfaction, for time and place are most important ingredients in such sort of satisfaction (*m*). In an old case, two out of three justices were of opinion that an award was good, which directed the defendant to make submission before the Mayor of Taunton for slanderous words spoken of the plaintiff (*n*).

When special directions good.

Unless there be some clause empowering the arbitrator to say what shall be done, or unless the very nature of the question require it, the arbitrator is rarely allowed to give any particular directions respecting the property in dispute.

Ordering replacement of fixtures.

Thus on a general reference, where the question was whether some fixtures which the landlord had removed were part of the premises demised to the tenant, it was decided that the arbitrator had no authority to order the fixtures to be replaced by the tenant, and the expense of replacing them to be repaid him by the landlord (*o*).

To take disputed title with all faults.

Where the dispute was respecting the goodness of the title of an estate agreed to be purchased, the arbitrator was

(*k*) Skipper *v.* Grant, 10 C. B. 237.
(*l*) Bac. Ab. Arb. E.; Rolle Ab. Arb. B. 10, p. 243.
(*m*) Glover *v.* Barrie, 1 Salk. 71.
(*n*) Spigurnell *v.* Jene, 1 Sid. 12.
(*o*) Price *v.* Popkin, 10 A. & E. 139.

not held justified in ordering in effect that the purchaser should take the title with all faults, and that the seller should execute a bond indemnifying him against eviction (*p*).

Awarding power of distress.

In like manner, on a reference of all matters in difference between a landlord and a tenant, where there were differences respecting a distress which had been put in, and as to the amount of rent which ought to be paid, the court decided that the arbitrator had no implied authority to give the landlord a power to distrain for the rent newly fixed by him, which power the landlord did not possess as to the rent originally created by the demise; and they held that the arbitrator's authority to give such a power ought either to appear by the express terms of the reference, or that it ought to be brought within the general words of the submission, by the fact that the question as to the power of distress was one of the matters in difference between the parties; they remarked, also, that there was scarcely any conceivable addition to the landlord's powers which an arbitrator might not give, unless he was held to be restrained by these two considerations, and that a power to enter for non-payment of rent or non-performance of covenants might be given by the same authority as a power to distrain. It is to be noticed in this case, that there was a clause in the submission empowering the arbitrator to order what he should think fit to be done by the parties respecting the matters referred, but it was not adverted to in the argument or judgment (*q*).

Matter in difference requiring special decision.

The above case, which lays down the rule that the arbitrator has power to give directions, however unusual, which are necessary to decide the very question in dispute, may be illustrated further. A party who supplied the British army in the Peninsula with provisions, brought an action against his agent, the principal object of which was to procure the agent to verify certain vouchers, without which the accounts of the plaintiff could not be passed. On a reference being proposed, Gibbs, C.J., expressed a clear opinion that it would be within the jurisdiction of the arbitrator to direct that the

Compelling party to verify vouchers.

(*p*) Ross *v.* Boards, 8 A. & E. 290.

(*q*) Pascoe *v.* Pascoe, 3 Bing. N. C. 898.

agent should go before the commissary and verify the vouchers in question (*r*).

Regulating future payment of tithes.

Where the question in difference is respecting the mode in which things are to be done in future, the arbitrator will in some cases have power to regulate the future enjoyment of property, although there be no clause authorizing him to say what shall be done. Thus, where there was a dispute between the parson of a parish and the parishioners whether the tithes should be paid in kind or not, the arbitrator was held to have power to award that a parishioner should in future pay the parson a certain yearly sum in lieu of tithes, for the right to the tithes was the question in dispute (*s*).

Ordering indentures of apprenticeship to be cancelled.

On a reference of all matters in difference between a master and apprentice, the arbitrator may order the indentures of apprenticeship to be delivered up (*t*); but he has no power to order them to be cancelled, when the submission is between the father and the master of the apprentice, and the latter is no party to the reference, although it be brought under the notice of the arbitrator as a matter in difference (*u*).

Acceptance of goods with deduction from price.

An arbitrator appointed on a dispute as to whether certain cases of tinned salmon were to be accepted, with power to make the "customary allowances" off the contract price, exceeds his jurisdiction if he orders the purchaser to take the goods, but subject to a deduction beyond the customary allowance, as to do so, would be imposing a new contract on the parties (*v*).

Ordering securities to be delivered up.

An arbitrator appointed to award, order, and determine of and concerning all matters of account then pending between L. and C., awarded that L. do pay to C. a specified sum due from him to C. in respect of shares in the W. Cement Company, and that on payment of such sum C. do deliver to L. the 118 shares in the said W. Cement Company held by him as a collateral security for the said sum. The court held the award valid, as it entitled C. to maintain an action for the amount, and seemed inclined to hold, though it was not

(*r*) Atkyns *v.* Baldwin, 1 Stark. 209.

(*s*) Beckingham *v.* Hunter, Rolle Ab. Arb. D. 8, p. 246.

(*t*) Bac. Ab. Arb. E.

(*u*) Wicks *v.* Cox, 11 Jur. 542. See P. II. ch. 8, s. 1, d. 4, as to ordering dissolution of partnership.

(*v*) Hooper *v.* Balfour, 62 L. T. 646. See Sinidino *v.* Kitchen, 1 C. & E. 217; Green & Co. *v.* Balfour, 6 T. L. R. 395, 445; 63 L. T. 97.

necessary to determine the point, that the arbitrator had authority to give such direction respecting the collateral securities on a final settlement of the accounts (*x*).

Directing illegal act to be done.

An arbitrator may not award an act to be done contrary to law (*y*). An award directing a party to commit a crime, as to kill, or steal, or forge a deed, would be clearly void (*z*). If an arbitrator order a party to do anything which will make him a trespasser, the direction is invalid (*a*).

Arbitrator should direct payment.

II. *Directions as to payment of money.*]—An arbitrator should direct payment of the amount he finds to be due from one party to the other; for if he do not, the party liable for the amount cannot be compelled in a court of law by attachment to pay it, as his not doing so is no disobedience of the award, and consequently no contempt of court (*b*).

The omission, however, will not render the award invalid; and it seems, when the suit referred is in Chancery, that that court would probably make an order to enforce payment of the balance found due; even if that could not be done, the validity of the award will not be affected by the nature of the remedy to which the parties are left in order to enforce obedience, provided there be some sufficient remedy (*c*), as there generally, if not always, is by action (*d*).

May fix time and place of payment.

An arbitrator may in general fix the time and place at which payment is to be made, though he need not do so unless he think fit (*e*).

Awarding promissory note.

It seems he may award one party to give the other a promissory note payable at a future day, for that is the same thing in effect as awarding the payment of the money at the

(*x*) Harrison *v.* Lay, 13 C. B. N. S. 528.

(*y*) Bac. Ab. Arb. E. 4; Eastern Union Rail. Co. *v.* Eastern Counties Rail. Co., 2 E. & B. 530.

(*z*) Co. Litt. 206; Wood *v.* Griffith, 1 Swanst. 55; Bac. Ab. Arb. E. 4.

(*a*) Bac. Ab. Arb. E. 4; Turner *v.* Swainson, 1 M. & W. 572. See post, s. 4 of this chapter.

(*b*) Edgell *v.* Dallimore, 11 Moore, 541; Hopkins *v.* Davies, 1 C. M. & R. 846, S. C. 3 Dowl. 508; Priddell *v.* Sutton, 5 Bing. 200.

(*c*) Wilkinson *v.* Page, 1 Hare, 276.

(*d*) Hopkins *v.* Davies, 1 C. M. & R. 846; Edgell *v.* Dallimore, 11 Moore, 541.

(*e*) Morphett, In re, 2 D. & L. 967; Freeman *v.* Bernard, 1 Salk. 69; Anon. 1 Keb. 92, S. C. 2 Brownl. 339. See Lindsay *v.* The Direct London and Portsmouth Rail. Co., 19 L. J. Q. B. 417.

future day (*f*). So he may order one party to execute a bond for the payment to the other of an ascertained sum of money at a specified time (*g*). He may direct payment to be made by instalments (*h*). He may add, that if the sum awarded be not paid by the appointed day, the party shall pay a larger sum by way of penalty; or when the payment is to be by instalments, that if one be overdue, the whole amount shall be payable at once (*i*).

Money bond.

Payment by instalments.

Penalty for non-payment at the time specified.

Penalty.

If an award orders a party to pay another a fixed sum monthly by way of penalty until the party to pay does some act for the other's benefit, he must pay the exact monthly sum, and cannot treat it merely as a penalty, and show that the party to receive has not been damaged by the neglect to the full amount (*j*).

Payment on Sunday.

It is no objection to the award that the day on which the arbitrator directs payment to be made happens to be a Sunday (*k*).

In some cases, however, the arbitrator should not specify any time of payment.

Fixing time for paying purchase price.

Or damages in action.

When he has merely to fix the purchase price of property, he has no right to direct the payment of the amount he awards as the price to be made at a future day, for delay in payment may affect the value of the compensation (*l*). We have previously seen that when a verdict is taken subject to a reference, it is very questionable whether an arbitrator may appoint a day or place of payment of the damages for which he directs a verdict to be entered for the plaintiff (*m*).

Ordering payment of rent not due.

An award made on the 23rd of June, ordering one of the parties to pay to the other so much for rent, which by the award itself appeared not to be due until the 24th of June, is void, for the rent may become extinct by eviction or surrender before it be due (*n*).

(*f*) Booth *v.* Garnett, 2 Str. 1082.

(*g*) Cooke *v.* Whorwood, 2 Saund. 337, S. C. 2 Lev. 6; Brown *v.* Watson, 6 Bing. N. C. 118.

(*h*) Kockill *v.* Witherell, 2 Keb. 838.

(*i*) Royston *v.* Rydall, Rolle Ab. Arb. H. 8, p. 250; Com. Dig. Arb. E. 15; Kockill *v.* Witherell, 2 Keb. 838. See P. II. ch. 5, s. 4, d. 9, p. 280, as to an alternative award.

(*j*) Parfitt *v.* Chambre, L. R. 15 Eq. 36.

(*k*) Hobdell *v.* Miller, 6 Bing. N. C. 292.

(*l*) Emery *v.* Wase, 8 Ves. 504 a.

(*m*) Rees *v.* Waters, 16 M. & W. 263, S. C. 4 D. & L. 567. See P. II. ch. 6, s. 4, p. 360.

(*n*) Barnardiston *v.* Fowler, 10

When cross claims or cross actions are referred, the arbitrator is at liberty in general to direct that one claim should be set off against the other, and to order the balance only to be paid (*o*). Where a solicitor has a lien for costs care must be taken that the award should have regard to it (*p*).

Setting off cross claims awarding balance.

The following is an instructive case respecting the extent of the arbitrator's power in directing payment.

Extent of power to direct payment.

Executors, who under a will were to pay the interest of a sum of money annually to the testator's son for his life, had out of other trust funds advanced him considerable sums at different times. He had not paid them interest on the advances, nor had they paid him the interest on the legacy for many years. On a reference of all matters in difference, and of anything in anywise relating thereto, the court held that the utmost limit of the arbitrators' power was to ascertain the respective principal sums due from the son, and whether they were to carry any and what interest, and from what period; to ascertain the principal sum to the interest of which he was entitled; for how many years his claim to that interest was to be carried back, and at what rate; and whether he was entitled to consider each year's interest withheld as a principal loan bearing interest, to be set off against that which he was to pay; that having ascertained all these particulars up to the date of the submission, their duty was to direct the payment by him of the balance forthwith, or at a future time or times. The court decided, also, that the arbitrators had no right to deal with the accounts beyond the date of the submission, or to regulate the future dealings of the parties with regard to them, as there was no clause in the submission empowering them to do so; that consequently, in calculating the accounts up to the quarter day beyond the date of the submission, and in making the payment by the executor of the future interest on the legacy due to the son indefinitely during his whole life dependent on his paying off at specified times the principal and interest

Mod. 204. See Gray *v.* Wicker, Rolle, Ab. Arb. B. 3, p. 242; C. 8, p. 358.

(*o*) Pennell *v.* Walker, 26 L. J. C. P. 9; Maloney *v.* Stockley, 4 M. & G. 647; Williams *v.* Moulsdale, 7 M. & W. 134.

(*p*) As to lien and set-off generally, see Ord. LXV. r. 14. Blakey *v.* Latham, 41 Ch. D. 518.

of the balance found due from him to them, the arbitrators had clearly exceeded their power (*q*).

An arbitrator, after finding a certain sum due from a party, directed him to pay or account for it to the trust estate, in respect of which the arbitrator had to award and to apportion among the parties interested. The finding was held bad and uncertain, on the ground that the arbitrator ought to have specified to whom and in what proportion the money was to be paid (*r*).

Benefit building society.

The arbitrators appointed to settle disputes between a benefit building society and its members may consider when, consistently with the due prosecution of the other objects of the society, payment should be made to the member, and may fix a time for such payment accordingly (*s*).

Party dying directing executor to pay.

If the submission contain the usual clause providing against the death of a party revoking the authority of the arbitrator, and a party die pending the reference, against whom the arbitrator finds the balance, it seems a proper course to award that such a sum is due from the deceased, and to direct his personal representatives to pay the amount out of his assets. Simply directing the executors to pay the sum out of the assets is sufficient (*t*).

Directing payment, on reference by executor.

On a general reference by an executor respecting differences between the testator and the other party, if the arbitrator come to a conclusion that the testator is liable to the other in a certain sum, and no question have been raised on the reference as to any want of assets to satisfy the demand, the

Directing executor to pay.

arbitrator may direct the executor to pay the amount. Such a direction, it is true, will preclude the executor from alleging a deficiency of assets in any proceedings to enforce the award: but as on such a reference the question of assets is impliedly referred, and the executor does not then allege any want of assets, which he ought to do, if he intended to rely on such a defence, the reasonable presumption is, that the estate is sufficient (*u*).

(*q*) Morphett, In re, 2 D. & L. 967.

(*r*) Tidswell, In re, 33 Beav. 213.

(*s*) Armitage *v.* Walker, 2 Kay & J. 211.

(*t*) Dowse *v.* Coxe, 3 Bing. 20; Lewin *v.* Holbrook, 2 Dowl. N. S. 991.

(*u*) See P. I. ch. 2, s, 2, d. 4, p. 29.

Merely awarding that the testator's estate is indebted in a certain sum seems to be a sufficient award.

Awarding testator indebted.

Directing the executor to pay the amount "out of the assets which may be in his hands, or which may come to them," does not prevent the executor from showing that he has no funds of the testator to pay the sum awarded, as such a finding leaves the question of assets open. This form of award may seem to be the fairer mode of adjudicating, and has never been expressly held to be improper, but has even been enforced by attachment on proof of assets (*x*). It can hardly, however, be pronounced quite safe under an ordinary submission from the objection that the award is not final, for leaving undetermined a matter held to be referred, namely, the question of the sufficiency of the assets (*y*).

Directing executor to pay out of assets, quando, &c.

Whether ordering the executor to pay "*out of the assets*" concludes him from saying that he has none, and so amounts, in fact, to a simple order to pay, or whether, as Abbott, C.J., was inclined to think, it leaves the point untouched, has never formally been decided (*y*).

To pay out of assets.

If a party by mistake paid to the assignees of a bankrupt a larger sum than he owed to the bankrupt's estate, the arbitrator might award that the assignees should repay the whole excess, and was not bound as to that amount to treat the party paying as a creditor of the bankrupt only entitled to share rateably with the other creditors (*z*).

Directing payment by assignees of bankrupt.

An arbitrator is sometimes justified in directing payment to be made to one of several joint parties. A rent-charge demised to a married woman (but not for her sole and separate use) being in arrear, a distress was put in by her, and an action of replevin was brought against her and her husband, the husband, though unwillingly, being compelled to allow his name to be used in the action. On the trial at Nisi Prius, a verdict having been taken for the plaintiffs, and the cause and all matters in relation to the annuity in question in the cause having been referred, the arbitrator, among other things, awarded a verdict for the defendants, and directed the plaintiff to pay the arrears of the annuity to the female defendant. On a motion to set aside the award, on the

Directing payment to wife instead of husband and wife.

(*x*) Joseph and Webster, In re, 1 Russ. & M. 496.

(*y*) Love *v.* Honeybourne, 4 D. & R. 814.

(*z*) Malcolm *v.* Fullarton, 2 T. R. 645.

ground, among others, that the arbitrator ought to have directed the arrears to be paid to the two defendants, and not to the female defendant only, the court held that the arbitrator was justified in the direction he gave (the facts of the case showing that the husband was acting in collusion with the plaintiff to deprive his wife of the annuity), and ultimately granted an attachment against the plaintiff for not paying the arrears to the wife, although it was sworn that he had already paid them to the husband (*b*).

Right to interest question of fact.

III. *Directions as to payment of interest.*]—The right to interest is a question of fact, of which the arbitrator is the sole judge; there is no rule of law on the subject; consequently an award is not to be impeached for allowing compound interest, since that may be due by contract between the parties, either express or to be inferred from the nature of their dealings (*c*).

Allowing interest contrary to practice of court.

Interest may be allowed by an arbitrator in cases where the court will not give it, as, for instance, in taking the accounts in a suit he may allow interest on both sides of the account, although the courts will not do so; for allowing it is a breach of a mere regulation of practice, and not a violation of any general rule of law, and the authority to adjust the account carries with it an implied authority to allow interest (*d*).

Interest as jury.

When substituted for the jury, an arbitrator, it is presumed, is at liberty to award interest, as they might under the stat. 3 & 4 W. IV. c. 42, ss. 28, 29.

Interest on money borrowed for purchasing estate.

An arbitrator may award to a purchaser of an estate, who has brought an action against the vendor for not completing the sale, the amount of interest paid by the former upon money borrowed by him to complete the purchase, and necessarily kept idle, pending an endeavour of the vendor to clear the title, and the court will presume that the arbitrator was justified by the circumstances in making the allowance, nothing to the contrary appearing on the face of the award (*e*).

(*b*) Wynne *v.* Wynne, 4 M. & G. 253, S. C. 9 Dowl. 396, 901.

(*c*) Morgan *v.* Mather, 2 Ves. Jr. 15; Morphett, In re, 2 D. & L. 967. See ante, p. 96.

(*d*) Badger, In re, 2 B. & A. 691.

(*e*) Sherry *v.* Oke, 3 Dowl. 349.

On the reference of an action brought by a servant to recover the balance of a sum deposited by him with his master, the arbitrator allowed him interest on the balance, and the court refused to disturb the award (*f*).

Benefit building society.

An award by arbitrators of a benefit building society, allowing interest to a member, is not bad on its face, and the court will not inquire into the propriety of the amount (*g*).

Power to award dissolution of partnership.

IV. *Directions in cases of partnership.*]—On a reference of all matters in difference between partners, the arbitrator may award a dissolution of the partnership, if the question whether the partnership shall be dissolved be a matter in difference (*h*). But he is not bound to direct a dissolution, although he be appointed "to arbitrate and determine as well a dissolution of the said co-partnership and a remuneration to either party, and the cancelling of the indenture of co-partnership, as of and concerning all matters in difference between the parties" (*i*).

Awarding on the debts and credits of a firm.

In winding up the affairs of a partnership, the arbitrator if there be any dispute as to amounts, should in general take an account as between the partners, of the outstanding debts due from the firm, and also of the debts due to the firm. It may be convenient sometimes to set forth in the award, or in a schedule appended to it, lists of the creditors and debtors of the firm, with the respective amounts of the claims or liabilities of each individual, and the court will presume the list full and correct, until the contrary be expressly proved (*k*).

He should reckon the claims and demands of any of the parties to the reference by, against, or upon the other or others, and state the amount (if any) to be received or paid by any of them on the footing of such account (*l*).

Awarding partners to pay and receive in moieties.

The arbitrator may direct that the partners shall pay the debts of the firm, and be entitled to receive the amounts due to it, in such proportions as he shall think just. Where there are two partners only, it is not uncommon to award that each shall pay and receive a moiety, and to provide that

(*f*) Beahorn *v.* Wolfe, 1 Alcock & Napier, Rep. 233 (Irish).
(*g*) Armitage *v.* Walker, 2 K. & J. 211.
(*h*) Green *v.* Waring, 1 W. Bl. 474; Bac. Ab. Arb. E.
(*i*) Simmons *v.* Swaine, 1 Taunt. 548; *Joplin* v. *Postlethwaite*, 61 L. T. 629.
(*k*) Lingood *v.* Eade, 2 Atk. 501.
(*l*) Aitken's Arbitration, 3 Jur. N. S. 1296.

if one advance or pay any sum beyond the half share due from him, the other shall reimburse him the amount overpaid. In like manner he may direct that if any sum due to the firm be paid to one partner, he shall pay the moiety of it to the other partner. There is no necessity for any more specific directions how the several sums are to be received and paid. Directing a division in equal shares of the amounts due to the firm is clearly all he can prescribe effectually, since he has no control over the debtors, who, if they please, can pay the whole they owe to one of the partners (*m*).

Not specifying amounts.

If there be no dispute respecting the amount of the debts and credits, the general direction to pay and receive them in moieties is sufficient, without ascertaining the amount in the award; and when the specific amounts are not stated, the court will presume there was no contention on this head (*n*).

Awarding all debts and credits to one partner.

It seems an unobjectionable course, instead of awarding a division as above, to direct that one of the parties shall pay all the liabilities of the firm, and collect for his own use all the money owing to it, and to allow in the ultimate account a specified sum for or against the other partner, according to the balance of advantage or loss calculated to accrue to the former (*o*).

In a case where it was a matter for the decision of the arbitrator which of the partners in the colliery business should be the purchaser, Wightman, J., in the Bail Court, held, that a direction that the partner whom the arbitrator had awarded to be the purchaser should receive the debts due to the firm and discharge its liabilities was a reasonable and proper direction, and that an objection to the award on account of such a direction could not be supported (*p*).

Appointing a receiver.

Appointing a third party as a receiver to collect and pay over the sums according to the arbitrator's directions, would no doubt in many cases be a very convenient way of settling matters, but without a special provision in the submission the arbitrator cannot make such an appointment (*q*). Sup-

(*m*) Wood *v.* Wilson, 2 C. M. & R. 241; Lingood *v.* Eade, 2 Atk. 501.

(*n*) Wood *v.* Wilson, 2 C. M. & R. 241.

(*o*) Coppard, Ex parte, 4 Deac. & Ch. 102; Aitken's Arbitration, 3 Jur. N. S. 1296.

(*p*) Wright *v.* Sparks, B. C. May 5, 1863.

(*q*) Mackay, In re, 2 A. & E. 356.

posing the arbitrator empowered, and desiring to adopt the above course, it is recommended, in order to effectuate the object, that he should direct the partners to join in giving the person appointed a power of attorney to collect the debts (*r*). Care should be taken in the submission to exonerate the arbitrator from all liability respecting the application of the money, because otherwise, if the person deputed become insolvent, it is said to be doubtful whether the arbitrator himself may not in some instances be liable (*s*).

Sometimes the arbitrator himself is appointed receiver (*t*).

Awarding on the partnership stock.

Whatever may be the power which the arbitrator, from the nature of the differences, or the terms of the submission, will in general have, to apportion the partnership stock and effects between the members, or to give the whole to one, making him pay a compensation to the rest for their shares, still if the submission recite that there are disputes touching the division of the partnership lands and effects, and give the arbitrator power to direct a division of them, and contain an agreement that each of the two parties will execute to the other conveyances according to such division, the arbitrator ought to make some division, and is not, it seems, justified in making one partner purchase the share of the other in the premises. Yet in an instance where the arbitrator had so awarded, the court held the award good on its face, as they said they would presume, till the negative were shown, that there had been some arrangement before the arbitrator, by which one of the parties was ultimately to become possessor of the whole property (*u*).

Dividing it between partners.

Making no provision for deficiency of assets.

An award as between partners, providing for the application of the partnership assets, if there should be a surplus, but not providing for the event of a deficiency, is not necessarily invalid; for as the arbitrators proceed on a supposition that the partnership effects are sufficient, the court, in support of the award, will presume the supposition well founded, unless the contrary be shown, and will intend that the state

(*r*) Lingood *v.* Eade, 2 Atk. 501.

(*s*) Lingood *v.* Eade, 2 Atk. 501. See, however, Anon., 12 Mod. 560.

(*t*) See Roberts *v.* Eberhardt, 3 C. B. N. S. 482, S. C. 27 L. J. C. P. 70; in error, 28 L. J. C. P. 74.

(*u*) Wood *v.* Wilson, 2 C. M. & R. 241.

being up to what date the joint liability of the plaintiff and defendant for debts due in respect of a vessel, in which the plaintiff had recently purchased out the defendant's interest, should continue, and from what date the plaintiff should be chargeable alone, the arbitrator awarded, that after a specified day the defendant should not bear any debts in respect of the vessel, and ordered the plaintiff to deliver to the defendant a bond conditioned for the payment by the plaintiff of all debts incurred in respect of the vessel after that date. The majority of the court held that the arbitrators had authority to direct the bond to be given, as the creditors were not bound by the award, and might sue the defendant, and so the giving it was only a necessary step to secure the defendant from a liability which the arbitrator had decided ought not to attach upon him; Maule, J., however, expressed a doubt whether it was necessarily within the arbitrator's authority to direct an indemnity bond to be given (*e*).

Principle.

The principle seems to be that wherever an arbitrator has authority to settle the liability of the respective parties to the reference with regard to debts due to third persons, he may order one party to pay them and to indemnify the other against them (*f*).

When settling terms of dissolution of partnership.

When the arbitrator has to settle the terms on which a partnership is to be dissolved, and he empowers one partner, to whom he awards the debts due to the firm, to use the other's name in bringing actions, for the sole benefit of the former, it has been assumed that the arbitrator has power to order him to indemnify the other against any liability to costs for the use of his name in the actions, and it was even urged that he was bound to do so, but to this latter proposition the court did not assent (*g*).

When settling terms of purchase.

So where the arbitrator had to settle the price and the terms on which the defendant should purchase an estate of the plaintiff, and he awarded that the defendant should be at liberty to use the plaintiff's name in enforcing his rights, Lord Abinger, C. B., expressed his opinion that the arbitrator, if he had pleased, might have fixed the terms on which

(*e*) Brown *v.* Watson, 6 Bing. N. C. 118.

(*f*) Goddard *v.* Mansfield, 19 L. J. Q. B. 305. See Aitken's Arbitration, 3 Jur. N. S. 1296.

(*g*) Burton *v.* Wigley, 1 Bing. N. C. 665. See ante, p. 424.

the defendant should have indemnified the plaintiff against an action (*h*).

VI. *Directions as to executing releases.*]—On a general reference of all matters in difference, the arbitrator has authority to order the parties to execute mutual releases respecting them (*i*), and where "all debts, sums of money, and demands" are submitted, he may direct a release of the bonds, specialties, judgments, executions, and verdicts, by virtue of which the debts, sums of money, and demands are due (*k*). Where a cause only is referred, he has no authority to direct the parties to execute mutual releases of all demands (*l*).

Arbitrator has power to direct releases.

The generality of the words in the clause of the award directing releases will, if possible, be construed to be limited to releases respecting all matters comprehended within the submission (*m*); and although the release ordered would in terms release the arbitration bond itself, that shall be intended to be excepted (*n*), for the arbitrator has no power to direct that to be surrendered (*o*).

Construction of award of releases.

But if the words in the award be too clear to admit of the limited construction, as if the submission be of all differences arising before the 10th of May, and the award direct releases respecting all differences up to the 20th of May, the award will still be perfectly good, unless some new difference arose between the 10th and 20th of May, and that be shown to the court (for the court will not intend it without it be shown), and even if a new difference be shown, the award will in general be void only as to the time beyond the submission, and that portion may be treated as surplusage (*p*).

An award to pay two sums at different times, and that the

Awarding re-

(*h*) Round *v.* Hatton, 10 M. & W. 660.

(*i*) Cable *v.* Rogers, 3 Bulst. 311.

(*k*) Roberts *v.* Marriett, 2 Saund. 190.

(*l*) Doe d. Williams *v.* Richardson, 8 Taunt. 697.

(*m*) Doe d. Williams *v.* Richardson, 8 Taunt. 697; Barry *v.* Rush, 1 T. R. 691; Boyes *v.* Bluck, 13 C. B. 652.

(*n*) Marks *v.* Marriot, 1 Ld. Raym. 114.

(*o*) Doyley *v.* Burton, 1 Ld. Raym. 533.

(*p*) Bac. Ab. Arb. E. 1; Hill *v.* Thorn, 2 Mod. 309; Squire *v.* Grevett, 2 Ld. Raym. 961; Lee *v.* Elkins, 12 Mod. 515; Anon., 12 Mod. 8; Hooper *v.* Pierce, 12 Mod. 116; Abrahat *v.* Brandon, 10 Mod. 201; Pickering *v.* Watson, 2 W. Bl. 1118; Stevens *v.* Matthews, Ld. Raym. 116.

leases before payment bad.

party to receive them should give one release immediately, has been held to be bad, on the ground that by the release under the provision, the arbitration bond, and the right to the second sum awarded to be paid subsequently, would be discharged (*q*).

To execute releases forthwith.

But where an award directed that A. and B. should *forthwith* execute certain conveyances to C., and that C. should *forthwith* execute indemnities and releases to A. and B., the awarded was supported, and it was held that "forthwith" in the latter clause meant as soon as A. and B. had by their execution of the reconveyances put themselves in a position to call for the execution of the indemnities (*r*).

Form of award of mutual releases.

It is not necessary for the award to point out the form of the releases, or to show when they are to be executed (*s*).

Awarding conveyances.

VII. *Directions as to executing conveyances.*]—When the question in dispute relates to real property, it often happens, from the nature of the differences, that the arbitrator has to order one party to execute a conveyance to the other; for as the title to land will not pass by the award, when he intends that one party shall have the land, he should also in many cases award a release or conveyance, in order that the award may be final (*t*).

Specifying nature of the conveyances.

In directing a conveyance or other deed, the arbitrator should take care to specify the nature and character of the instrument (*u*), but he need not prepare it himself (*x*).

If an order of reference to an arbitrator, who has settled the price to be paid to the plaintiff for his land, contains a clause, "the plaintiff agreeing to execute or procure the execution of such a conveyance as the arbitrator may direct," it is the duty of the arbitrator to give sufficient directions respecting the conveyance (*y*).

(*q*) Adams *v.* Adams, 2 Mod. 169.

(*r*) Boyes *v.* Bluck, 13 C. B. 652.

(*s*) Toby *v.* Lovibond, 17 L. J. C. P. 201, S. C. 12 Jur. 436; 5 C. B. 770. See the Appendix of Forms for the form of an award to execute mutual releases.

(*t*) Johnson *v.* Wilson, Willes, 248.

(*u*) Tandy *v.* Tandy, 9 Dowl. 1044; Tipping *v.* Smith, 2 Stra. 1024; Thinne *v.* Rigby, Cro. Jac. 314.

(*x*) Tebbutt *v.* Ambler, 2 Dowl. N. S. 677. See Tomlin *v.* Mayor of Fordwich, 5 A. & F. 147; Toby *v.* Lovibond, 17 L. J. C. P. 201, S. C. 12 Jur. 436; 5 C. B. 770.

(*y*) Smalley *v.* Blackburn Rail. Co., 2 H. & N. 158, S. C. 27 L. J. Ex. 65.

Where an award directed the plaintiff to execute a deed of assignment of some leasehold premises, and a deed of mortgage of some freehold property, and further, at the request and cost of the defendant, to execute a release of all his right, title, and interest in some other premises; on a motion for an attachment against the plaintiff for not executing certain deeds of assignment, mortgage, and release, tendered to him for execution in pursuance of the award, the plaintiff, who alleged that the deeds were not properly drawn, objected that the arbitrator ought himself to have settled in what terms they should have been drawn and executed; the court, however, held, that it was not necessary for the arbitrator to have drawn the deeds himself, that he had sufficiently prescribed what the plaintiff had to do, and made the rule for an attachment absolute (*z*).

Arbitrator need not draw the conveyance.

The arbitrator is recommended to state in the award at whose expense the conveyance or other instrument is to be prepared, and which of the parties is to prepare it, and tender it to the other for execution, as the parties are very likely to contest the point with each other, and difficulties may arise in enforcing the performance of the award (*a*).

Advisable to direct which party to prepare it.

Where an arbitrator has to deal with matters affecting estates dedicated to charitable purposes, he should be cautious to see that his directions are such as the Court of Chancery will sanction. If he directs the trustees of the property to grant a lease of the estates, he should, it is apprehended, in directing the terms of the lease, award such terms and such only as the Court of Chancery would permit the trustees of their own accord to have granted (*b*).

Directing lease of charity estates.

(*z*) Tebbutt *v.* Ambler, 2 Dowl. N. S. 677.

(*a*) Standley *v.* Hemmington, 6 Taunt. 561; Doe d. Clarke *v.* Stillwell, 8 A. & E. 645.

(*b*) Attorney-General *v.* Clements, 1 Turn. & R. 58.

SECTION II.

OF DIRECTIONS UNDER A POWER TO AWARD WHAT SHALL BE DONE.

PART II. CH. VIII. S. 2.

1. *Whether clause to say what shall be done compulsory.*]—With a view of removing causes of future differences, large discretionary powers to affect the property of the contending parties are, in many instances, given to the arbitrator by the submission. This course is one which meets with the full approbation of the courts (*c*).

Clause what shall be done.

The clause giving the authority is often worded thus: "That the arbitrator shall have power to determine what he shall think fit to be done by the parties respecting the matters in dispute."

Whether compulsory to award something.

Under this power the arbitrator need not, unless he choose, give any directions at all; but if the words run, "the arbitrator to determine what he shall think fit to be done," it is not quite clear that they would not at times be construed imperative, and calling upon him to make some regulation or other respecting the property; Parke, B., being of opinion that the clause is imperative, in the same manner as when the arbitrator is to ascertain what costs are to be paid, he has no discretion on the subject, but must ascertain some costs; while Lord Abinger, C.B., with whom the rest of the court concurred, is reported to have intimated that the words "*what he shall think fit*," import a discretionary power (*d*).

To direct what, if anything, shall be done.

A power to direct "what, *if anything*, shall be done by the parties respectively," is permissive and not compulsory (*e*).

Words "shall or may," construed imperative.

The following case throws light on this question. On the reference of a claim respecting a will and the granting an annuity, a clause in the submission, "that in case the arbitrator shall award any such annuity, he *shall* or *may* award the same with a proviso that in case of a deficiency of assets of the testator, the annuity or the fund from which the same

(*c*) Taylor *v.* Shuttleworth, 8 Dowl. 281, per Maule, J.

(*d*) Angus *v.* Redford, 2 Dowl. N. S. 735, S. C. 11 M. & W. 69; Morgan *v.* Smith, 1 Dowl. N. S. 617, S. C. 9 M. & W. 427.

(*e*) Nicholls *v.* Jones, 6 Ex. 373.

shall arise shall abate in the same manner as if it were a provision contained in the will," was held to be imperative, and to make it incumbent on the arbitrator when awarding the annuity, to insert the proviso in his award (*f*).

In the following instance, the permissive words seem to have been construed to be compulsory from the nature of the circumstances of the case.

Awarding to enjoy property as before.

A claim having been made on a reference respecting the obstructing of a flue, the diversion of a water-spout, and the building over a watercourse, the arbitrator, who had "power to direct how the property should be enjoyed for the future," awarded damages to the plaintiff for the above claims, and directed "that the parties should enjoy the property respectively as heretofore." This the court held was not a final adjustment, but left the property in a state of dispute, pregnant, to a certain degree, with injury, instead of preventing further disputes, which was the peculiar object of the reference (*g*). It is to be observed that the direction "to enjoy as before" is vague and indefinite, and that the holding the above award to be void does not necessarily determine that the award would have been set aside if the arbitrator had simply been silent respecting the future enjoyment of the property.

Awarding that nothing be done.

Where an action was brought by a reversioner for the continuance of an incumbrance on his land, and it was ordered by the order of reference that the arbitrator was to say what should be done between the parties by way of a sale or otherwise, respecting the land or premises in dispute, the court held the arbitrator justified in adjudging in terms that nothing should be done between the parties respecting the said land or premises, and Williams, J., distinguished this case from the above-mentioned case of *Morgan* v. *Smith* (*h*), where it was left to the arbitrator to ascertain what costs were to be given, on the ground that those words imported that there must be some given, and that there, in not finding the costs, the arbitrator had neglected the point submitted to him; and when the case of *Ross* v. *Clifton* (*i*)

(*f*) Crump *v.* Adney, 1 C. & M. 355, S. C. 3 Tyrw. 270.
(*g*) Ross *v.* Clifton, 9 Dowl. 356. See Grenfell *v.* Edgcombe, 7 Q. B. 661.
(*h*) 9 M. & W. 427.
(*i*) 9 Dowl. 356.

was cited as an authority to show that the arbitrator was bound to say that something was to be done, Coleridge, J., remarked that in that case it appeared that damage had been occasioned and would continue (*k*).

Whether award bad if direction faulty, when clause to say what shall be done enabling only.

Not only the duty of the arbitrator, but the fate of the award, may be affected by the consideration whether the clause to say what shall be done be enabling or compulsory. The Court of Exchequer were of opinion that when the clause was enabling only, the whole award need not be set aside if the direction given by the arbitrator were defective (*l*). The Court of Queen's Bench, however, held, that where an arbitrator undertook to give a specific regulation, which he was at liberty but not bound to do, the award must be set aside in toto if he did it erroneously; though if the faulty direction were an excess of authority, the award would be set aside for the excess only (*m*).

Injunction where no directions in award, and nuisance recurring.

Actions brought for injuries by certain manufactories or by gas works to neighbouring landowners are often referred to an arbitrator, with power to him to say what shall be done with the view of his regulating the future course of the works. If the injury be of a recurring or continuous nature, it is important for the manufacturer to suggest some scheme for the future, which the award may direct to be followed. For if the question as to regulations for the future be not brought before the arbitrator, and the award be confined to an assessment of damages, the continuance of the business of the manufacturer may sometimes practically be stopped by a perpetual injunction founded on the award as a decision of the legal right (*n*).

Valid directions.

II. *Directions as to what shall be done held valid.*]—What is the extent of the authority conferred by clauses empowering an arbitrator to say what shall be done by the parties, and how it ought to be exercised, must depend so much on the special wording of each submission, and the special circumstances of each particular case, that it is difficult to lay down

(*k*) Grenfell *v.* Edgcombe, 7 Q. B. 661.

(*l*) Nicholls *v.* Jones, 6 Ex. 373.

(*m*) Stonehewer *v.* Farrar, 6 Q. B. 730.

(*n*) Broadbent *v.* The Imperial Gas Light Company, 7 De G. M. & G. 436, S. C. 26 L. J. Ch. 276; in error, 6 H. L. Cases, 600, S. C. 29 L. J. Ch. 377.

any rule that is not too general to be of much practical utility.

A consideration, however, of the succeeding cases will, it is hoped, assist an arbitrator when he is in doubt as to what is the nature and limit of his own authority, and how his duty may be best performed.

No objections on the merits open.

It may be proper to remark that the court will not entertain any objection to the directions given in the award as to the mode of enjoyment of property, which resolve themselves into questions on the merits, or are founded on the justice or propriety of the arbitrator's determination with reference to facts (*o*).

Directions when presumed certain.

If any state of facts would fairly justify the directions in the award, the court will presume that some such state exists, so as to support the award, as sufficiently certain, unless the contrary is shown, or the party ordered to obey has been misled (*p*).

Awarding release of annuity.

A cause relating to the breach of an agreement for the purchase of an estate, the price of which was to be paid by the defendant, partly by instalments and partly by an annuity to be secured on land, was referred, and the arbitrator was empowered to settle the cause and all matters in difference, and to determine what he should think fit to be done by the parties. The non-payment of the annuity, and the omitting to provide such security for the payment, were the breaches complained of. The award directed that the defendant should pay the plaintiff a gross sum by way of damages, and that after the damages were paid, the plaintiff should convey the premises to the defendant, and execute a release of the annuity so agreed to be secured. It was objected that the arbitrator had no authority to award a gross sum to be paid as the value of the annuity. The court, however, held that the direction was fully authorised by the submission, and Tindal, C.J., said, "I agree if the party had brought an action for the arrears of an annuity which were due, and that action had been referred, the arbitrator would have had no right or power to fix the value of the annuity, and to throw so large a burden upon the defendant;

(*o*) Winter *v.* Lethbridge, 13 Price, 533.

(*p*) Mays *v.* Cannell, 24 L. J. C. P. 41.

but that is not the case here. The original agreement was not only that the defendant should pay the annuity, but that he should give security for its payment; the non-payment of the annuity, and the omission to provide such security as was required, are the two breaches alleged in the declaration. That subject, therefore, being brought before the arbitrator as one of the matters in difference, and it being expressly stipulated by the order of reference that the parties shall do whatever the arbitrator directs upon that subject, it appears to me that it is within the power given him to find, as we must suppose he has found, that there was no sufficient security in the possession or power of the defendant, and that he should fix what was the value of the annuity, and that it should be paid as matter of damage to the plaintiff" (*q*).

Awarding undivided shares of tithes.

An arbitrator, to whom it was referred to ascertain among other things what lands were severally titheable to the rectors of two neighbouring parishes, and who was authorised "to devise all means to prevent future litigation," and generally to settle all matters of difference, and to order and determine what he should think fit to be done, was held to have acted wisely, and perfectly within his authority, in making an award, which, reciting that it was impossible to ascertain the particular parcels of land to which the several rectors were respectively entitled, awarded that the tithes of the whole lands should be divided between them in certain proportions (*r*).

Awarding easement and repairs.

A submission empowered the arbitrator to decide how, and by whom, and in what manner, a certain pump, yard, hedge, and ditch, respecting which disputes had arisen, should in future be enjoyed and occupied, and who should have the care and management thereof. The arbitrator, after finding that the pump was the exclusive property of one of the parties, subject to an easement in it by the other, was held not to be authorised to dispose of the property in it to the other, so as to make the two disputants tenants in common; but it was ruled, that he had power to direct that the easement in the pump should continue, and under the provision respecting "care and management," it was decided, that he

(*q*) Taylor *v.* Shuttleworth, 8 Dowl. 281.

(*r*) Prosser *v.* Goringe, 3 Taunt. 425.

might order that the pump should in future be repaired at the joint expense of the parties, and that the clause empowering him to award "how" the property should be occupied, gave him authority to say under what conditions the occupation should be, and to impose on the party, not the owner of the hedge and ditch, the sole obligation of repairing them (*s*).

Continuing damage up to completion of repair.

A tenant of a water mill sued his landlord for breach of a covenant in the lease by the landlord to repair the mill, weir, and mill bank. The cause being referred to an arbitrator with power to decide all matters and questions, and do justice between the parties, and to order and direct what should be done, either immediately or prospectively, it was held that the arbitrator had power to award damages for the continuing breach of covenant up to the date of the award, and beyond that period; for it seems that the award might lawfully have directed the defendant to pay to the plaintiff so much per week until the completion of the repairs ordered to be done, so long as the plaintiff remained lawfully in possession of the premises under the lease, but that a direction absolutely and without any limitation to pay a weekly sum to the plaintiff until the repairs were done was bad, but did not vitiate the rest of the award (*t*).

Regulating a stream.

Under a power to the arbitrator to decide the right to a certain stream of water claimed in the action, and to regulate the use of it in future, and to order and determine what he should think fit to be done, it was considered that the authority given to the arbitrator to regulate the flow of the stream in dispute incidentally and necessarily empowered him to affect the enjoyment of other rights of the parties, and to make regulations respecting the flowing of the water in the stream in question, notwithstanding they interfered with the former enjoyment of other streams not the subject of dispute (*u*). But the court seemed inclined to think that the arbitrator had no power to make a prospective regulation respecting the flowing of the water, proceeding on the assumption that the ponds, through which the stream of water was stated in the declaration to have flowed, might possibly be hereafter filled up, and providing for that con-

Hypothetical provision for future changes.

(*s*) Boodle *v.* Davies, 3 A. & E. 200.

(*t*) Lewis *v.* Rossiter, 44 L. J. Ex. 136.

(*u*) Winter *v.* Lethbridge, 13 Price, 533.

tingency; and that he had authority to regulate the stream only whilst it should continue to flow through those ponds. They held, however, that though such hypothetical directing might be void as exceeding the submission, such excess could not vitiate the other directions in the award independent of it (*v*).

Directing change from wood to iron machinery.

Under a reference to settle the matters in difference, and to award such alterations in the defendant's works as to the arbitrator should seem necessary, regard being had to their state at a particular period, an award directing no other alteration than that certain parts of the machinery, which were of wood, should be made of cast iron, was held a due execution of the authority (*x*).

Directing to sue in plaintiff's name.

We have before seen that an arbitrator, who has to settle at what price and on what terms the defendant shall purchase the plaintiff's estate, may award that the defendant, after the conveyance of the property to him, shall be entitled to use the plaintiff's name in enforcing his rights, and may, if he please, fix the terms on which the defendant shall indemnify the plaintiff against an action (*y*).

Directing specific performance of agreement.

An arbitrator, empowered to investigate legal and equitable claims and to give directions, awarded that the plaintiffs would be entitled to have the benefit of an agreement by which they were to be paid by the defendant a sum of money so soon as the plaintiffs had discharged the claims of certain other persons; and he directed that, on production by the plaintiffs to the defendant of proper receipts from such persons, the defendant should pay the plaintiffs the amount stated. This was held good (*z*).

To pull down wall.

Under a power to order possession of lands to be given, and how and in what manner it shall be given, an arbitrator has power to order the party whom he directs to give up possession to pull down a wall he has erected on the premises (*a*).

Directing running of trains.

By an act to facilitate intercourse between the U. Railway and the C. Railway, it was enacted, that if at any time or

(*v*) Winter *v.* Lethbridge, 13 Price, 533.

(*x*) Walker *v.* Frobisher, 6 Ves. 70.

(*y*) Round *v.* Hatton, 10 M. & W. 660. See the previous section, d. 5, p. 424.

(*z*) Miller *v.* De Burgh, 4 Ex. 809.

(*a*) Mays *v.* Cannell, 24 L. J. C. P. 41.

times after the passing of the act, either party should require it, "it should be referred to arbitration to determine what arrangements should be made by the U. and the C. Railways, or either of them, for affording proper facilities and convenience for the conveyance and all other accommodation of passengers, animals, and goods to be conveyed from the U. Railway, or any part thereof, upon and along the C. Railway between L. and C., or any part thereof, and from the C. Railway between L. and C., or any part thereof, and upon and along the U. Railway, or any part thereof," &c. Held, first, that the arbitrators had power to order that the C. Railway should run an express train from C. to L. every day, except Sunday, at 10 A.M., arriving at 11 A.M., stopping at three intermediate stations; that the times of departure and arrival were properly made part of the terms of arrangement, and that the court could not intend that the speed ordered was improper, though, if it were, the award would be bad, and the company would not be justified in obeying it. Secondly, that they had also power to order the C. Company to run a train daily from L. to C. at specified hours of departure and arrival, and to convey the U. carriages, with passengers, through to L. They held, also, that it was no objection that the award did not say how long the arrangement was to continue, as new regulations might be made from time to time, under the arbitration clause (*b*).

Invalid directions.

III. *Directions as to what shall be done held void.*]—A consideration of the following instances will, it is hoped, assist the arbitrator in guarding against making a faulty direction.

Awarding verdict.

The power to order and direct what he shall think fit to be done by and between the parties respecting the matters in dispute, does not authorise the arbitrator to direct a verdict to be entered in the cause referred (*c*). A suggestion, however, was in one case thrown out by the bench, that when the verdict was taken on the reference for too small a sum, the arbitrator, under this clause, might possibly have authority to direct an application to be made to the court to enlarge

Directing increase of damages.

(*b*) Eastern Union Rail. Co. *v.* Eastern Counties Rail. Co., 2 E. & B. 530.

(*c*) Hayward *v.* Phillips, 6 A. & E. 119.

the amount of damages, and that the defendant should consent to the enlargement (*d*).

Awarding a carriage way.

An action, in which the plaintiff claimed a right of way (not a carriage way), was referred to an arbitrator, who was to settle all matters in difference between the parties, and to direct in what manner the road in question (if he should find for the plaintiff) should be enjoyed. The arbitrator awarded a verdict for the plaintiff, and that the plaintiff was entitled to a right of way, including a carriage way. Though there were contradictory affidavits as to whether the plaintiff's claim to a carriage way was a matter in dispute before the arbitrator, the court held that the arbitrator, in awarding a carriage way, had clearly exceeded his authority, and set aside that part of the award (*e*).

Depth of weir, water marks.

Disputes having arisen between the owners of two mills on a river, an arbitrator, appointed to define the water rights and depths of weir, and authorised to order any erections to be put up about the defendant's weir, awarded that the defendant was entitled to maintain his weir at the depth of fourteen inches and no more, and for the purpose of marking the depth ordered such durable marks and erections to be placed about the weir as B. might direct. The court held the direction as to the depth of weir sufficient, but that the award was avoided by delegating to B. to fix the marks (*f*).

Uncertain directions invalid.

Not specifying fixtures.

A landlord having removed some gates, locks, bolts, and fastenings, from the demised premises, a direction by the arbitrator ordering the tenant to put up other gates, locks, bolts, and fastenings, in the place and stead of such as had been removed, was held bad for uncertainty, the award not showing what fixtures had been removed, or specifying the nature, quality, or price of those which were to be substituted (*g*).

Not specifying precautions or process of filtering.

The plaintiff, a bleacher, complained of the defendant's polluting a stream of water by his works; and the arbitrator, who was empowered to regulate the mode in which the water should be enjoyed, awarded, that the defendant should take

(*d*) Prentice *v.* Reed, 1 Taunt. 151.

(*e*) Hooper *v.* Hooper, M'Lel. & Y. 509.

(*f*) Johnson *v.* Latham, 19 L. J. Q. B. 329.

(*g*) Price *v.* Popkin, 10 A. & E. 139.

all proper and reasonable precautions and measures for preventing the water of the stream from being rendered unfit for the use of the plaintiff, and that all refuse waters from the defendant's works should, at the defendant's expense, be passed through filters, so as to be thereby effectually purified and cleansed, so far as the same could be purified and cleansed *by the ordinary and most approved process of filtering*. The court held the award bad, as uncertain, ambiguous, and not final, because it did not prescribe or ascertain in any way how the water was to be prevented from becoming unfit for the purposes of bleaching, or if rendered unfit, how it was to be purified and cleansed by the defendant; that the direction to use all proper and reasonable precautions did not at all point out to the defendant what he was to do; and that ordering him to purify the water by the use of the ordinary and most approved process of filtering was also insufficient, as it was not certain what the ordinary and most approved process of filtering was; and Lord Denman, C.J., added the following important observation: "It is said that the arbitrator would run great risk by setting out in his award what acts were to be done, because he might fail in directing them scientifically. But I think he runs a much greater risk of making an imperfect award, if he do not make himself scientifically master of the subject before him, so as to discover how justice may be dealt to the litigating parties. He is bound to understand the matters in dispute so accurately and fully, that the acts being done which he has prescribed, it may be clear that the award has been obeyed. The words in which the arbitrator describes what shall be done should be certain, and accompanied in his own mind with an understanding of what he prescribes" (*h*).

Duty of arbitrator as to matters of science.

Vague and imperfect directions in an award often lead to renewed litigation. Some commissioners, under an inclosure act, being empowered to set out public ditches, ordered the owners of lands over which a certain drain set out by them passed to cleanse and keep it "of sufficient width and depth to carry off the water intended to run down the same." Some years afterwards the plaintiff cut a sough or underdrain across his close, opening into the drain in question,

Not specifying capacity of drain.

(*h*) Stonehewer *v.* Farrar, 9 Jur. 203, S. C. 6 Q. B. 730.

PART II. CH. VIII. S. 2.

which in the part of it immediately below (where it ran across the defendant's lands) was not of sufficient capacity to carry off the additional water brought in by the sough. The plaintiff contended that it was the defendant's duty to make it sufficient for that purpose. The court, however, remarking that the award was lamentably vague in its terms in not explaining what water was intended to run down the drain, ultimately held that this method of draining by a sough or under-drain not being contemplated by the award, the defendant was not required to make and keep the drain of the increased size and depth demanded (*i*).

Plan annexed to award.

It is often very advantageous for the arbitrator to make a plan or map on his award (or annexed to it and referred to by words incorporating it), so as to show precisely what he intends to be done (*j*).

Coal Mines Regulation Act, 1872.

In an arbitration under s. 46 of the Coal Mines Regulation Act, 1872, the duty of the arbitrator is limited to determining whether the matter complained of by the inspector is dangerous and ought to be remedied, and he has no power to determine what is the proper remedy, or to direct that any particular remedy be adopted (*k*).

SECTION III.

OF DIRECTIONS AS TO ALLOTTING LANDS.

PART II. CH. VIII. S. 3.

Award under Inclosure, &c. Acts.

1. *Directions under Inclosure Acts.*]—As persons appointed under private acts of parliament for inclosing waste lands and commuting tithes have to decide on the various rights of parties interested, and to perform duties in many respects analogous to those of arbitrators, and are even sometimes so styled, some points respecting awards in such cases may here, it is apprehended, be noticed with advantage.

Allotment for right not extinguished by act.

Commissioners under an inclosure act have no power to make allotments in respect of other rights than those which

(*i*) Sharpe *v.* Hancock, 7 M. & G. 354.

(*j*) Johnson *v.* Latham, 20 L. J. Q. B. 236.

(*k*) Secretary of State and Fletcher, In re, 18 Q. B. D. 339.

are to be extinguished under the powers of the act, and for which allotments in compensation are provided to be given. Hence they are not justified in allotting to a lord of a manor a portion of the waste in lieu of his right to warren, such right not being mentioned in the act (*l*).

Specifying exchanged lands.

Where, besides allotting the common lands, they are empowered to assign lands in exchange for other lands, so that the exchange shall be ascertained by the award, the award will convey no title to a close assigned in exchange, unless it state in respect of what particular land the land assigned is given in exchange; for with a view to the charges affecting the original property, it is of extreme importance that the exchanges should be ascertained (*m*).

Reciting fact of proper consents.

If the act require the previous consent, in writing, of the respective proprietors to sanction the exchanges, it would seem advisable at least that the award should recite that such consents had been given (*m*).

Awarding to parish officers in succession.

When an inclosure act directed that the grass and herbage of the parcels set out for getting materials for the repair of the highway should remain for ever for the benefit of such persons as the commissioners should appoint, it was held that they were authorised to award the herbage to the surveyors of the highways of a certain parish, "and their successors for the time being;" for although the award was bad as a common law conveyance, the surveyors not being a corporation, it was good as a parliamentary declaration of the persons entitled to take the herbage, and had the same effect as if the direction had been inserted in the act (*n*).

Right of way.

A purchaser of a close which has a right of way attached to it over a waste about to be enclosed under the General Inclosure Act (8 & 9 Vict. c. 118), should take care to bring his claim to the way before the valuer. In one case where he did not, and the way was not set out in the award, it was held to be gone for ever; though the site of the old way was allotted to the vendor, who had sold the close with all rights of way, but had reserved his right to all allotments (*o*). The

(*l*) Casamajor *v.* Strode, 2 M. & K. 706.

(*m*) Cox *v.* King, 3 Bing. N. C. 795.

(*n*) Johnson *v.* Hodgson, 8 East, 38.

(*o*) Turner *v.* Crush, L. R. 4 App. Cas. 221.

owner of a private way set out by inclosure commissioners is not restricted in its use (*p*).

Specifying lands liable to tithe rent-charge.

If by a private act of parliament the estate of one proprietor in a parish be alone to be charged with the rent-charge in lieu of tithes, an arbitrator who has to ascertain the amount of the rent-charge, and to whom it is lawful to divide and apportion it into so many parts as he shall think fit, and to charge each such part on a distinct part of the estate, need not, unless he think fit to make an apportionment, specify what lands the proprietor has in the parish, but it is sufficient if his award charge the rent-charge in one entire sum "on all and every the lands and grounds" of the proprietor within the parish (*q*).

What a neglecting to make an award.

Under a private act of parliament, a commissioner was to allot waste land, and a specified arbitrator was empowered to declare by an award, within six months after the passing of the act, the amount of rent-charge to be paid in lieu of tithes, and the statute further provided, that in case he should neglect or refuse to act, another arbitrator should be nominated with like powers by a certain party; although the arbitrator assumed that he could not make an award before the inclosure commissioner had made his, and the latter had not awarded before the six months had expired, consequently the arbitrator did not make an award within the six months, though he did after they had expired, it was held that he had "neglected" to award within the meaning of the act, and an award made by an arbitrator afterwards appointed to supply his place was held valid (*r*).

Equity cannot rectify mistaken apportionment.

An award under an inclosure act appointed certain lands and rent-charges between the inhabitants of two parishes. It was held that Chancery had no jurisdiction to rectify the mistake if the apportionment were ultra vires (*s*).

Power of commissioners of partition.

II. *Directions in making partitions of lands.*]—Commissioners of partition appointed by the Court of Chancery being judges of the parties' own choosing, are looked upon by the

(*p*) Finch *v.* Great Western Rail. Co., 5 Ex. D. 254.

(*q*) Willoughby *v.* Willoughby, 4 Q. B. 687.

(*r*) Willoughby *v.* Willoughby, 9 Q. B. 923, S. C. 16 L. J. Q. B. 251. See also R. *v.* Grant, 14 Q. B. 43.

(*s*) Bateman *v.* Boynton, L. R. 1 Chanc. 359.

Court of Chancery in a light very similar to arbitrators; their proceedings are clothed with somewhat of the character of a reference; and the same principles which guide the courts in respect of arbitrators are, in a great measure, applicable to the consideration of the award of the commissioners (*t*).

As arbitrators are sometimes called upon to make partition of lands, it may not be inexpedient to consider the powers which the commissioners have for that purpose.

Awarding right of way.

It seems the latter are justified in awarding a right of way for one party to his own portion of the lands over the portions of the lands allotted to another party; or that one may enter the lands of the other for the purpose of repairing and cleansing watercourses: they may direct such new fences to be made as are reasonably necessary for dividing off the lands which are the subject of partition; and they may allot to one party as his lot the mansion-house and grounds, and also other lands at a distance from the house and grounds, and separated from it by lands allotted to another (*u*).

Erection of fences.

Separated lots to one party.

Arbitrator making partition must award conveyances.

When an arbitrator is appointed to make partition of lands among tenants in common, he must not only set out the separate portions for the respective parties, but must direct deeds of conveyance to vest the allotments in the several owners, or the award will not be final, and his duty will have been incompletely performed (*v*).

SECTION IV.

OF DIRECTIONS AFFECTING STRANGERS TO THE SUBMISSION.

1. *Directing a payment to be made to a stranger.*]—If an arbitrator direct a party to do a thing to a mere stranger to the submission, as to pay a stranger a sum of money, the direction is void; and the award will often be void also, as not being mutual, if the payment or thing to be done be in

Direction to pay money to stranger void.

(*t*) Jones *v.* Totty, 1 Sim. 136; Manners *v.* Charlesworth, 1 M. & K. 330; Story *v.* Johnson, 1 Y. & C. 538.

(*u*) Lister *v.* Lister, 3 Y. & C. 540.

(*v*) Johnson *v.* Wilson, Willes, 248; Knight *v.* Burton, 6 Mod. 231. See ante, s. 1, d. 7, p. 428.

satisfaction of the claims of the other party, for then the latter, if the award were held good, would lose his right without receiving any compensation (*w*).

When rest of award good.

The direction as to the stranger has often been held void, and the rest of the award sustained, where the courts have considered that the parties to the submission were not prejudiced, if the award as to the stranger were not complied with. Thus, where the award directed that the defendant should make a lease of certain land to the plaintiff for life, with remainder to a stranger in fee, the court held that though the award was void as to the remainder to the stranger, it ought to be performed as to the lease for life (*x*). So where there were disputes between the plaintiff and defendant respecting certain lands, an award that the plaintiff and his wife should enjoy the land was held void as to the wife, she not being a party to the submission (*y*). So, also, a direction to pay ten shillings to the writer of the award was held bad and void (*z*).

Direction valid when for party's benefit.

The award, however, is held to be mutual, if the thing to be done to the stranger to the submission be beneficial to the party entitled to receive satisfaction; and on this principle, it is said, if the arbitrator direct, that one party shall pay money to the servant of the other (*a*), or that the defendant shall pay a sum to a stranger to discharge money owing to the latter by the plaintiff, the award may be sustained (*b*).

To pay stranger for use of party.

To pay a joint debt.

An award to pay a sum of money to two part-owners of a ship for the use of themselves and the rest of the part-owners and mariners parties to the submission is good (*c*). So an award that the parties shall in certain proportions discharge a debt by bond in which they are jointly bound is valid although the obligee be no party to the submission (*d*). And

(*w*) Dale *v.* Mottram, 2 Barnard, 291.

(*x*) Bretton *v.* Prat, Cro. Eliz. 758; Pope *v.* Brett, 2 Saund. 292. See also Rous *v.* Lun, 1 Keb. 569; Alsop *v.* Senior, 2 Keb. 707, 718; Anon. 1 Leon. 316.

(*y*) Samon's case, 5 Rep. 77, b.; Samon *v.* Pit, Rolle Ab. Arb. B. 7, p. 243.

(*z*) Busfield *v.* Busfield, Cro. Jac. 577.

(*a*) Dudley *v.* Mallery, 3 Leon. 62; Norwich *v.* Norwich, 3 Leon. 62.

(*b*) Bedam *v.* Clerkson, 1 Ld. Raym. 123; Rolle Ab. Arb. E. p. 247.

(*c*) Wood *v.* Thompson, Rolle Ab. Arb. F. 11, p. 249.

(*d*) Gray *v.* Gray, Rolle Ab. Arb. E. 6, p. 247.

so, it seems, is a direction that one of two joint owners of a vessel shall discharge a debt due to a stranger for things supplied to the vessel, though a stranger cannot have an attachment to enforce payment (*e*). But the party is bound to pay the stranger according to the award, and if the latter die, payment must be made to his personal representative, whether the award order payment to the stranger only, or use the words to the stranger or his assigns (*f*).

Stranger dying, payment to his executors.

In one case, Holt, C. J., said that an award to pay a stranger, without showing that the payment was any benefit to the party, was good, as it should be presumed that the payment was for the party's benefit. Powell, J., on the contrary, was of opinion that it was void, unless the advantage to the party appeared on the face of the award; he, however, agreed that the benefit sufficiently appeared in an award on a submission between two brothers, which directed each of them to pay a certain sum to a stranger for the use of their mother (*g*). This view that the benefit to the party must appear on the face of the award has been more recently maintained in the Common Pleas (*h*).

Whether benefit need to appear on face of award.

It has been held that directing payment to a third person for the use of a party is good, even though the person to receive the money do not appear to be invested with any express authority by the party for whom the money is to be paid (*i*). And on a dispute between two partners, principally as to whether one of them had brought in his proper share into the stock, the arbitrator was considered justified in awarding that the one who was deficient should pay a sum of money into the hands of a person, who was agent for the partners, in trust for both partners, and for the benefit of the partnership (*k*).

Stranger not expressly authorised to receive.

Agent of firm.

On the reference of a cause, directing the defendant to pay the sum due "to the plaintiff, or to A. his solicitor," is a convenient and right form of awarding (*l*).

To pay to plaintiff or his solicitor.

But when on a reference of partnership disputes the award directed that some of the parties to the reference should pay

Payment to arbitrator for party's benefit.

(*e*) Skeete, In re, 7 Dowl. 618.
(*f*) Anon. 1 Leon. 316.
(*g*) Bird *v.* Bird, 1 Salk. 74.
(*h*) Laing *v.* Todd, 13 C. B. 276.
(*i*) Snook *v.* Hellyer, 2 Chitt. 43.
(*k*) Dale *v.* Mottram, 2 Barnard, 291.
(*l*) Hare *v.* Fleay, 11 C. B. 472.

certain amounts found due from them into the hands of one of the arbitrators, to be by him applied in the payment of certain specified debts due from the firm, the court held the direction bad, and the whole award void, although it appeared by the award that the payments would have been for the benefit of the parties; since the arbitrators who directed the payments had no control over the single arbitrator, to compel him to a due application of the money (*m*).

Award defendant to pay arbitrator, who is to pay over to plaintiff.

An award ordering a defendant to pay a sum to one of the arbitrators, to be by him immediately paid over to the plaintiff, was held good in the Courts of Exchequer and Exchequer Chamber. The rule was stated by Patteson, J., in error, to be, that an award directing a party to pay money to a stranger is not good, unless it be for the benefit of one of the parties to the submission, and that the onus of showing that is thrown on the party seeking to enforce the award. It was considered in both courts that the benefit to the plaintiff sufficiently appeared (*n*). The case of *Mackay, In re* (*o*), was distinguished on the ground that there the defendant could not have discharged himself by paying the money directly to the plaintiff, which, as Patteson, J., observed, would no doubt have satisfied the award in the present case.

Directing stranger to do an act void.

II. *Directing a stranger to do an act.*]—A direction in an award that a stranger shall do an act is in general void, because another in his natural freedom is not supposed to be within the party's power (*p*). On this principle an award that the defendant shall enter into a bond to the plaintiff with sureties conditioned for the payment of money at a future day is void as to the sureties (*q*); so an award that the defendant and one of the arbitrators shall enter into a bond to the plaintiff is void as to the arbitrator (*r*); so likewise directions that a party to the reference and his wife

Bond with sureties.

Arbitrator to be surety.

Wife to convey.

(*m*) Mackay, In re, 2 A. & E. 356.

(*n*) Adcock *v.* Wood, 6 Ex. 814; Wood *v.* Adcock, S. C. in error, 7 Ex. 468.

(*o*) 2 A. & E. 356.

(*p*) Bac. Ab. Arb. E. 4; Mudy *v.* Osam, Litt. 30.

(*q*) Cooke *v.* Whorwood, 2 Saund. 377; Rolle Ab. Arb. F. 2, p. 248; Norwich *v.* Norwich, 3 Leon. 62; Thursby *v.* Helbert, Carth. 159, S. C. 1 Show. 82; Moore *v.* Bedel, Rolle Ab. Arb. B. 5, p. 247.

(*r*) Pits *v.* Wardal, Godb. 164.

and son (the two latter not being parties) shall convey an estate (*s*); or that a party shall deliver up a deed or a house stated to be in the possession of another (*t*); or that a stranger shall pay the costs of the reference (*u*), are all void. So we have just seen, that directing one of the arbitrators to apply the money awarded to be paid into his hands by the parties, as the award ordered it should be applied, is void, as the other arbitrators have no means of enforcing the proper application of the fund (*x*).

To deliver deed not in possession.

Stranger to pay costs.

Arbitrator to apply funds.

Where an arbitrator was authorised to deal with the rights of the parties under existing or any future patents, it was held that he had exceeded his authority by giving directions in such wide terms; that they applied to any patents in which the alienee of a licensee under the award might become interested (*y*).

Assignee of a patent.

But if it appear that the party has any means either at common law or equity to compel the stranger to perform the act which he is directed to do, the award is good (*z*).

Direction valid where stranger bound to obey.

Therefore, an award that one of the parties shall discharge the other of a bond in which both are bound to a stranger, is a good award, for it shall be intended that the money was to be paid at a day to come, and therefore the party directed might then tender it and acquit the other; and if the day of payment be past he may pay the penalty and compel the creditor to give a release in a court of equity (*a*). So an arbitrator may order one of the parties to discharge the other from his undertaking to pay a debt to a third person not a party to the submission; for when the debt is paid the stranger can be compelled in equity to give a release to him that had undertaken to pay it (*b*).

To give release.

An arbitrator empowered to say whether a promissory note

Direction to

(*s*) Barney *v.* Fairchild, Rolle Ab. Arb. E. 10, p. 248, N. 9, p. 259.

(*t*) Lee *v.* Elkins, 12 Mod. 585; Lane *v.* Tanner, cited in Dale *v.* Mottram, 2 Barnard, 291.

(*u*) Proudfoot *v.* Poile, 3 D. & L. 524.

(*x*) Mackay, In re, 2 A. & E. 356. See the previous division, p. 445.

(*y*) Nickels *v.* Hancock, 7 De G. M. & G. 300.

(*z*) Com. Dig. Arb. E. 13; Phillips *v.* Knightley, Fitzg. 272; Dudley *v.* Mallery, 3 Leon. 62; Lynch *v.* Clemence, Lutw. 571; Rolle Ab. Arb. F. 1, p. 248.

(*a*) Bradsey *v.* Clyston, Cro. Car. 541, S. C. Bac. Ab. Arb. E. 4; Anon. March, 18.

(*b*) Beckett *v.* Taylor, 1 Mod. 9, S. C. 2 Keb. 546, 554.

cancel note on condition that stranger should not seek for costs.

of the plaintiff and his daughter (who was not a party to the reference), on which the defendant had commenced an action, should be cancelled, and on what conditions, awarded that it should be cancelled, on condition that neither the plaintiff nor his daughter should seek to compel the defendant to proceed with the action, or pay the costs of it; the court held that the defendant could not object to the condition, as it was for his benefit, and that he might keep the note, unless the daughter agreed to the terms (*c*).

When stranger merely ministerial.

It is said, that an award that one should surrender his copyhold into the hands of the tenants of a manor who should present it, or that one party should cause a feoffment to be made with a letter of attorney to J. S. to make livery, was good, on the ground that the tenants in the former and J. S. in the latter case, though strangers to the reference, were to be used only as instruments (*d*); but where the submission is respecting the right, title, and possession of certain land, the arbitrator has no authority to award that one of the parties shall procure the lord of the manor to grant a copyhold, or a stranger to make a release or a confirmation (*e*).

Directing act by the court. To levy fine.

The old cases say that an award to levy a fine was valid, for though it was an act of the court, yet by the law and public justice of the kingdom it was not to be refused to any man; but if the award were to command the justice to do it, this, it was said, was no good award, for the parties in effect prayed leave to agree from the king himself, which was quite different from a command (*f*). An award to make a discontinuance of an action was good, for though the discontinuance were the act of the court, yet the default on which it necessarily proceeded was the act of the party. The same principle applied in the case of a direction to submit to a nonsuit or to enter a retraxit (*g*).

Discontinuance.

Nonsuit retraxit.

Party submitting on behalf of a stranger.

If a person submit to an award on the part and behalf of a stranger, the arbitrator has full authority to direct an act to or by the stranger; not that he can bind the stranger himself by the award, but the party, when submitting on behalf of another, incurs the penalty of disobeying the

(*c*) Kirk *v.* Unwin, 6 Ex. 908.
(*d*) Coote *v.* Pooley, Rolle Ab. Arb. E. 7, p. 247.
(*e*) Anon. F. Moore, 3 pl. 11.
(*f*) Bac. Ab. Arb. E. 4; Rolle Ab. Arb. F. 3, 4, pp. 248, 249.
(*g*) Com. Dig. Arb. E. 13; Rolle Ab. Arb. F. 7, p. 249.

award, if that other fail to do what the award requires him (*h*).

III. *Directions affecting a stranger's property.*]—As the submission only refers to the arbitrator questions between the parties, the moment he touches the interests of strangers, he exceeds his authority (*i*). Award on stranger's property void.

A direction, however, to pay money at the house of a stranger is good; for the party ordered to pay can come to the house without entering it, and a payment as near to the house as can be is, it seems, sufficient, and so the party can obey the award without being guilty of a trespass (*k*). But if the payment is to be on the land of a stranger, or at the house, and the owner of the house has the adjacent land, so that the party cannot go there without committing a trespass, the direction is void (*l*). In an old case, where money was awarded to be paid in the bishop's palace, it was held a good award, for it was said a licence would be intended, especially as in the particular case the bishop himself made the award (*m*). Award to pay at stranger's house.

Where the arbitrator ordered some bankers, parties to the reference, to pay to the other party, the defendant, out of funds in their hands belonging to a firm of which the defendant was a member, a certain sum, stated to be the amount of a debt due to the defendant from his partners, these latter not being parties to the submission, the direction was held invalid (*n*). Directing payment out of stranger's funds.

Under the power to say what should be done, an arbitrator must be cautious in directing a party to do anything to property in which strangers are interested.

Where the award, under a clause empowering the arbitrator to direct what should be done, ordered a party to put up a stile and footbridge on land which appeared by the affidavits to belong to a stranger, the court set the award Directing something to be done on stranger's land.

(*h*) Shelf *v.* Baily, 1 Com. Rep. 183; Bacon *v.* Dubarry, 1 Ld. Raym. 246; Cayhill *v.* Fitzgerald, 1 Wils. 28, 58; Adams *v.* Statham, 2 Lev. 235; Browne *v.* Meverell, Dyer, 216 b.

(*i*) Turner *v.* Swainson, 1 M. & W. 572.

(*k*) Lynsey *v.* Aston, Rolle Ab. Arb. E. 2, p. 247, S. C. 2 Bulst. 38; Anon. 1 Keb. 92; Bac. Ab. Arb. E. 4.

(*l*) Taverner *v.* Skingley, Rolle Ab. Arb. E. 3, p. 247.

(*m*) Horton *v.* Benson, Freem. 204.

(*n*) Ingram *v.* Milnes, 8 East, 444.

aside so far as regarded that provision; although it was sworn that no doubt the owner of the land would have granted permission to enter it for that purpose, and it did not appear that any attempt had been made to obtain his permission; they added, however, that the award would have been sufficient if the terms had been conditional, namely, to do the acts required, provided the owners and occupiers of the land should consent (*o*). And it seems the award need not be conditional, if it can be gathered from the agreement of reference that there was an undertaking on the part of the party ordered to do the act on the stranger's land to procure the consent of the owner and occupier of the land (*p*).

Good if conditional on consent had.

Directing repairs.

Ordering a person to repair a river bank not his own property, nor a place to which he has a right to go for the purpose of executing repairs, is an invalid direction (*q*).

When a reversioner complains of an injury to his house, though the arbitrator under the clause in question cannot order the parties to do anything to the house without, it seems, being liable himself to an action of trespass if his orders be obeyed, when the tenant of the injured premises is no party to the reference, yet he may (and if the submission be compulsory, it seems, he should) direct the defendant to do some act to remove the grievance, conditionally if the consent of the tenant can be obtained, or at all events at the end of the term, or he may order some compensation to the plaintiff in respect of the continuance of the injury (*r*).

Directing tenant to commit waste.

Under a like power, where the arbitrator ordered the defendants, who were lessees of a water-mill, to make a tumbling bay on the land in their tenancy for the discharge of the water injuring the plaintiff's land, the court held that if the defendant had been seised in fee of the land the direction in the award would have been perfectly good, but that the power given to the arbitrator to determine what he should think fit to be done must be confined to reasonable acts, and that as the making a tumbling bay on the land held by them as tenants would render them liable to be sued

(*o*) Turner *v.* Swainson, 1 M. & W. 572.

(*p*) Nicholls *v.* Jones, 6 Ex. 373.

(*q*) Lewis *v.* Rossiter, 44 L. J. Ex. 136.

(*r*) Angus *v.* Redford, 2 Dowl. N. S. 735, S. C. 11 M. & W. 69.

by their landlord for waste, the award was void as to that direction, but good as to the rest (*s*).

Party and stranger jointly interested in property.

Though to direct a party to meddle with property, with which he has no right to interfere, is an excess of authority, yet where an award ordered the defendant to remove from a river certain hatches, two of which were the defendant's own property, while in the third he had only a share, and also further provided that the directions in the award should refer only to such interest as the defendant should have in the hatches, the court enforced the award by attachment, saying, that though the direction as to the hatch in which the defendant had only a share might be nugatory, the award as to the hatches of which the defendant was sole owner was to be obeyed (*t*).

Showing in the award direction as to stranger justified.

Whenever an arbitrator embodies in his award a direction as to anything to be done by a stranger to the submission, or affecting the property of a stranger, which primâ facie would appear to be exceeding his authority, he is recommended to state on the face of the award sufficient facts to enable the court to see that he is justified in giving such directions. Where an arbitrator awarded that the defendants had no title to a certain roadway, but that they should have and enjoy another road which ran in a different direction (not saying over whose lands), the court held the award bad, as it did not appear by the award that the defendants had any legal title to the road granted them, the award not stating that the ground of the road belonged to either of the parties (*u*).

(*s*) Alder *v.* Savill, 5 Taunt. 453.

(*t*) Doddington *v.* Bailward, 7 Dowl. 640.

(*u*) Harris *v.* Curnow, 2 Chitt. 594. See Turner *v.* Swainson, 1 M. & W. 572; semble contrà.

CHAPTER IX.

THE AWARD UNDER THE LANDS CLAUSES CONSOLIDATION ACT, 1845.

Awarding under the Lands Clauses Consolidation Act.

IN this chapter, the provisions of the Lands Clauses Consolidation Act, 1845 (*a*), respecting awards under that act, and the substance of the various decisions on that point, have been endeavoured to be collected. To what matters the reference should be limited, and how the arbitrator should be appointed, has been previously discussed (*b*).

(1.) PROCEEDINGS AND AWARD UNDER THE LANDS CLAUSES CONSOLIDATION ACT.

References within the provisions of the Lands Clauses Consolidation Act, 1845, to settle the amount of compensation to be paid to parties for lands taken under the authority of parliament for the purpose of a public undertaking, arise out of a notice to treat by the promoters. This notice binds the promoters like an agreement to purchase, and binds the landowner also. Each must abstain from altering his position. Any interest subsequent to service of the notice to treat acquired by or from the person on whom the notice to treat has been served is not a subject for compensation.

Notice to treat by promoters.

Requisition under Artisans, &c. Dwellings Improvement Act.

The publication of the requisition under s. 6 of the schedule to the Artisans, &c. Dwellings Improvement Act, 1875 (*c*), specifying lands wanted for the improvement, is equivalent to a notice to treat under the Lands Clauses Act (*d*), which is substantially incorporated.

Service.

The service of the notice must be in the manner which the Lands Clauses Act directs (s. 18). Service on an agent appears to be insufficient to bind the principal or to found a valid arbitration (*e*).

(*a*) 8 & 9 Vict. c. 18. See Appendix of Statutes.

(*b*) See P. I. ch. 3, s. 7, d. 5, p. 95.

(*c*) 38 & 39 Vict. c. 36. Repealed by The Housing of the Working Classes Act, 1890, 53 & 54 Vict. c. 73.

(*d*) Wilkins *v.* Mayor of Birmingham, 25 Ch. D. 78.

(*e*) Shepherd *v.* Norwich Corporation, 30 Ch. D. 553.

The party whose lands will be taken or injuriously affected by the erection of the works, is expressly required in his notice to the promoters, signifying his desire for arbitration, to state the nature of the interest in respect of which he claims compensation, and the amount of compensation so claimed [ss. 23, 68].

Claim for compensation must state nature of interest.

That notice should contain the particulars of his estate and interest in the premises, and give such reasonable information as will enable the promoters to decide what sum they will offer in respect of his interest, or else it will be invalid (*f*). The costs of the arbitration depend on whether the arbitrators award a greater amount than that offered by the promoters [s. 34].

The question which the arbitrators are appointed to decide [s. 25], is not the amount of compensation generally, but the amount of compensation in respect of the interest stated in the claim. Giving compensation in respect of a different interest from that claimed, is awarding in respect of a matter not submitted, and consequently an excess of authority (*g*).

Arbitrators cannot go beyond claim.

The court will not grant an injunction to stay proceedings by a party claiming compensation by arbitration in the name of a person who had given no authority to use it: for the award would be a nullity, and could hurt no one (*h*).

No injunction.

The arbitrators are not to decide any question of title (*i*). The statute intends the award to be final and conclusive on the matters on which the arbitrators have to decide, namely, the amount of compensation; and it is clear that the promoters are not bound by the arbitrators' awarding in respect of a claim to make any compensation to the party, if he have no real title (*k*). For if, on tender of the purchase-money or compensation awarded, the party "neglect or fail to make out a title to such lands, or to the interest therein claimed by him, to the satisfaction of the promoters of the undertaking,"

Arbitrators not to try title.

Party failing to make title deposit of compensation in the bank.

(*f*) Healey *v.* Thames Valley Rail. Co., 34 L. J. Q. B. 52.

(*g*) Rhys *v.* Dare Valley Rail. Co., 37 L. J. Ch. 719, S. C. L. R. 6 Eq. 429. See Bradshaw's Arbitration, 12 Q. B. 562.

(*h*) London & Blackwall Rail. Co. *v.* Cross, 31 Ch. D. 354; Farrar *v.* Cooper, W. N. (1890), 69.

(*i*) Brandon *v.* London, Chatham, and Dover Rail. Co., 34 L. J. N. S. Ch. 333.

(*k*) Wilkins *v.* Mayor of Birmingham, 25 Ch. D. 78.

the latter may "deposit the purchase-money or compensation payable in respect of such lands, or any interest therein, in the Bank in the name of the Accountant-General," &c., "to be placed there to the credit of the parties interested in such lands (describing them as far as the promoters of the undertaking can do), subject to the control and disposition" of the court of equity [s. 76].

On deposit estate to vest in promoters.

This course relieves the promoters from deciding any question of title, for after such deposit, on executing a certain deed poll, "all the estate and interest in such lands of the parties for whose use and in respect whereof such purchase-money or compensation shall have been deposited, shall vest absolutely in the promoters of the undertaking, and as against such parties they shall be entitled to immediate possession of such lands" [s. 77].

If the party claims a larger interest than he has, the Court of Chancery, using its own machinery, will find out the true value of the claimant's interest, and repay the surplus to the promoters (*l*).

Title to be assumed when claim under s. 68.

In cases under section 68, of claims for compensation made after the promoters have taken or injuriously affected the lands (*m*), the same particularity is required in the notice of claim (*n*), and it is clear by the language of the section, that it is only the person *entitled to compensation* who can benefit by the award; but it has been decided, after much consideration, that the complainant must be assumed by the arbitrator to have the title he professes, and that it is not the arbitrator's province to try the question of title. Though the whole proceeding will be coram non judice, if there be no title, yet the inquiry must be made as if there were; for the statute in effect ordains, that the assessment of compensation shall be made first, and afterwards the inquiries before the ordinary courts, as to the title of the claimant (*o*). The promoters, therefore, are not in any way concluded by contesting

(*l*) Brandon *v.* London, Chatham, and Dover Rail. Co., 34 L. J. N. S. Ch. 333.

(*m*) As to what claims are within s. 68, see Broadbent *v.* The Imperial Gaslight Co., 26 L. J. Ch. 276, S. C. 7 De G. M. & G. 436, in H. L. 29 L. J. Ch. 377, S. C. 7 H. L. Cases, 600.

(*n*) Healey *v.* Thames Valley Rail. Co., 34 L. J. Q. B. 52.

(*o*) The Queen *v.* The London and North Western Rail. Co., 23 L. J. Q. B. 185; The Queen *v.* The Metropolitan Commissioners of Sewers, 1 E. & B. 694.

the amount of compensation and appointing an arbitrator, especially if they do so under protest; and equity will not restrain the claimant from proceeding by arbitration until he makes out his right to compensation (*p*).

Promoters may contest that claimant has sustained any damage.

Where a jury had assessed a large compensation, and the promoters pleaded to an action on the inquisition and judgment, that the plaintiff's interest in the premises had not been damaged, such plea was held good. But a plea that the plaintiff was not entitled to compensation exceeding 50*l.* was held bad, and said to be good only when the compensation claimed does not exceed 50*l.* (*q*).

And where an arbitrator awarded that the plaintiff's premises had been injuriously affected, by raising an embankment and narrowing the road in front of the premises, to the amount of 80*l.*, a plea that the premises had not been injuriously affected by the narrowing the road was supported by the court (*r*).

Award no evidence.

On a plea that the compensation awarded was in respect of matters not the subject of compensation, the award seems not to be any evidence that the compensation awarded was in respect of matters which were subjects of compensation (*s*).

Party claiming greater title than he has.

Under provisions in a railway act, somewhat similar to those of the Lands Clauses Consolidation Act, 1845, leasehold property, professed to be sold by the lessee, was held in equity to vest in the railway company, although a party claimed as under-tenant to be entitled to an apportioned part of the price, and the court directed an issue as to his interest and the proportionate value of it (*t*).

Under Sewers Act, and Public Health Act.

It may here be noticed, that under ss. 69, 70, of the Metropolitan Sewers Act, 1848 (11 & 12 Vict. c. 112) (*u*), and under the Public Health Act, 1875 (38 & 39 Vict. c. 55) (*x*),

(*p*) The Sutton Harbour Improvement Co. *v.* Hitchens, 1 De Gex, M'N. & G. 161.

(*q*) Read *v.* The Victoria Station and Pimlico Rail. Co., 32 L. J. Ex. 167. See Barber *v.* The Nottingham Canal Co., 15 C. B. N. S. 726.

(*r*) Beckett *v.* Midland Rail. Co., 35 L. J. C. P. 163, S. C. L. R. 1 C. P. 241.

(*s*) Rhodes *v.* Airdale Drainage Commissioners, 1 C. P. D. 402.

(*t*) Issauchaud, Ex parte, 3 Y. & C. 721. See as to tenant for a term of years selling the fee by mistake, Jones, Ex parte, 4 Y. & C. 466.

(*u*) The Queen *v.* The Metropolitan Commissioners of Sewers, 1 E. & B. 694.

(*x*) West *v.* Downman, 14 Ch. D. 111; The Queen *v.* The Burslem Local Board of Health, 1 E. & E. 1077.

it was said that power was given to compel an arbitration in those cases only where the mere amount of compensation is in dispute; not in cases where the liability to make any compensation is denied.

Under Public Health Act, 1875, amount may be settled before liability.

But it is now decided that if a claim is made under the Public Health Act, 1875, the arbitrator, notwithstanding that the local authority dispute their liability to compensate, must proceed as in case of a claim under section 68 of the Lands Clauses Act. He must assess the amount of compensation. The parties who dispute their liability may raise the question of liability by way of defence to an action on the award (*y*). Mere refusal to acknowledge the jurisdiction of the arbitrator will not take away his authority; some primâ facie reasonable ground for disputing it must be shown (*z*).

Apportionment by equity of compensation deposited.

Under the Lands Clauses Act the parties interested may try the question of title in equity, for on petition of any party making claim to the money deposited, or to the lands in respect of which it is deposited, or any interest in the same, the court may order the money to be invested in the funds, or may order distribution thereof, or payment of the dividends thereof, according to the respective estates, titles or interests of the parties making claim to such moneys or lands [s. 78].

Arbitrator not empowered to try whether claim to easement well founded.

In *The Queen* v. *The London and North-Western Railway Company* (*a*), above cited, a distinction was taken by Erle, J., between the title to the land and the rights belonging to it. The company had by their works permanently obstructed a private way claimed by certain parties as belonging to them as lessees of certain premises. The company denied the existence of the way. Erle, J., was of opinion that though an arbitrator, or jury, to assess compensation under section 68, could not inquire into the title of a claimant to be the party to receive compensation, if any, yet that an arbitrator or jury had jurisdiction to try the question of the existence of the right of way, as incidental to the question of the amount of compensation. But the majority of the court held that the tribunal to assess compensation had no authority

(*y*) Brierly Hill Local Board *v.* Pearsall, 9 App. Ca. 595.

(*z*) Burgess *v.* Northwich Local Board, 37 L. T. N. S. 355.

(*a*) 23 L. J. Q. B. 185.

to try the right of way; and that its power was limited to assessing compensation according to the nature of the claimant's interest set out in his notice of claim. Such tribunal has no right to try the question whether the claimant's premises, which have sunk by reason of the excavation for a railway, had a right to the support of the adjacent soil (*b*).

Though legality of claim doubtful, arbitrator should assess compensation.

Another case of difficulty may occasionally arise. A claimant may claim compensation for some alleged injury in respect of which it is doubtful whether any compensation is intended by the act to be allowed. Is the arbitrator to determine whether the injury is too general or too remote to give a legal right to compensation? For instance, suppose a claim has been made for compensation by a resident in a street, permanently stopped up by the works of a railway authorized by the act, to his damage; or by a shopkeeper, when the works partially impede the access of customers to the shop (*c*); or by some brewers against a dock company for polluting the water of a river which they had used for making their beer (*d*). It would seem to be the opinion of Lord Cranworth, C., and Lord Truro, C., that if the arbitrator found against the claimant in such cases as to the right to compensation, the decision would be final, but if it were in his favour, that it would be open to review on the part of the promoters (*e*).

In a case like the first instance put, Lord Cottenham, C., assumed that it was not the province of a jury (and the same principle applies equally to an arbitrator) to consider the legality of the claim, but simply to assess compensation, assuming it to be legal (*f*). The better course, therefore, it is suggested, is, that the arbitrator should assess the compensation, treating the claim as good in law, and let the parties afterwards discuss the legality of it, as they may be advised. Sometimes, under a claim clearly in its terms within the act, grounds for compensation may be set up under the general

(*b*) R. *v.* The Metropolitan Rail. Co., 32 L. J. Q. B. 367.

(*c*) The East and West India Docks, &c. Railway *v.* Gattke, 3 McN. & G. 155.

(*d*) The King *v.* The Bristol Dock Co., 12 East, 429.

(*e*) The Queen *v.* The London and North Western Rail. Co., 23 L. J. Q. B. 185, per Erle, J.

(*f*) The London and North Western Rail. Co. *v.* Smith, 1 McN. & G. 216.

words, which may possibly or probably be beyond it. In such case it would be advisable for the arbitrator to make an assessment of compensation in respect of the doubtful claim, separate from the amount given in respect of the other matters, so that if it should turn out to be an excess, the rest of the award might not be vitiated.

Test whether land injuriously affected.

To entitle a claimant to compensation under the Lands Clauses Consolidation Act, 1845, and Railway Clauses Consolidation Act, 1845, for injury to his land caused by works where the promoters have not taken any of his land, he must show that he has sustained a particular damage from the execution by the company of the works authorized by the special act, and that the damage is one for which he might have maintained an action, if the work had not been authorized by parliament; and further, that the injury of which he complains is an injury to his estate, and not a mere obstruction or inconvenience to him personally or to his trade, although it might have been the subject of an action, if the works which occasioned it had not been executed under the sanction of parliament. And the damage must be one which is sustained in respect of the property itself, and not in respect of any particular use to which it may from time to time be put (*g*). If no action would have lain, no claim for compensation is maintainable (*h*). Thus, when no land of the claimant is taken, no claim is sustainable for the annoyance caused by a railway embankment overlooking his house and gardens, such being not an injury in law to the lands, but only an annoyance to the amenities of his pre-

Amenities.

mises (*i*); nor for cutting off by an embankment convenient access to a public dock or place for drawing water at some distance from the house, by which the value of the premises

(*g*) Beckett *v.* Midland Rail. Co., L. R. 3 C. P. 82, S. C. 37 L. J. C. P. 11; Rhodes *v.* Airdale Drainage Commissioners, 1 C. P. D. 380, S. C. 45 L. J. C. P. 337.

(*h*) The Queen *v.* The Eastern Counties Rail. Co., 2 Q. B. 347, S. C. 11 L. J. Q. B. 66; Broadbent *v.* The Imperial Gas Light Co., 26 L. J. Ch. 276, S. C. 7 De G. M. & G. 436; Chamberlain *v.* The West End of London and Crystal Palace Rail. Co., 31 L. J. Q. B. 201, S. C. 2 B. & S. 605; in error, 32 L. J. Q. B. 173; Glover *v.* The North Staffordshire Rail. Co., 16 Q. B. 912; The Caledonian Rail. Co. *v.* Ogilvy, 2 Macq. 229; Glasgow Union Rail. Co. *v.* Hunter, L. R. 2 Scotch App. 78.

(*i*) Penny *v.* The South Eastern Rail. Co., 26 L. J. Q. B. 225, S. C. 7 E. & B. 660.

is not diminished (*k*). But if such access is precluded by an embankment made on a highway, under the powers of the act, and the premises are thereby permanently depreciated in value, they are injuriously affected, within section 68, and compensation may be given (*l*). Nor can damages be given for a personal annoyance; as, for instance, for the personal inconvenience caused to a gentleman by a railway crossing a public road very close to the entrance to his grounds (*m*). On the like principle, no compensation is claimable for loss of custom to a public house by the company's pulling down neighbouring houses (*n*); nor for drawing off water from a well, nor for diverting water percolating through the earth (*o*); nor for diverting the profits of an ancient ferry by erecting a bridge near to it carrying a railway over the river (*p*).

Annoyance.

The converse of the proposition, that compensation may be given in all cases where an action would have lain but for the special act, is generally but not universally true (*q*).

If a railway company block up a highway, and make a deviation way, so that a portion of the old road is thrown out of the general thoroughfare, and the access to a house situate on that portion is rendered less convenient, and a less number of persons pass by it, and the house is less suitable for the purpose of being used as a shop, and the value of the house is thereby diminished, the lessee suffers such a special damnification above the rest of the public that he may claim compensation from the company (*r*).

Special damage from obstruction of highway.

A person is entitled to compensation if the company lower or raise by many feet the level of a high road, which bounds his premises, so as to render the access to them more incon-

(*k*) Reg. *v.* Metropolitan Board of Works, L. R. 4 Q. B. 358.

(*l*) McCarthy *v.* Metropolitan Board of Works, L. R. 8 C. P. 191, S. C. below, L. R. 7 C. P. 508.

(*m*) Caledonian Rail. Co. *v.* Ogilvy, 2 Macq. 229; Chamberlain *v.* The West End of London and Crystal Palace Rail. Co., 32 L. J. Q. B. 173.

(*n*) R. *v.* Vaughan, L. R. 4 Q. B. 190.

(*o*) The New River Co. *v.* Johnson, 29 L. J. M. C. 93.

(*p*) Hopkins *v.* Great Northern Rail. Co., 2 Q. B. D. 224, overruling Reg. *v.* Cambrian Rail. Co., L. R. 6 Q. B. 422.

(*q*) Caledonian Rail. Co. *v.* Ogilvy, 2 Macq. 229; Glasgow Union Rail. Co. *v.* Hunter, L. R. 2 Scotch App. 78.

(*r*) Chamberlain *v.* The West End of London and Crystal Palace Co., 31 L. J. Q. B. 201, S. C. 2 B. & S. 605, in error, 32 L. J. Q. B. 173.

venient (*s*), or narrow the road in front of his house, so as to render the house of less value (*t*).

It has, after much discussion, been decided in the House of Lords, that mere loss of profits to a shop by reason of the obstruction to a neighbouring highway caused by the railway works, which prevent the free access of customers, is not a ground of damage that can be taken into consideration as affecting the value of the premises (*u*).

Notwithstanding this decision of the House of Lords in *Ricket's case* (*x*), the Court of Common Pleas have sustained an award of compensation, where the arbitrator found that the company's works had obstructed the lights of the plaintiff's house, that it was thereby rendered less convenient for his trade, but that he had sustained damage to a certain amount in his trade only, and that the saleable value of his interest in the house was not diminished (*y*).

Interference with lights.

Interfering with ancient lights by the erection of the promoter's works is a ground of compensation under section 68 (*z*).

Railways Clauses Act.

A person whose house is injuriously affected by the execution of the powers of a railway company is entitled, under the Railway Clauses Consolidation Act, 1845, ss. 6, 16, to compensation for damage done to his goods in his house by the exercise of such power (*a*). So, where a company had darkened both ancient and modern lights, it was held that compensation might be given for the darkening of both classes (*b*).

(*s*) Moore *v.* The Great Southern and Western Rail. Co., 10 Ir. C. L. Rep. 46; The Queen *v.* The Eastern Counties Rail. Co., 2 Q. B. 347, S. C. 11 L. J. Q. B. 66; Tuohey *v.* The Great Southern and Western Rail. Co., 10 Ir. C. L. Rep. 98.

(*t*) Beckett *v.* Midland Rail. Co., L. R. 3 C. P. 82, S. C. 37 L. J. C. P. 11; R. *v.* St. Luke's, Chelsea, L. R. 5 Q. B. 572; R. *v.* Wallasey Local Board, L. R. 4 Q. B. 351.

(*u*) Ricket *v.* The Metropolitan Rail. Co., L. R. 2 H. L. 175, S. C. 36 L. J. Q. B. 205; below, 5 B. & S. 149, S. C. 34 L. J. Q. B. 257; and Cameron *v.* The Charing Cross Rail. Co., in error, 19 C. B. N. S. 764, overruling Senior *v.* The Metropolitan Rail. Co., 32 L. J. Ex. 225, S. C. 2 H. & C. 258; and Cameron *v.* The Charing Cross Rail. Co., 16 C. B. N. S. 430; Bigg *v.* Corporation of London, L. R. 15 Eq. 376.

(*x*) L. R. 2 H. L. 175, S. C. 36 L. J. Q. B. 205.

(*y*) Eagle *v.* Charing Cross Rail. Co., 36 L. J. C. P. 297.

(*z*) Bedford, Duke, *v.* Dawson, 44 L. J. Chanc. 549; Glasgow Union Rail. Co. *v.* Hunter, L. R. 2 Scotch App. 78.

(*a*) Knock *v.* Metropolitan Rail. Co., L. R. 4 C. P. 131, S. C. 38 L. J. C. P. 78.

(*b*) Gower's Walk Schools *v.* London, Tilbury, and Southend Rail. Co., 59 L. J. Q. B. D. 162.

Abstraction of water.

The abstraction by a waterworks company of water from a stream does not enable a riparian proprietor to require the company to treat for the purchase of his interest in the stream, but entitles him only to compensation as for land injuriously affected (*c*).

Injury from use of railway and works.

No action or indictment will lie for injury caused by carrying on the business of the undertaking in the absence of negligence or misconduct on the part of the company (*d*). But the question often has been raised whether the arbitrator may assess damages prospectively in respect of the likelihood of such injury occurring.

Damage foreseen.

Where, many years after an award had been made giving compensation, it appeared that houses had been cracked by the subsidence of the soil and otherwise injured by the constant vibration caused by the running of heavy trains, the Court of Queen's Bench refused to allow of an attempt to obtain further compensation, on the ground that the probability of such damage occurring to the building was so great, that it must have been foreseen, and that it must be taken that the arbitrator on the first inquiry gave compensation for it (*e*).

Vibration.

In one instance, where it was not necessary to decide the point, Lord Campbell, C.J., and Erle, J., intimated an opinion that an arbitrator assessing compensation under s. 68 of the Lands Clauses Act, ought to give compensation for an injury to a house from vibration caused by the running of the trains during the construction of the works; but not for injuries from vibration in working the line after the railway has been completed (*f*).

Vibration, noise, and smoke.

In a more recent case, it was found that no structural injury was or could be caused to the premises by the construction of the railway, but that by reason of the working of the railway after it had been opened for traffic, the premises were and would be subjected to vibration, noise, and smoke

(*c*) Bush *v.* Trowbridge Waterworks Co., L. R. 10 Ch. App. 459, S. C. 44 L. J. Ch. 645, S. C. below, L. R. 19 Eq. 291, S. C. 44 L. J. Ch. 235.

(*d*) R. *v.* Pease, 4 B. & Ad. 30, S. C. 2 L. J. M. C. 26; Whitehouse *v.* Birmingham Canal Co., 27 L. J. Ex. 25. But see London and North Western Rail. Co. *v.* Bradley, 3 Mac. & G. 336.

(*e*) Croft *v.* London and North Western Rail. Co., 32 L. J. Q. B. 113, S. C. 3 B. & S. 436.

(*f*) Penny *v.* South Eastern Rail. Co., 7 E. & B. 660, S. C. 26 L. J. Q. B. 223.

from passing trains, and were and would always be affected and depreciated in value thereby. It was held by the House of Lords, supporting the judgment of the Queen's Bench, and overruling that of the Exchequer Chamber, that the claimant was not entitled to compensation for injury arising from the working of the railway after its construction (*g*).

Compensation when land taken.

When land is taken compulsorily by promoters under their statutory powers, the arbitrator, in assessing the compensation in respect to the value of such land, should take into account, not only the present purpose to which the land is dedicated, but also any other such beneficial purpose to which, in the course of events at no remote period, it may be applied, just as an owner might do if he were bargaining with a purchaser in the market (*h*).

Larger elements of compensation.

And larger elements of compensation are admissible where a person's land is taken than when it is only injuriously affected; for by section 63 of the Lands Clauses Consolidation Act, 1845, the arbitrator, in estimating the purchase-money, is to have regard, not only to the value of the land to be purchased or taken by the promoters, "but also to the damage (if any) to be sustained by the owner of the lands by reason of the severing the lands taken from the other lands of such owner, or otherwise injuriously affecting such other lands by the exercise of the powers of this or the special act."

Increased risk of fire.

Thus an owner of a cotton mill, part of whose land was taken for a railway, was held entitled to compensation on account of the increased risk of fire to his mill from the near passage of the railway trains (*i*).

Cutting off springs.

And though draining the underground springs of water on a person's premises by making a cutting on land outside his property affords no ground of claim against the company (*k*), it has been laid down that compensation might be given if the cutting were on land taken compulsorily from the claimant by the company (*l*).

(*g*) Brand *v.* Hammersmith and City Rail. Co., L. R. 4 App. Cas. 171, S. C. 38 L. J. Q. B. 265, S. C. below, 7 B. & S. 1; 35 L. J. Q. B. 53. See Hopkins *v.* Great Northern Co., 2 Q. B. D. 224.

(*h*) R. *v.* Brown, 2 Q. B. D. 630.

(*i*) Stockport Rail. Co., In re, 33 L. J. Q. B. 251.

(*k*) The Queen *v.* Metropolitan Board of Works, 3 B. & S. 710, S. C. 32 L. J. M. C. 115.

(*l*) Buccleuch, Duke, *v.* Metropolitan Board of Works, L. R. 5 Ex. 221, per Blackburn, J., p. 250.

Goodwill. Trade profits.

When part of premises on which a business is being carried on is taken, the arbitrator in estimating the compensation may include a sum for the goodwill of the business, and may take the amount of trade profits as one of the elements for his consideration (*m*).

Depreciation of value of house from substitution of highway for river frontage.

The garden of Montagu House, belonging to the Duke of Buccleuch, had at one time a river frontage on to the Thames. The Metropolitan Board of Works, under their statutory powers, took away a causeway, part of the premises, which ran from the garden to low water mark in the river, and made an embankment, destined for a public road and highway, between the garden and the river.

It was held in the House of Lords, affirming the judgment of the Exchequer and reversing that of the Exchequer Chamber, that the plaintiff was entitled to compensation in respect of the taking away the causeway and landing-place, and the injury arising to the house and premises by depriving him of access to the river along the whole frontage; and also for the depreciation in value of Montagu House by the conversion of the land between it and the river, along the whole frontage, into a highway, and the consequent public use of it, entailing loss of privacy and increase of dust and noise (*n*).

Land taken, but injury arising from works on other land.

Where the owner of a house and back premises, part of which back premises had been taken by a railway company, claimed compensation in respect of the depreciation of his house by reason of the smoke and noise of trains running on land purchased from other persons in front of his house; it was decided by the House of Lords that he was not entitled to such compensation, since the injury did not arise from any works of the company on the land taken from himself, and that he consequently could only claim as for land injuriously affected under section 68, and that it had been determined in that house, in *Brand* v. *Hammersmith and City Railway Company* (*o*), that no compensation was maintainable in cases under that section for depreciation in value from the vibration, noise, and smoke caused by passing trains (*p*).

(*m*) Pile *v.* Pile, 3 Ch. D. 36.

(*n*) Buccleuch, Duke, *v.* Metropolitan Board of Works, L. R. 5 App. Cases, 418, S. C. below, L. R. 3 Ex. 306, on appeal, L. R. 5 Ex. 221.

(*o*) L. R. 4 App. Cas. 171.

(*p*) Glasgow Union Rail. Co. *v.* Hunter, L. R. 2 Scotch App. 78.

Sewer compensation.

In estimating the compensation to be awarded in consequence of a local board making a sewer across the claimant's land, the arbitrator may properly take into account the possibility that the board will, under the powers of the act, refuse him permission to build over the sewer, also that the sewer has been made in an inconvenient course, and at an inconvenient depth, and also that stenches may occasionally arise from the sewer (*q*).

Compensation to be given for necessary and probable damage.

Much consideration has been given to the question what matters the arbitrator should take into consideration in assessing the compensation by severance, or otherwise, occasioned by the railway, or other works constructed under the special acts.

In a case in the Queen's Bench, it was laid down that compensation "relates only to all damage known or contingent by reason of the construction of the railway on the lands purchased, and to other damage arising from the construction of the railway at other places, which was apparent and capable of being ascertained and estimated at the time when the compensation was awarded;" and that it did not "also embrace all contingent and possible damages which might arise afterwards by the works of the company at other places, and which could neither be foreseen nor even guessed at by the arbitrator" (*r*).

Relying on this decision, it was said, in the Exchequer, that if any injuries should hereafter arise, compensation might be obtained under section 68 of the act (*s*).

In the House of Lords, under the Scotch Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 19), where the arbitrator had awarded compensation for damage likely to be sustained in future from the water in the Clyde being penned back by the works of the company, and thereby damaging the land of the complainant, Lord Chancellor Campbell said, "It was contended that such prospective damage could not properly be included in the award; and that if any such damage should arise, the proper remedy would be an action against the company. But I am of opinion that the arbi-

(*q*) Uttley *v.* Todmorden Local Board, 44 L. J. C. P. 19.

(*r*) Lawrence *v.* The Great Northern Rail. Co., 16 Q. B. 643.

(*s*) In re Ware, Ex. 395. See Ware *v.* The Regent's Canal Co., 3 De G. & J. 222.

trator was bound to take into his consideration the damage to the land of the claimant likely to be produced by the works which the company were authorised to construct by virtue of an act of parliament, and that no future action could be brought against the company, except for negligence in the original construction of these works, or in the manner in which these works were kept in repair."

Lord Wensleydale also, with reference to the objection that the arbitrator had awarded prospective and contingent damages, said, "The answer is, that he really has not done so. The compensation given is for the necessary damages by the construction of the railway, and for the highly probable damages which would be occasioned in the ordinary course of events. It becomes, therefore, unnecessary to consider what would be the effect of awarding a sum for purely speculative damages not reasonably foreseen."

No future claim sustainable if unforeseen damage arise.

He further stated that, except in cases where by the special acts compensation might be given from time to time (*t*), the price should be a full compensation once for all for the injury to the landowner's rights; and that if afterwards unforeseen damage accrued to the landowner by the reasonable exercise by the company of the rights given to them by the statutes, no action would lie, and no fresh claim for compensation could be sustained; and he doubted the soundness of the observation cited from *Ware, In re*, 9 Ex. 395, that compensation might be obtained under section 68 for such future injuries, saying that it was a mere extra-judicial dictum (*u*).

And in a case (*x*) in the Exchequer Chamber, Erle, C.J., said, that "it is well known in law that a party must make one claim for damages, once for all, for all damages that can be reasonably foreseen, and have one inquiry, and one compensation."

Even if damage subsequently accruing be such as it was not possible to have anticipated, there seems very great doubt whether a fresh compensation can be obtained (*y*).

(*t*) The King *v.* Leeds and Selby Rail. Co., 3 A. & E. 683; Lee *v.* Milner, 2 M. & W. 839.

(*u*) The Caledonian Rail. Co. *v.* Lockhart, 3 Mac. 808.

(*x*) Chamberlain *v.* The West End of London and Crystal Palace Rail. Co., 32 L. J. Q. B. 173, S. C. 2 B. & S. 605.

(*y*) Croft *v.* London and North

If injury arises afterwards from the neglect of the company to do what the act directs them to do, or from the negligent or improper manner in which the company's works are made or maintained, an action will lie (*z*), but no compensation can be claimed as for lands injuriously affected (*a*).

Compensation from time to time.

The lessee of a mine about to make a pit for its necessary working, being stopped by a railway company taking a slip out of the middle of his land, showed that to work the mine after the severance, more expensive works would be necessary. It was held that, as the expenses were imminent, and capable of being ascertained, the arbitrator might award compensation for them at once, though by section 81 of the Railways Clauses Act, 1845, the railway company are from time to time to pay the lessee all such additional expenses as shall be incurred by him by reason of the severance (*b*).

Severance rifle range.

A volunteer corps had hired two separate pieces of land for a rifle range, and had a license from the occupier of the intermediate close to shoot across his land. This license was paid for annually, and was determinable on notice. A company, under statutable authority, took part of the hired land, and so used it as to render it impossible to shoot any longer at the range. The corps was held entitled to compensation for the loss of the range, as for damage by severance or otherwise injuriously affecting the land left (*c*).

Reservoir depreciated.

A landowner had made a reservoir for the purpose of supplying with water cotton mills, intended to be erected on his own land. A railway company took a portion of the land, so that the mills could not be built. The umpire was held to have acted rightly in receiving evidence of the profits that could have been made from the supplying the water to these mills, as a step to the ascertaining how much the value of the reservoir had been depreciated by the taking of the land (*d*).

Western Rail. Co., 32 L. J. Q. B. 113, S. C. 3 B. & S. 436; Todd *v.* Metropolitan District Rail. Co., 24 L. T. 435.

(*z*) Lawrence *v.* The Great Northern Rail. Co., 16 Q. B. 643; The Caledonian Rail. Co. *v.* Lockhart, 3 Mac. 808; Blagrave *v.* The Bristol Waterworks Co., 1 H. & N. 369, S. C. 26 L. J. Ex. 57.

(*a*) Byles *v.* Ipswich Dock Commissioners, 4 Ex. 464, S. C. 25 L. J. Ex. 53.

(*b*) Whitehouse *v.* Wolverhampton, &c. Rail. Co., 39 L. J. Ex. 1.

(*c*) Holt *v.* Gaslight and Coke Co., L. R. 7 Q. B. 728.

(*d*) Ripley *v.* Great Northern Rail. Co., L. R. 10 Ch. 435.

Damages from severance, accommodation works.

In estimating the amount of damages arising from severance and other injuries, from the execution of the works, it is presumed that the arbitrator should not generally, in the case of a railway, treat it as one of total severance, but should remember that by the Railways Clauses Consolidation Act, 1845, the company are bound to make such means of communication between the severed lands, and to provide such drains, and watering places for cattle, to remedy the inconvenience caused by the railway, as, in case of dispute, two justices shall appoint (*e*).

Accommodation works useless.

But where the land severed is agricultural land, having a prospective value as building ground, the arbitrator may treat the case as one of total severance, for the justices have no power to direct accommodation works except for the present use of the land, and accommodation works for agricultural purposes would be useless when the land was built upon (*f*).

No right to set out approaches.

It has been decided that the arbitrator has no right to set out approaches to the severed land, though the claimant call on him to do so, or to apportion the rent of the premises affected (*g*).

Directing work to be done, and penalty per month till done.

Arbitrators appointed under the Canadian Railway Act, 1868, to assess the amount to be paid by a railway company for a piece of land taken by it, and for damages resulting from the taking, should simply assess a gross sum. They have no right to say that the company shall pay a fixed sum per month till a certain watercourse is set free or that a particular culvert should be made (*h*).

Damages contingent on exercise of option by the company.

A railway company were empowered to abandon, if they thought fit, certain tramways which led to the applicant's works. The latter claimed compensation for the injury that would result to him if the company exercised their option, and stopped up the tramways. The umpire awarded compensation "for damage sustained, and which may be sustained," by execution of the railway works. The court intimated the inclination of their opinion that the award would not have been bad, if it had clearly given compen-

(*e*) Stat. 8 & 9 Vict. c. 20, ss. 68—75; Manning *v.* Eastern Counties Rail. Co., 12 M. & W. 237.

(*f*) Reg. *v.* Brown, L. R. 2 Q. B. 630.

(*g*) Ware, In re, 9 Ex. 395.

(*h*) Bourgoin *v.* Montreal, &c. Rail. Co., L. R. 5 App. Cas. 381.

sation for the damage contingent on the tramways being stopped up (*i*).

Stream to be taken from time to time.

Where a company authorised to take a whole stream, diverts part and gives notice of an intention to divert the remainder, an arbitrator appointed to assess damages for the injuriously affecting the land may, it seems, give compensation at once for the injury to be sustained by reason of the loss of the whole stream, though the company was empowered to take portions of the stream from time to time (*k*).

Awarding one sum for purchase price and damage by severance.

It is not necessary for the arbitrator appointed to fix the purchase price of lands, taken by the promoters, and also the compensation for damage by severance, or by the injurious effects of the promoter's works on the claimant's other lands, to make separate assessments for the purchase price and the damage. One joint assessment for both is sufficient (*l*). But the award should clearly show that the arbitrator has included both items, or it may be considered uncertain (*m*).

Arbitrator may not direct payment.

The arbitrator has no right to order payment of money: only to assess what is the proper amount of compensation (*n*).

Arbitrator awarding no compensation due.

The duty of the arbitrator in relation to the compensation is confined to a mere assessment of money (*o*). If, assuming the interest of the claimant to be such as he states, and that he has the right to compensation which he asserts, the arbitrator find, as a question of amount, that no damage at all has been done to the claimant by the promoters, he is at liberty to award that the claimant's land or interests therein have not been injuriously affected, and need not assess him any compensation (*p*).

When no damage by severance.

If the arbitrator be of opinion that the landowner has suffered no damage by severance, it is better that he should

(*i*) Brogden *v.* Llynvi Valley Rail. Co., 9 C. B. N. S. 299, S. C. 30 L. J. C. P. 61.

(*k*) Stone *v.* Yeovil Corporation, 1 C. P. D. 691, S. C. 45 L. J. C. L. 657; on appeal, 46 L. J. C. L. 137, S. C. 2 C. P. D. 99; Bush *v.* Trowbridge Water Co., L. R. 19 Eq. 291, S. C. 44 L. J. Chanc. 235, on appeal, L. R. 20 Ch. 459, S. C. 44 L. J. Ch. 645.

(*l*) Bradshaw's Arbitration, 12 Q. B. 562.

(*m*) Wakefield *v.* Llanelly Rail. and Dock Co., 34 Beav. 245, in error, 3 De G. F. & S. 11.

(*n*) Bidder *v.* North Staffordshire Rail. Co., 4 Q. B. D. 424, per Bramwell, L.J.

(*o*) Ware, In re, 9 Ex. 395.

(*p*) Reg. *v.* Lancaster and Preston Rail. Co., 6 Q. B. 659; Reg. *v.* Metropolitan Commissioners of Sewers, 1 E. & B. 694; Reg. *v.* London and North Western Rail. Co., 23 L. J. Q. B. 185; Reg. *v.* Biram, 17 Q. B. 969.

say so in terms in his award. The award, however, will not be bad if he simply confine his award to the assessment of the value of the land taken (*q*).

Whether sewer a benefit or injury.

A party claimed compensation for damage done by a sewer made by a local board of health across his land, under the statute 11 & 12 Vict. c. 65, the Public Health Act, 1848. The board contended that the sewer benefited the property. The Court of Queen's Bench decided that this was a question as to amount of compensation, within section 144, proper to be decided by arbitration under section 123 of the act, and held that if the arbitrator were satisfied that the property had not been injured, he would have been justified in finding that no damage had been done (*r*).

Arbitrator may not consider excuse by promoter for non-payment of damages.

An arbitrator has no right to enter into the question whether the promoters are excused from the obligation to pay by any collateral matter, as by a deed or release of damages (*s*). Nor where lessees of a coal mine claim an absolute right for a term of years, is the arbitrator entitled to consider a covenant in the lease, empowering the lessor to take back part of the land; or that the lessees had wished for the railway of which they afterwards complained (*t*).

Not to consider possible claims by tenants.

In awarding compensation to a landowner, the arbitrator ought not to consider the possible claims by tenants, or with reference to them give the landowner a larger sum, at the same time directing him to indemnify the company against the tenants' claims (*u*).

Yearly tenant.

A tenant from year to year, no part of whose land is taken by a railway company, but whose interests in his land are injuriously affected by the railway works, is entitled to claim compensation under section 68 of the Lands Clauses Consolidation Act, 1845, and is not bound to go before justices, under section 121 of the same act, to obtain an assessment of the compensation due to him (*x*).

But if any part of his land is taken, and he be required to

(*q*) Beaufort, Duke of *v.* Swansea Harbour Trustees, 8 C. B. N. S. 156, S. C. 29 L. J. C. P. 241.

(*r*) Bradby *v.* Local Board, &c., Southampton, 24 L. J. Q. B. 239.

(*s*) Byles *v.* Ipswich Dock Co., 11 Ex. 464, S. C. 25 L. J. Ex. 53.

(*t*) Rhys *v.* Dare Valley Rail. Co., L. R. 6 Eq. 429, S. C. 37 L. J. Chanc. 719.

(*u*) Caledonian Rail. Co. *v.* Lockhart, 3 Macq. 808.

(*x*) Reg. *v.* Sheriff of Middlesex, In re Somers *v.* Metropolitan Rail. Co., 31 L. J. Q. B. 261.

give up possession of it before the expiration of his term, he can only apply to justices to assess the compensation (*y*).

Verbal award by justices to yearly tenant.

Justices called upon by a railway company to determine the compensation to be paid to a tenant from year to year, for giving up possession before the expiration of his term, under section 121 of the Lands Clauses Consolidation Act, 1845, need not put their decision into writing, but may give it verbally (*z*).

Artizans and Labourers' Dwellings Improvement Act, 1875.

Under some statutes an arbitrator has to make a provisional award before his final award.

The compensation to be paid to a claimant interested in some lands taken under the Artizans and Labourers' Dwellings Improvement Act, 1875 (stat. 38 & 39 Vict. c. 36) (*a*), was, by mistake, not considered by the arbitrator, nor entered in his provisional award. The claimant, however, attended the subsequent meeting on a short notice, and though under protest, gave proof of his claim before the arbitrator, who subsequently altered his provisional award by inserting the amount that he thought due on the claim, and confirmed his award so altered. This award was held to be regular, and a valid decision on the claim (*b*).

Power to state a special case.

It has been held recently in the Court of Appeal, that an arbitrator under the Lands Clauses Act has power to state a special case in his award, on the ground that as the appointment of an arbitrator is by the statute to be deemed a submission to arbitration, the reference became a reference by consent under the Common Law Procedure Act, 1854 (*c*). This decision reversed that of the court below (*d*).

Under Arbitration Act, 1889.

The Arbitration Act (*e*), which by section 24 is to apply to every arbitration under any act, whether passed before or after it, except in so far as the Arbitration Act is inconsistent with it, enacts, by section 19, that an arbitrator may "state in the form of a special case for the opinion of the court any question of law arising in the course of the reference."

(*y*) The Queen *v.* Great Northern Rail. Co., 2 Q. B. D. 151.

(*z*) Reg. *v.* Boyce Coombe, 32 L. J. M. C. 67.

(*a*) Repealed by 53 & 54 Vict. c. 70.

(*b*) Carr *v.* Metropolitan Board of Works, 14 Ch. D. 807.

(*c*) Rhodes *v.* Airdale Drainage Commissioners, 1 C. P. D. 402; Dare Valley Rail. Co., In re, L. R. 4 Chanc. 554.

(*d*) Rhodes *v.* Airdale Drainage Commissioners, L. R. 9 C. P. 508; Newbold *v.* Metropolitan Rail. Co., 14 C. B. N. S. 405.

(*e*) 52 & 53 Vict. c. 49.

Costs of reference and award.

By section 34 of the Lands Clauses Consolidation Act, 1845 (which requires, however, to be read as modified by the section of the Lands Clauses Consolidation Act, 1869, set forth further on, p. 474), "All the costs of any such arbitration, and incident thereto, to be settled by the arbitrators, shall be borne by the promoters of the undertaking, unless the arbitrator shall award the same or a less sum than shall have been offered by the promoters of the undertaking, in which case each party shall bear his own costs incident to the arbitration, and the costs of the arbitrators shall be borne by the parties in equal proportions."

This provision applies not only to references respecting the purchase-price of lands taken, but also to arbitrations concerning the compensation to be paid, under section 68, for lands being injuriously affected by the works of the promoters (*f*).

When arbitrator specially appointed.

And where a local act incorporated the Lands Clauses Consolidation Acts, 1845, 1869, but directed that the arbitrator to assess the compensation should be appointed by the Board of Trade, a person injured by the works was held entitled to costs under section 34, above set forth (*g*).

Costs of arbitration when land taken under Public Health Act.

When lands are taken compulsorily by a local board under the Public Health Act, 1875, the arbitration proceedings are under the Lands Clauses Acts, which are incorporated, not under the Public Health Act; and when the promoter's offer is too low, the claimant has a right to the costs of the arbitration, though the award is silent as to costs, and though section 180 of the Public Health Act leaves the costs of references under that act in the discretion of the arbitrator (*h*).

Costs "of and consequent on reference."

When an arbitrator awarded a sum for compensation under the Public Health Act, 1875, but said nothing as to costs, the court on a motion remitted the award to the arbitrator to decide as to them, and directed him also to deal with the costs of the motion, he having power under section 180 (13), over the costs "of and consequent on the reference" (*i*).

Costs of

By the Epping Forest Act, 1878, the conservators were

(*f*) Richardson *v.* The South-Eastern Rail. Co., 20 L. J. C. P. 236.

(*g*) Sharpe *v.* Metropolitan District Rail. Co., 4 Q. B. D. 645, in H. L. 5 App. Cas. 425.

(*h*) Rayner, Ex parte, 3 Q. B. D. 446.

(*i*) Peake *v.* Finchley Local Board, 57 L. T. 882.

arbitration part of costs of purchase.

entitled to purchase certain lands at a price to be fixed by the statutable arbitrator, who had power to award costs and order taxation. The arbitrator fixed the price, but said nothing about costs in his award. The money was paid into court. It was held, that under section 80 of the Lands Clauses Act, 1845, which was incorporated, the conservators were liable to pay the costs of the arbitration, as part of the costs of the reasonable charges and expenses incident to the purchase and taking of the lands (*i*).

No offer by promoters.

If the promoters make no offer of any sum by way of compensation for lands taken by them, or injured by their works, it is the same as if they had offered a less amount than the award gives, when any compensation is awarded (*j*).

How late promoters may make offer.

The offer must be made before the appointment of the last arbitrator, or it will be too late (*k*), and must be an offer of compensation for the land taken or injured alone, and not an offer of one sum for such compensation and costs (*l*).

Costs of party, how to be settled.

Before the Lands Clauses Consolidation Act, 1869, grave questions were raised respecting the duty of the arbitrators or umpire as to costs, whether when they award more than the promoters offer, they should assess the costs in their award or by a separate instrument subsequently. In the first case that arose, where the umpire subsequent to his award by a separate certificate settled the amount of the party's costs, Erle, J., refused an application for a rule to compel the promoters to pay this amount, thinking that the umpire ought to have assessed them in the award. He there treated it as a conceded fact, that the umpire or arbitrators ought to settle the amount of their costs in the award (*m*).

In the award, per Erle, J.

After the award, per Court of Exchequer.

The Court of Exchequer, however, in a subsequent decision, disagreed from the opinion of Erle, J., in the *London & N. W. Rail. Co.* v. *Quick* (*n*), and decided that it is the arbitrator's or umpire's duty by the award simply to determine the

(*i*) Pardoe *v.* Epping Forest Conservators, W. N. p. 33, 11th Feb. 1882.

(*j*) Martin *v.* The Leicester Waterworks Co., 27 L. J. Ex. 432, S. C. 3 H. & N. 463.

(*k*) Gray *v.* North-Eastern Rail. Co., 1 Q. B. D. 696; Fitzhardinge *v.* Gloucester and Berkley Canal Co., L. R. 7 Q. B. 776; Yates *v.* Mayor of Blackburn, 6 H. & N. 61, S. C. 30 L. J. Ex. 447. See Hayward *v.* Metropolitan Rail. Co., 33 L. J. Q. B. 73.

(*l*) Balls *v.* Metropolitan Board of Works, L. R. 1 Q. B. 337.

(*m*) London and North-Western Rail. Co. *v.* Quick, 5 D. & L. 685.

(*n*) 5 D. & L. 685.

amount of compensation to be paid, and subsequently by a separate instrument to settle the amount of costs under section 34, if the sum awarded be not less than the sum offered by the promoters (*o*). Though section 34 says the costs are to be settled by the "arbitrators," it means the party who makes the award, whether arbitrator, arbitrators, or umpire, and he may be called upon to settle these costs, though the time for making the award has expired (*p*).

Assessing costs under s. 67.

Notwithstanding the language used in the above case, it does not seem open to any objection for the arbitrator to comprise his assessment of compensation and settlement of costs in one award. When the reference is under section 64, according to Erle, J. (*q*), the power given by section 67 to the arbitrator to assess costs must be exercised in the award itself.

Assessment of costs ministerial act.

In assessing the amount of costs under the statutes the arbitrator acts ministerially, not judicially (*r*).

Separating claims.

Where a landowner claimed compensation for land taken by a company, and also for damage to other lands of his, by reason of the company's works affecting some wells on them at a little distance from the portion taken, and the company offered compensation for the land, but nothing for the alleged injury, and the award gave him compensation to a greater amount than the company offered for the land, but adjudged that the other lands were not injuriously affected by the company's works, the court held that as the claims in respect of the land taken and the other land alleged to be injured were clearly separable, the umpire had done right in assessing the claimant's costs as to the land taken, and in refusing to assess him any costs in respect of the rejected claim (*s*).

No costs of claim where nothing found due.

No lien on land for costs.

When land is taken by a railway company, and the purchase price assessed by arbitration, the vendor has no lien on the land taken for the costs of the arbitration payable to him by the company (*t*). But a tenant for life will be allowed

Claim on fund in court.

(*o*) Gould *v.* Staffordshire Potteries Waterworks Co., 5 Ex. 214; The Wilts, Somerset and Weymouth Rail. Co. *v.* Fooks, 3 Ex. 728.

(*p*) Gould *v.* Staffordshire Potteries Waterworks Co., 5 Ex. 214.

(*q*) London and North-Western Rail. Co. *v.* Quick, 5 D. & L. 685.

(*r*) Sharpe *v.* Metropolitan District Rail. Co., 4 Q. B. D. 645; in H. L. 5 App. Cas. 425.

(*s*) Reg. *v.* Biram, 17 Q. B. 969.

(*t*) Ferrers, Earl *v.* Stafford and Uttoxeter Rail. Co., L. R. 13 Eq. 524.

the costs of the reference properly incurred by him out of the purchase price, when paid into court, if entitled to them from the promoters (*u*).

Conveyance not condition precedent.

When a person is entitled to costs of an arbitration for lands taken under the Lands Clauses Acts, it is not a condition precedent to his right to recover them that he should have executed a conveyance of the lands (*x*).

Taxation by the master.

The Lands Clauses Consolidation Act, 1869 (32 & 33 Vict. c. 18), s. 1, enacts, that "where in England under the Lands Clauses Act, 1845, or any act incorporating the same, any question of disputed compensation is determined by arbitration, the costs of and incident to the arbitration and award shall, if either party so requires, be taxed by any one of the taxing masters of the superior courts of law," &c.

Since this clause, the award need not say anything about costs, for the statute gives the right to them, and the master may settle the amount (*y*). The courts cannot review his taxation, for he taxes, not as officer of the court, but as a persona designata (*z*).

This section, according to Lush, J., applies only to arbitrations pure and simple begun and carried on within the Lands Clauses Acts, and does not attach when there is a special agreement of reference concerning matters not within those acts. It does not seem to have a retrospective effect (*a*).

No costs recoverable if solicitor uncertificated.

If the solicitor whom the claimant employs to conduct the arbitration is uncertificated, or not duly qualified, the claimant, though he be otherwise, by the result of the award, entitled to his costs from the promoters, and though he was not, during the arbitration, aware of the disqualification, cannot recover from the promoters anything for costs or disbursements, the prohibition in the stat. 37 & 38 Vict. c. 68, s. 12, being clear and express (*b*).

What recitals advisable in the award.

It is advisable that the award should recite all those facts which are necessary to give the arbitrators jurisdiction. It

(*u*) Earl Berkley's Will, In re, 31 L. T. 531; Perpetual Curate of Whitworth, Ex parte, 24 L. T. 126.

(*x*) Capel *v.* Great-Western Rail. Co., 4 Q. B. D. 459.

(*y*) Sharpe *v.* Metropolitan District Rail. Co., 4 Q. B. D. 645; in H. L. 5 App. Cas. 425; Rayner, Ex parte, 3 Q. B. D. 446.

(*z*) Sandback Trustees *v.* North Staffordshire Rail Co., 3 Q. B. D. 1.

(*a*) Doulton *v.* Metropolitan Board of Works, L. R. 5 Q. B. 333, S. C. 39 L. J. Q. B. 165.

(*b*) Fowler *v.* Monmouthshire Rail., &c. Co., 4 Q. B. D. 334.

should therefore shortly allege the right of the promoters of the undertaking under their act to take the lands in question, their notice to the party offering to treat for the purchase of his interest, the claim by the party for compensation, the statement of the nature of his interest, the disagreement respecting the amount of compensation, the demand by the party to have the matter settled by arbitration, the appointment of the arbitrators and umpire, the delivery to them of such appointments, and the making and subscribing by them of the declaration required by the act, before entering on the matters referred. The arbitrators are also recommended to state that, in calculating the compensation, they have had regard to the principles prescribed by the statute for assessing the amount in section 63.

Misdescription of subject-matter.

A misdescription or variance in the statement of the subject-matter on which they profess to award is a serious error. Thus, if they be appointed to ascertain the amount of compensation to be paid to a party for his *interest* in the land required by the promoters, and they award in terms respecting the *value* or *the fee simple* of the land, grave questions may be raised suspecting the validity of their decision (*c*).

Delivery of award to promoters.

The award must be in writing, and is to be delivered to the promoters; and the latter, on demand, at their own expense, are to furnish the other party with a copy (*d*).

Compelling promoters to take up award.

It has been held that the Court of Chancery has no jurisdiction to order the promoters to take up the award (*e*): but an order to that effect was made in one case by the Master of the Rolls (*f*). And a mandamus will issue to compel the promoters to do so if they neglect; and they are bound to pay the arbitrator his reasonable fees on taking it up, for he has a lien on the award which the statute does not take away. It is not decided whether, when the applicant is to pay half the costs of the award under section 34, a different rule would apply (*g*).

Mandamus.

(*c*) See Barker *v.* North Staffordshire Rail. Co., 12 Jur. 324; Bradshaw's Arbitration, 12 Q. B. 562; The North Staffordshire Rail. Co. *v.* Landor, 17 L. J. Ex. 350.

(*d*) 8 & 9 Vict. c. 18, s. 35.

(*e*) The Sutton Harbour Co. *v.* Hitchens, 16 Beav. 381.

(*f*) Harper *v.* Great-Eastern Rail. Co., L. R. 20 Eq. 39.

(*g*) The Queen *v.* The South Devon Rail. Co., 15 Q. B. 1043. See The Queen *v.* The West Midland Rail. Co., 10 W. R. 583; Mason *v.* Stokes Bay Rail. Co., 32 L. J. Ch. 110.

Return.

A return that the claimant's premises had not been injuriously affected by the works is a good answer to such a mandamus (*h*).

Declaration to be annexed to award.

The declarations made and subscribed by the arbitrators or umpire before entering upon the matters referred, must be annexed to the award when made (*i*).

In a case where the arbitrators had never entered on a consideration of the matters referred, and where they disagreed about the umpire, and allowed the twenty-one days to expire without enlargement, and without having made the declarations required by the statute, though they made such declarations afterwards, and the umpire was appointed by the Board of Trade, an objection to the award, on the ground of the omission of the arbitrators to make such declarations in due time, seems to have been treated as futile. It is probable that where the arbitrators do not enter on the reference, it is unnecessary for them to make the declarations (*k*).

Award not void through error in form.

"No award made with respect to any question referred to arbitration, under the provisions of this or the special act, shall be set aside for irregularity or error in matter of form" (*l*). Ordering a company to *pay* an amount, though wrong, is an error in form only (*m*).

Enforcing award by action.

The award fixes only the quantum of damage, but does not decide the right any more than the finding of the jury. Therefore, where it appeared by facts stated in the award that there was a real question as to the claimant's right to compensation, the Court of Common Pleas refused to enforce the award by granting a rule to pay, but left the party to his action, and intimated that probably the same course would be pursued, if the point appeared, not on the award, but by affidavits in answer to the motion (*n*). The costs of the reference settled by the arbitrator cannot be recovered except by action (*o*).

(*h*) Reg. *v.* Cambrian Rail. Co., L. R. 4 Q. B. 320, S. C. 38 L. J. Q. B. 198.

(*i*) 8 & 9 Vict. c. 18, s. 33.

(*k*) Bradshaw's Arbitration, 12 Q. B. 562.

(*l*) 8 & 9 Vict. c. 18, s. 37.

(*m*) Harper *v.* Great Eastern Rail. Co., L. R. 20 Eq. 39. See Bidder *v.* North Staffordshire Rail. Co., 4 Q. B. D. 412.

(*n*) Newbold *v.* The Metropolitan Rail. Co., 14 C. B. N. S. 405.

(*o*) London and North-Western Rail. Co. *v.* Quick, 5 D. & L. 685; Gould *v.* Staffordshire Potteries Waterworks Co., 5 Ex. 214.

Where a party is entitled to costs and to have them taxed by the master, he may commence his action to recover them before the taxation (*p*).

Action before taxation.

A motion to set aside an award under the Lands Clauses Act must have been made within the time prescribed by the stat. 9 & 10 Will. III. c. 15 (*q*). That act is repealed by the Arbitration Act, 1889 (*r*). But the time for moving to set aside awards seems to be governed by R. S. C. Ord. LXIV. r. 14.

Time for moving to set aside award.

Moving to set aside the award for objections of weight, though ultimately overruled, is not such a wilful refusal to receive the money awarded as will disentitle the claimant to the costs of making out his title under section 80 of the Lands Clauses Consolidation Act, 1845 (*s*).

Moving to set aside award not bar right to costs of title.

The making of an award which has assessed the compensation on the assumption that the railway would cross two public roads by passing under them in a cutting, does not preclude the company from exercising their powers of diverting one of these roads. If the claimant is injured by the change, he may demand further compensation (*t*). But subject to the exercise of such a statutory power, a notice to take lands given by a railway company, and the fixing the amount of compensation by arbitration, together constitute a contract for sale and purchase, which a court of equity will enforce at the instance of the claimant (*u*). The promoters may, after paying the sum awarded into court, take possession of the land though proceedings to set aside the award are pending (*x*).

Award not prevent deviation.

But enforceable in equity as a contract.

(*p*) Sharpe *v.* Metropolitan District Rail. Co., 4 Q. B. D. 645, in H. L. 5 App. Cas. 425.

(*q*) Harper *v.* Great Eastern Rail. Co., L. R. 20 Eq. 39.

(*r*) 52 & 53 Vict. c. 49.

(*s*) Bradshaw's Arbitration, 17 L. J. Ch. 454.

(*t*) Selby *v.* The Colne Valley and Halstead Rail. Co., Wood, V.-C., June 13, 1862, 7 L. T. N. S. 709; The Regent's Canal Co. *v.* Ware, 23 Beav. 575, S. C. 26 L. J. Ch. 566.

(*u*) Mason *v.* The Stokes Bay Rail. Co., 32 L. J. Ch. 110. See P. III. ch. 4, s. 1.

(*x*) Lambert *v.* Dublin, &c. Ry. Co., 24 L. R. Ir. 164.

(2.) AWARD UNDER THE AGRICULTURAL HOLDINGS ACT, 1883.

Requisites of award.

In awarding under the Agricultural Holdings Act, 1883 (*y*), the arbitrator is not to award a lump sum, but is to specify the several sums allowed for the several improvements, acts, and things for which compensation is given and the matters taken into account in reduction or augmentation thereof, and the time when the improvements, &c. were executed.

A reference of matters under the act, together with others outside it, is not a reference under the act, and does not render it obligatory on the arbitrator to specify the sums and details as required by the act (*z*).

(*y*) 46 & 47 Vict. c. 61, s. 19. See Appendix of Statutes.

(*z*) Shrubb *v.* Lee, 53 J. P. 55.

CHAPTER X.

THE AWARD REFERRED BACK TO THE ARBITRATOR.

THIS chapter treats of the power of the courts and of their practice, in referring awards back to the arbitrator for reconsideration, and of his powers and duties in such cases.

SECTION I.

HOW AWARDS ARE REFERRED BACK.

Formerly, if an award were defective, the court could not, without consent, send it back to the arbitrator to amend it. They could only set it aside (*a*). But submissions now often contain a stipulation, giving the court power to refer it back to the arbitrator. The following is a very common form of such a clause: "That in the event of either of the parties disputing the validity of the award, or moving the court to set it, or any part of it, aside, the court shall have power to remit the matters referred, or any of them, to the reconsideration and determination of the arbitrator."

Clause to refer back "all matters or any of them."

Nice questions used to be raised on the effect of the special terms of the clause employed in particular cases. Thus, where the power was to refer back "the matters referred," it was held, that the court could not direct the arbitrator to reconsider one point only, and that the parties on the reference back were entitled to go into fresh evidence respecting every question in dispute. But where the words are "the matters referred, or any of them," the court can shape an issue for the arbitrator on any particular point (*b*), or will

(*a*) Kynaston *v.* Liddell, 8 Moore, 223; Cuerton, Ex parte, 7 D. & R. 774. See Phillips *v.* Hopwood, 1 B. & Ad. 619.

(*b*) Nickalls *v.* Warren, 6 Q. B. 615, S. C. 9 Jur. 10.

send the award back, with a view to his correcting an error of form, such as the misnomer of one of the parties in the cause referred (*c*).

Power to refer back under the Arbitration Act, 1889.

These cases, however, have lost much of their importance since the passing of the Arbitration Act, 1889 (*d*), which says, "In all cases of reference to arbitration the court or a judge may, from time to time, remit the matters referred or any of them to the re-consideration of the arbitrators or umpire." This applies also to references under order of court (s. 16).

On reference for trial.

Under R. S. C. Ord. XXXVI. r. 52, which deals with references for trial, the court "may remit the cause or matter or any part thereof for re-trial or further consideration to the same or any other referee." And it has the same power in respect of the report of referee appointed to inquire and report (rr. 54 and 55). This applies also to an arbitrator "to whom any cause or matter and any question or issue of fact therein is referred" (*e*).

On reference for report.

Applies to all references by compulsion or consent.

The repealed section to the same effect (s. 8) of the Common Law Procedure Act, 1854, applied to all compulsory references under the act, and to all references by consent of parties where the submission was or might be made a rule or order of one of the superior courts of law or equity (*f*). The fact that the submission contained a clause empowering the court to refer back the award in case of a motion being made to set the award aside, did not exclude the general power given to the court or a judge by this section, and the court or a judge might remit the award, though no motion had been made to set it aside (*g*).

Lands Clauses Act.

An award made on a reference to assess compensation under the Lands Clauses Consolidation Act, 1845, might be referred back under the Common Law Procedure Act, 1854 (*h*).

Public Health Act.

So also an award to assess compensation under the Public Health Act, 1875 (*i*).

(*c*) Howett *v.* Clements, 7 M. & G. 1044; Davies *v.* Pratt, 16 C. B. 586, S. C. 25 L. J. C. P. 71.

(*d*) 52 & 53 Vict. c. 49, s. 10.

(*e*) Order XXXVI. r. 55 (c), Dec. 1889.

(*f*) Morris *v.* Morris, 6 E. & B. 383, S. C. 25 L. J. Q. B. 261; Mills *v.* The Bowyer's Society, 3 Kay & J. 66; Aitken's Arbitration, 3 Jur. N. S. 1296.

(*g*) Morris *v.* Morris, 6 E. & B. 383, S. C. 25 L. J. Q. B. 261.

(*h*) Dare Valley Rail. Co., In re, L. R. 4 Ch. App. 554, S. C. 38 L. J. Ch. 417.

(*i*) Warburton *v.* Haslingden L. B., 48 L. J. Q. B. D. 451.

On what motions an award will be remitted.

More commonly the power is exercised on a motion being made to set the award aside, and on a defect being pointed out, in opposition to the party objecting to the award (*k*). Often, however, when an error was made manifest in the award on showing cause against a rule for an attachment to enforce the award, or to pay money pursuant to it, the court, instead of discharging the rule, would refer back the award for amendment (*l*).

Sometimes, instead of applying to have the award set aside for a supposed defect, the party against whom the award has been made will content himself, as he might have done even before the Common Law Procedure Act, 1854, with asking to have it remitted back (*m*).

It will also be remitted on the application of the party who is interested in supporting the substantial validity of a decision in his favour (*n*). In one case, where the award in favour of the plaintiff described the defendant by a wrong Christian name, the court refused the plaintiff's application, in the first instance, to send the award back, saying that possibly the defendant might pay without objecting (*o*); but afterwards, on the plaintiff's applying for a rule to enforce payment, or to have the award remitted to amend the misnomer, the objection being taken by the defendant, the court, refusing the former part of the application, made absolute the latter branch of the rule (*p*).

When the award is bad on its face, not being sufficiently final or certain (*q*), or where, though good on its face, it is invalid, as, for instance, for not having been executed by all the arbitrators together (*r*), and the ends of justice require, the award will be sent back.

(*k*) Anning *v.* Hartley, 27 L. J. Ex. 145; Peterson *v.* Ayre, 23 L. J. C. P. 129; Howett *v.* Clements, 1 C. B. 128.

(*l*) Morris *v.* Morris, 6 E. & B. 383, S. C. 25 L. J. Q. B. 261; Davies *v.* Pratt, 16 C. B. 586, S. C. 25 L. J. C. P. 71; Johnson *v.* Latham, 19 L. J. Q. B. 329.

(*m*) Bradley *v.* Phelps, 6 Ex. 897; Bury *v.* Dunn, 1 D. & L. 141; Nalder *v.* Batts, 1 D. & L. 700.

(*n*) Caswell *v.* Grocott, 31 L. J. Ex. 361; Cross *v.* Cross, 13 C. B. N. S. 253.

(*o*) Davies *v.* Pratt, 16 C. B. 162.

(*p*) Davies *v.* Pratt, 16 C. B. 586, S. C. 25 L. J. C. P. 71.

(*q*) Morris *v.* Morris, 6 E. & B. 383, S. C. 25 L. J. Q. B. 261; Fearon *v.* Flinn, L. R. 5 C. P. 34.

(*r*) Anning *v.* Hartley, 27 L. J. Ex. 145.

For what causes an award will be remitted.

It was said in several cases that the courts had no power to refer back an award, except where they had power to set it aside (*s*), but the authorities referred to in the following pages will show that the courts have exercised the power of remitting it back in many cases, where the award was not invalid.

On some occasions the courts expressed opinions that the statutory power of remitting back applied, or, at least, ought only to be exercised, on the same principles as before the Common Law Procedure Act, 1854, passed (*t*).

Those observations, however true, must not be pressed too far; for the language of the statute now in force is more extensive than that of the clauses commonly inserted in agreements of reference, which almost always made the power depend on one party disputing the validity of the award. It may well be that the legislature intentionally omitted such a condition, and left the matter at large, foreseeing that cases might often arise in which justice would require the award to be remitted, though no question could be raised as to its validity.

Submission often gives power to remit the award to the same or a fresh arbitrator. But unless the courts think that the arbitrator can no longer be trusted, they will remit the award to him, though he has miscarried in the conduct of the reference; as, for instance, if he have without an improper motive asked some questions of a witness in the absence of the parties, or where there are several arbitrators, if they have executed the award separately (*u*).

Discovery of new evidence.

It is doubtful how far an award can be set aside on the ground of the discovery of new and material evidence since the award (*x*); but such a discovery may be good ground for an application to refer back the award (*y*). Thus, where one party moved on the ground that since the award he had found a material letter written by his opponent, and the latter swore

(*s*) Webber *v.* Lee, 1 D. & L. 584; Mills *v.* The Bowyer's Society, 3 Kay & J. 66; Hogg *v.* Burgess, 3 H. & N. 293, S. C. 27 L. J. Ex. 318; Fuller *v.* Fenwick, 3 C. B. 705.

(*t*) Hodgkinson *v.* Fernie, 27 L. J. C. P. 66, S. C. 3 C. B. N. S. 189; Hogg *v.* Burgess, 3 H. & N. 293, S. C. 27 L. J. Ex. 318.

(*u*) Anning *v.* Hartley, 27 L. J. Ex. 145.

(*x*) See post, Setting aside Awards, P. III. ch. 9.

(*y*) Huntley, In re, 1 E. & B. 787.

that the letter was a forgery, the court (before the statute) remitted the matter back for the arbitrators to decide on its genuineness and effect (*z*).

To explain letter.

So, where an arbitrator had read and relied on a letter of the defendant in a letter-book containing other letters, but the particular letter had not been put in evidence, Hill, J., in the Bail Court refused to set aside the award, but referred it back, in order that the defendant might have an opportunity of explaining it (*a*).

Award good on face not sent back where mistake in law.

When an award on a voluntary submission is good on its face, the courts will not in general refer it back, any more than set it aside for an alleged mistake in law, attempted to be made out on affidavits (*b*); as, for instance, that the arbitrator has treated as a penalty that which was by the contract of the parties liquidated damages (*c*), or has allowed an improper item to swell the amount of damages (*d*). Nor will they refer it back that he should state a case, when he has declined to do so (*e*). Nor where it appears by his own letter, setting forth the supposed principles of law on which he has acted, that his award is wrong in law, the parties never during the reference having asked him to state a case (*f*).

Whether reference by consent or compulsion.

The general principle is that the arbitrator is final judge, both of law and fact, and the rule was held to apply equally to a compulsory reference under the Common Law Procedure Act, 1854 (*g*).

Arbitrator declining jurisdiction.

On such a reference, if the arbitrator, thinking that his jurisdiction was confined to matters of account, mistakenly refused to investigate a charge of fraud, the court would remit the award (*h*).

Not interfere

When the arbitrator had the same power of certifying, or

(*z*) Burnard *v.* Wainwright, 1 L. M. & P. 455, S. C. 19 L. J. Q. B. 423.

(*a*) Davenport *v.* Vickery, 9 W. R. 701.

(*b*) Baguley *v.* Markwick, 30 L. J. C. P. 342, S. C. 10 C. B. N. S. 61.

(*c*) Fuller *v.* Fenwick, 3 C. B. 705.

(*d*) Hodgkinson *v.* Fernie, 27 L. J. C. P. 66, S. C. 3 C. B. N. S. 189.

(*e*) Gibbon *v.* Parker, 5 L. T. N. S. 584.

(*f*) The London Dock Co. *v.* St. Paul's, Shadwell, 32 L. J. Q. B. 30.

(*g*) Hogg *v.* Burgess, 3 H. & N. 293, S. C. 27 L. J. Ex. 318; Baguley *v.* Markwick, 30 L. J. C. P. 342, S. C. 10 C. B. N. S. 61; Mundy *v.* Black, 3 H. & N. 193; Gibbon *v.* Parker, 5 L. T. N. S. 584.

(*h*) Insull *v.* Moogen, 27 L. J. C. P. 75, S. C. 3 C. B. N. S. 359.

with arbitrator's discretion.

of amendment, as a judge at Nisi Prius, and the award was good on its face, the court would not interfere with the exercise of his discretion, so as to send the case back to him to reconsider an amendment which he had made in the record (*i*), or his refusal to certify that the cause was brought to try a right (*k*).

Otherwise where arbitrator admits the mistake.

But where the arbitrator states that the award as framed, though unimpeachable in law, does not carry out his intentions, the courts will sometimes remit it for amendment (*l*).

Defective certificate for costs.

Thus, where the award, as drawn in the plaintiff's favour, contained a certificate which entitled the plaintiff to costs only on the lower scale, and the arbitrator, being applied to, stated that he had intended to give the plaintiff his full costs, the court remitted the award to the arbitrator, but at the plaintiff's expense, saying that the defendant ought not to be put to expense for an error, to which he had not contributed (*m*).

So, where words giving the plaintiff the costs of the reference, inserted in the arbitrator's rough draft of his award, were, as he stated, omitted by mistake from the fair copy which he signed as his award, the court sent it back to have it corrected (*n*).

Correcting mistake in award under Arbitration Act, 1889.

Now on a reference out of court he may amend "any clerical mistake or error arising from any accidental slip or omission" (*o*).

Even where there had been no failure of intention on the part of the arbitrator, the court, thinking it a proper case for costs, referred an award back for him to certify for costs if he should think fit, under the 30 & 31 Vict. c. 142, s. 5 (*p*).

To enable arbitrator to find on separate items of one general count.

So, where the declaration contained a single count for work and labour, goods sold and delivered, money paid and lent, use of rooms, for necessaries provided, and an account stated, and the arbitrator found for the plaintiff on the issue joined

(*i*) Nalder *v.* Batts, 1 D. & L. 700.

(*k*) Bury *v.* Dunn, 1 D. & L. 141.

(*l*) Shaw *v.* Pitt, W. R. 616, June 14, 1856; Mills *v.* The Bowyer's Soc., 3 K. & J. 66; Walton *v.* The Swanage Pier Co., 10 W. R. 629; Lockwood *v.* Smith, 10 W. R. 628; Warner *v.* Powell, L. R. 3 Eq. 261.

(*m*) Caswell *v.* Grocutt, 31 L. J. Ex. 361; Cross *v.* Cross, 13 C. B. N. S. 253.

(*n*) Mordue *v.* Palmer, L. R. 6 Chanc. 22.

(*o*) 52 & 53 Vict. c. 49, s. 7 (c).

(*p*) Harland *v.* Mayor of Newcastle, 39 L. J. Q. B. 69, S. C. L. R. 5 Q. B. 47.

on the plea of never indebted, but for the defendant on the plea of set-off, and afterwards by letter informed the defendant's attorney that the plaintiff had made out no claim, except as to one of the many separate claims included in the indebitatus count, the court referred the award back, that the arbitrator might, if he thought fit, find separately as to the items in the declaration; for as the costs were to abide the event, it was not just that the defendant should have to pay the plaintiff costs in respect of the items on which he had failed to establish a claim (*q*).

Limit of time for application.

Where an order of Nisi Prius, referring a cause and all matters of difference, contained a provision that in the event of any application being made to the court on the subject of the award, the court should have the power to refer the matter back, it was held that the usual limitation of time must be considered to be understood in the submission, and that the application for a reference back must be made within the same time as a motion to set aside the award (*r*).

This case does not decide that, if a valid objection be taken to an award by a party against whom it is sought to be enforced, the courts would feel themselves bound to yield to the objection, and so in effect annul the award, instead of referring it back, merely because the time for moving to set it aside had expired (*s*).

And the Queen's Bench Division has now expressly decided that the time for moving to refer back an award is not limited to the period for setting it aside, but that the court has a discretion to allow such motions to be made at any time, though it will require them to be made within a reasonable period, or the delay must be satisfactorily explained (*t*).

Arbitration Act, 1889.

The Common Law Procedure Act, 1854 (*u*), it should be observed, gave power to the court "at any time, and from time to time," to refer back. The words in the Arbitration Act, 1889 (*x*), are "the court or a judge may from time to time remit."

(*q*) Gore *v.* Baker, 4 Q. B. 470, S. C. 24 L. J. Q. B. 94.

(*r*) Doe d. Banks *v.* Holmes, 12 Q. B. 951; Doe d. Mays *v.* Cannell, 22 L. J. Q. B. 321.

(*s*) Brooks *v.* Parsons, 1 D. & L. 691, S. C. 13 L. J. Q. B. 50.

(*t*) Leicester *v.* Grazebrook, 40 L. T. N. S. 883.

(*u*) 17 & 18 Vict. c. 125, s. 8.

(*x*) 52 & 53 Vict. c. 49, s. 10, see ante, p. 480.

Award sent back on compulsory reference, though time for setting aside expired.

In a case where an award on a compulsory reference under the Common Law Procedure Act, 1854, made in favour of the plaintiff was so framed, that the master felt himself bound to tax the costs on the lower scale, the plaintiff on this applied to the arbitrator, who stated that his intention was, that the plaintiff should have his full costs; the court, on the application of the plaintiff, sent the award back to the arbitrator to amend the certificate as to costs; although the seven days allowed by the Common Law Procedure Act, 1854, s. 9, for applying to set aside such an award had elapsed, and the objection was pressed that the application was too late (*y*).

In this case, the court, thinking it unreasonable that the party who had been in no default should be put to costs by reason of the omission of the arbitrator, made the rule absolute, on the terms that the applicant should be at the whole expense of taking the case a second time before the arbitrator.

Rule absolute in first instance conditionally.

Where the application was made on behalf of the plaintiff to refer back the award, to allow the arbitrator, who was willing to do so, to amend his certificate as to costs, the court, instead of granting a rule nisi, granted a rule to be absolute in the first instance, unless within four days after service the defendant should give notice that he would come in and show cause against him (*z*). This rule was granted on the authority of *Caswell* v. *Grocutt* (*a*), just above cited, and on the same terms as to costs.

On a motion, made eighteen months after the award, for an order to pay money awarded on a reference in a cause in equity, the court referred the award back to correct a mistake admitted by the arbitrator (*b*).

A rule to refer back an award may be enlarged by consent (*c*).

Motion.

By Order LII. r. 2, 1883, an application to remit an award must be made by motion, not by rule nisi. And by Order LII. r. 4, 1883, the notice of motion must state in general terms the ground of the application. And where

(*y*) Caswell *v.* Grocutt, 31 L. J. Ex. 361.

(*z*) Cross *v.* Cross, 13 C. B. N. S. 253.

(*a*) 31 L. J. Ex. 361.

(*b*) Mordue *v.* Palmer, L. R. 6 Chan. 22.

(*c*) Stafford *v.* Stafford, 25 L. T. 572.

any such motion is founded on evidence by affidavit, a copy of any affidavit intended to be used shall be served with the notice of motion.

The motion in the case of a report on a reference under section 13 of the Arbitration Act, 1889 (*d*), to inquire and report is a four days notice of motion in a cause or matter, the further consideration of which has been adjourned (*e*), and an eight days notice when it has not (*f*).

Court can refer back more than once.

After the arbitrator has amended his award, a fresh application may be made to set it aside, and if it be defective a second time, it will be again avoided (*g*). It was considered doubtful whether the clause, as usually drawn in agreements of reference, gave the court the power to refer it back to the arbitrator more than once (*h*). But as the Arbitration Act, 1889 (*d*), s. 10, now empowers the courts to refer back "from time to time," that question has become unimportant.

Clause to refer back to same or different arbitrator.

Sometimes the clause is drawn up in agreements of references, empowering the court to refer the case back to the same arbitrator, "or to such other person as the court should think fit."

This seems an improvement on the clause as originally given above. For there may be many cases most fit to be determined by arbitration, in which there may be serious objections to having recourse again to the same arbitrator who has once miscarried; and in which, if the court had authority to send the parties summarily before a different arbitrator, the ends of justice would be best attained, and with the least expense and delay (*i*).

A submission to several arbitrators contained a power to remit the award, followed by a clause that in the event of the death of one of the arbitrators before the award, the parties, or in case of the parties not agreeing, the court, should have power to appoint a new arbitrator: after an award made, one arbitrator died. The court remitted the matters back to the survivors and to the new arbitrator to be appointed pursuant to the reference (*k*).

(*d*) 52 & 53 Vict. c. 49.
(*e*) Order XXXVI. r. 54.
(*f*) Order XXXVI. r. 55.
(*g*) Nickalls *v.* Warren, 6 Q. B. 615; Howett *v.* Clements, 1 C. B. 128.
(*h*) Nickalls *v.* Warren, 6 Q. B. 615.
(*i*) Webber *v.* Lee, 1 D. & L. 584; Porch *v.* Hopkins, 1 D. & L. 881.
(*k*) Lord *v.* Hawkins, 2 H. & N. 55.

PART II. CH. X. S. 1.

Effect of clause to refer back in Chancery.

The fact that a court of common law had a power of remitting the award for reconsideration, had weight with the Court of Chancery when called upon to interfere with an award (*l*).

Where an award was held uncertain, because the arbitrator had irregularly received a claim made by one party in the absence of the other, Romilly, M. R., refused to refer the matters back to him, on the ground that the arbitrator, though perfectly honest, could hardly help being tempted to act so as to show that the objection was useless (*m*).

Divisional Court remitting award on appeal.

Under R. S. C. Ord. LIX. r. 3, on an appeal against an award on a compulsory reference to arbitration, the Divisional Court "may remit all or any part of the matter in dispute to the arbitrator or referee, or make any order with respect to the award or certificate on all or any matters in dispute that may be just."

SECTION II.

DUTY OF ARBITRATOR WHEN AWARD REFERRED BACK.

PART II. CH. X. S. 2.

Arbitrator's powers revived by reference back.

When the matters submitted, or any of them, are referred back by the court to the arbitrator, all his original powers, so far as they are not affected by the order referring the award back, seem to be revived (*n*).

Arbitrator has same power over costs of second reference as over first.

If by the original submission the costs of the reference and award be in his discretion, and nothing be said about costs in the order referring back the award, the arbitrator has power over the costs of the second reference and award, and will, it is conceived, be bound to exercise it just as much as on the original reference (*o*). The costs of the motion to refer back may be left by the court for the arbitrator to decide (*p*).

(*l*) The Londonderry, &c. Rail. Co. *v.* Leishman, 12 Beav. 423.

(*m*) Tidswell, In re, 33 Beav. 213. See Mordue *v.* Palmer, L. R. 6 Chanc. 22.

(*n*) M'Rae *v.* M'Lean, 2 E. & B. 946.

(*o*) Ibid.

(*p*) Pearson *v.* Overell, 12 W. R. 709.

Limit of time under Arbitration Act, 1889, on reference back.

The Arbitration Act, 1889 (*q*), s. 10 (2), however, affects the duration of his authority, for it says, "when an award is remitted, the arbitrators or umpire shall, unless the order otherwise directs, make their award within three months after the date of the order." The time, however, may probably be enlarged by the parties or by the court under section 9 of the same act.

Duty of arbitrator to hear evidence.

It is the duty of the arbitrator to hear additional evidence on the points remitted to his consideration, if they be such as require evidence; if all matters be sent back he must hear evidence, if tendered, on all, and not merely on the point on which the award is deficient (*r*).

Party not offering evidence.

The award made on a submission which empowered the court to remit the matters referred back to the arbitrator, appearing to the attorneys of both parties to be inconsistent on its face, it was verbally agreed, that the award should be considered not to have been delivered, and that the arbitrator should amend it. Subsequently to this the defendant's attorney obtained a judge's order to remit the matters referred to the consideration of the arbitrator. The latter amended his award without giving notice to either party of his intention to do so, and without hearing any fresh evidence or arguments. It was contended that the reference back by the judge's order opened the whole case again, but as the party objecting to the award had never intimated to the arbitrator his wish to offer fresh evidence, and did not even seem to have such a wish, the court held that there was no ground for impeaching the award (*s*).

Award sent back for specific purpose.

When the court, being empowered so to do, remit the award for a specific purpose, as, for instance, the amendment of a clerical error or technical defect in form, in regard to which the arbitrator needs no assistance from either party, he is not bound to give either party notice to attend before him on his reconsidering and amending his award.

Thus, where it was objected to the award that the arbitrator had described one of the parties by a wrong Christian name, the court ordered that the award should be referred back to the arbitrator to "reconsider and amend the same if he

(*q*) 52 & 53 Vict. c. 49.
(*r*) Nickalls *v.* Warren, 5 Q. B. 615.
(*s*) Baker *v.* Hunter, 16 L. J. Ex. 203, S. C. 16 M. & W. 672.

should think fit." The court held the arbitrator justified in making the amendment without any communication with the parties. He was also held warranted in amending other errors in the award than those which formed the ground of motion. In the original award he had decided the cause simply by directing a verdict to be entered for the defendant, which he had no authority to order; in the amended award, he directed the insertion of a clause stating that the defendant was not guilty of the grievances therein laid to his charge, or any or either of them, or any part thereof. A motion was again made to set aside the award, on the ground that the action was improperly decided by the unauthorised direction respecting the entry of a verdict; but the court held that the objection as to the faulty mode of deciding the cause was raised too late, not being raised when the award was first objected to, and that at all events it was cured by the amendment which determined the issue, and left the direction as to the verdict simply useless (*t*).

To find on one issue.

Where the arbitrator had omitted to decide on the issue raised on the count for the account stated, and the cause was referred back to him to set his award right, the court held the arbitrator justified in amending the error without rehearing the parties (*u*).

On the reference back of a poor law appeal, the order directed that the matters of the said appeal be referred back to the arbitrator, on the ground that he had not ascertained the amount of the costs to be paid by the appellant. The arbitrator refused to hear evidence on the general merits of the appeal, though discovered since the first award, and made a fresh award identical in all respects with the first, except that he inserted the amount of the costs. The court said that he had acted properly (*x*).

For arbitrator to amend directions as to weir.

After awarding that a miller was entitled to maintain his weir of the depth of fourteen inches, the arbitrator directed that, for the purpose of defining the limit of the depth, the miller should put up such durable marks as A. should direct. The award was remitted back for the arbitrator to reconsider his direction as to A. It was held that the arbitrator was

(*t*) Howett *v.* Clements, 1 C. B. 754.

(*u*) Bird *v.* Penrice, 6 M. & W. 128.

(*x*) Huntley, In re, 1 E. & B. 787.

not bound to hear the parties either upon the matter referred back or upon the question as to the costs of the reference and award (*y*).

Referee to amend defective direction as to costs.

Where the first award gave a direction not sufficiently final or certain as to paying the costs of making the submission a rule of court, the arbitrator, without notice to or hearing the parties, made a supplemental award, directing one of the parties to pay them. The court held that his conduct was correct, and that it was not necessary for him to give any notice to the parties (*z*).

Mode of framing second award.

Whether the reference back be general or limited to some one or more matters, the second award had better embrace every matter originally referred, either by confirming the first award in terms as to matters not referred back, or what seems better, by re-copying the first award as to such matters on which the arbitrator cannot alter his decision into the second award: for it has been held in one case, that the first award becomes inoperative by the rule remitting matters back, at least so far as concerns the costs of the reference and award; and as the discretion of the arbitrator over the costs of the reference is said to be a single power, and to be exercised at the close of the reference, it would seem that though one special matter only was sent back to be amended, the arbitrator might review his decision as to the costs of the original reference (*a*).

Where the award is sent back to cure a misnomer of one of the parties, it is sufficient, if the arbitrator make a certificate that the award ought to be amended by substituting the right name for the wrong, and that the award should be read as if the right name had been originally inserted (*b*).

(*y*) Johnson *v.* Latham, 20 L. J. Q. B. 236.

(*z*) Morris *v.* Morris, 6 E. & B. 383, S. C. 25 L. J. Q. B. 261.

(*a*) Johnson *v.* Latham, 20 L. J. Q. B. 236; M'Rae *v.* M'Lean, 2 E. & B. 946.

(*b*) Howett *v.* Clements, 1 C. B. 128; Davies *v.* Pratt, 16 C. B. 586, S. C. 25 L. J. C. P. 71.

CHAPTER XI.

THE PERSONAL INTERESTS OF THE ARBITRATOR.

PART II. CH. XI.

Scope and contents of the eleventh chapter.

THE preceding chapters of this part having been devoted to a full exposition of the arbitrator's power and duty in deciding as judge between the parties, this, the concluding chapter, is dedicated to a consideration of his personal interests.

Section one treats of the remuneration to which he is entitled for his services, and the means at his disposal for insuring payment.

The second section points out his liability at law for extortionate demands, for corruption, or improper directions in his award, and his duty in respect of money or chattels deposited in his hands to abide the event of his decision.

His liability in equity to costs for misconduct forms the subject of the third section.

The fourth remarks on his position, when called as a witness; and after discussing the propriety of his making out of court voluntary statements or affidavits respecting his award at the request of a party, winds up the whole with noting the distinction in this respect, which the etiquette of the bar often makes between a lay and a legal arbitrator.

SECTION I.

OF THE ARBITRATOR'S RIGHT TO REMUNERATION.

PART II. CH. XI. S. 1.

Though the cases are not quite agreed on the subject, it seems the better opinion that the appointment of an arbitrator, on a reference by consent, is not of such a nature as

to raise an implied promise to pay him a reasonable compensation for his services (*a*).

Whether arbitrator can sue for fees.

His remuneration, it is said, like that of a physician or barrister, is to be left to the option of his employers, and cannot be enforced by action (*b*).

Implied promise to pay.

It has been recently stated that in mercantile references, there is often an implied promise to pay the arbitrator; and an action may be brought on it, even when the award is taken up by neither party (*c*).

Express promise to pay.

Where there is an express promise to pay, he may maintain an action (*c*), for the taking upon himself the burthen of the reference is quite a sufficient consideration (*d*).

Submission providing for compensating arbitrators.

A clause in a submission that the costs of the reference and award, *including a reasonable compensation to the arbitrators*, shall be in their discretion, is *evidence* of a joint promise to pay them for their trouble; but they could not sue on the submission itself, as they were not parties to it (*e*).

Whether remedy for fees by attachment.

According to Eyre, C. J., the court would give the arbitrator a remedy for his fees by attachment against the party or parties whom the award directs to pay them, on the ground that the party who is bound by the rule of court to obey the award, is consequently bound to pay the costs of the award pursuant to its directions (*f*).

In a more recent instance, however, where an award was taken up by one party, and all the costs paid to two out of the three arbitrators, the court refused to grant the third arbitrator a rule, calling on the parties to pay him such sum as should be found on taxation due as a compensation for his services. It was urged that the arbitrator became a party to the rule of court, which, taken with the award, amounted to an express promise by the party to pay the costs of the award. But it was answered that the whole costs had been paid pursuant to the award, and that the remedy, if any, of the third arbitrator, was against the other two, who

(*a*) Virany *v.* Warne, 4 Esp. 46. See Swinford *v.* Burn, Gow. N. P. 5, contrà; Burroughes *v.* Clarke, 1 Dowl. 48; In re Coombs, 4 Ex. 839.

(*b*) Veitch *v.* Russell, 3 Q. B. 928.

(*c*) Crampton *v.* Ridley, 20 Q. B. D. 48; Willis *v.* Wakeley, 7 T. L. R. 604.

(*d*) Hoggins *v.* Gordon, 3 Q. B. 466; Hardress *v.* Prowd, Sty. 465.

(*e*) Bates *v.* Townley, 2 Exch. 152.

(*f*) Hicks *v.* Richardson, 1 B. & P. 93.

had received the amount. In refusing the rule, Taunton, J., expressed his disapprobation of the opinion above cited of Eyre, C. J. (*g*).

There does not seem to be any recorded instance of an attachment being granted to enforce an arbitrator's claim.

And the courts have refused to grant a rule calling upon a party to pay the sum which the arbitrators had awarded as due in respect of their costs, and directed to be paid by the parties to a stranger, Jervis, C. J., saying that the arbitrators cannot have judgment for their costs (*h*).

Practice not to deliver award until fees paid.

It is usual, therefore, for an arbitrator to settle for himself what he considers a proper remuneration for his trouble. He ought not in general, as we have before observed, to state the sum in the award (*i*); but on giving notice to the parties that the award is ready for delivery, it is advisable to notify also to them the amount of his charges, in order that the party who comes to take up the award may be prepared to pay them. The arbitrator has a lien for his reasonable costs on the award and submission, and on any memoranda or valuation obtained by himself from other persons for his own guidance, but not on documents put in evidence before him by the parties (*k*). As the retention of the award is the only security on which practically he can rely for the satisfaction of his claim, the practice commonly prevails not to deliver the award up to the party demanding it, until he have paid the arbitrator's charges. This mode of securing payment has been sanctioned by judicial approbation, even where the party who takes up the award is not by the terms of its provisions to be the party ultimately liable to them; since the party paying in the first instance may redress himself by attachment, and recover from his opponent all the costs of the award that its directions impose upon the latter (*l*).

Costs of solicitor.

It is reasonable in many cases for a lay arbitrator to employ a solicitor or counsel to draw up the award, and to charge

(*g*) Burroughes *v.* Clarke, 1 Dowl. 48.

(*h*) Laing *v.* Todd, 13 C. B. 276.

(*i*) See P. II. ch. 7, s. 1, d. 3, p. 385, as to awarding costs of award.

(*k*) In re Coombs, 4 Ex. 839; Ponsford *v.* Swaine, J. & Han. 433.

(*l*) Hicks *v.* Richardson, 1 B. & P. 93; Stokes *v.* Lewis, 2 Smith, 12; Smith *v.* Troup, 7 C. B. 757.

the expenses as costs of the award (*m*). But the court will not allow such expenses where the charges for his own fees are very high (*n*).

Arbitrator and referee under Arbitration Act, 1889.

It must here be noticed that, by the Arbitration Act, 1889, s. 15, in all cases of reference under an order of the court or a judge in any cause or matter, the official or special referee or arbitrator shall be deemed to be an officer of the court, and "the remuneration to be paid to any special referee or arbitrator to whom the matter is referred under order of the court or a judge shall be determined by the court or a judge."

Fees on award under the Lands Clauses Consolidation Act.

An arbitrator or umpire appointed under the Lands Clauses Consolidation Act, 1845, is not bound to deliver up the award to the promoters, until his reasonable charges are paid, and cannot be compelled to do so by mandamus, for he has a lien on the award for the amount (*o*). Though the point has not been decided, it is apprehended that his lien is the same in cases where the claimant is, under section 34 of the act, liable to half the costs.

SECTION II.

OF THE LIABILITY OF THE ARBITRATOR AT LAW.

Arbitrator attempting to extort excessive fee.

1. *Liability in respect of fees.*]—The courts, till of late years, seem to have assumed that the amount charged for fees by the arbitrator might be summarily reviewed by them as against the arbitrator. As between party and party it is clear that the arbitrator's charges will be taxed on application to the court, and, if excessive, reduced (*p*); but it seems to have been taken for granted that the arbitrator could be compelled to deliver up the award on payment of the reduced

(*m*) Threlfall *v.* Fanshawe, 19 L. J. Q. B. 334.
(*n*) Galloway *v.* Keyworth, 15 C. B. 229.
(*o*) The Queen *v.* The South Devon Rail. Co., 15 Q. B. 1043.
(*p*) Brazier *v.* Bryant, 2 Dowl. 600; Westwood, &c. *v.* Cape of Good Hope, 2 Times L. R. 667. See ante, P. II. ch. 7, s. 1, dd. 1, 3, pp. 375, 385.

amount. In one case, where the arbitrator's claim was alleged to be exorbitant, it was held that the award was not to be considered published until the arbitrator's charges had been taxed by the officer of the court, on the ground that it could not be considered to be ready, when it was only to be had on submitting to a wrongful demand (*q*). This ruling assumes that after taxation the arbitrator could be forced to deliver the award up on tender of the sum found reasonable by the master. It is true that the decision as to the time of publication has been overruled, but not on the ground of any mistake in the power of the court over an arbitrator (*r*).

Whether liable in action for withholding award.

Not liable to attachment.

How far the arbitrator is liable to an action for wrongfully withholding the award, if he refuse to deliver it up except on payment of an extortionate fee, does not seem to have been decided in any case; but it is now clear that the courts have no power to issue an attachment against him on the ground of such refusal (*s*); unless, perhaps, where he is now deemed to be an officer of the court under the Arbitration Act, 1889 (*t*), s. 15.

No attachment against arbitrator refusing to refund excess.

On one occasion, indeed, the court granted a rule nisi, calling on an arbitrator to refund the difference between the sum he obtained from the party before he delivered up the award, and the amount of fees allowed to be proper on taxation; and though they refused to make the rule absolute, it was not on any ground of want of jurisdiction, but on the ground of the lapse of time, and the death of the attorney who could have explained the circumstances (*u*).

Court no jurisdiction over arbitrator.

But it has been determined in later cases, that there is no summary jurisdiction in the courts over an arbitrator. And where an arbitrator refused to deliver the award up, except on the payment of an exorbitant fee, and thus compelled the party to pay it, as he did under protest, the court, on the ground of want of jurisdiction over the arbitrator, refused an application for an attachment to force him to refund the amount found on taxation to be an excess (*x*).

(*q*) Musselbrook *v.* Dunkin, 9 Bing. 605.

(*r*) Macarthur *v.* Campbell, 5 B. & Ad. 518; Brooke *v.* Mitchell, 6 M. & W. 473; Moore *v.* Darley, 1 C. B. 445; Brazier *v.* Bryant, 2 Dowl. 660.

(*s*) Dossett *v.* Gingell, 2 M. & G. 870, note 872.

(*t*) 52 & 53 Vict. c. 49.

(*u*) Brazier *v.* Bryant, 2 Dowl. 757, S. C. 3 M. & Sc. 844.

(*x*) Dossett *v.* Gingell, 2 M. & G. 870.

The court has no authority to compel the arbitrator to submit his charge to taxation by the master, but if he consent, will sometimes order that course to be adopted (*y*).

Excess recoverable by action for money had and received.

If the arbitrator refuse to deliver up the award until an exorbitant charge be paid, the party paying it to get the award may recover the excess beyond what is a reasonable fee to the arbitrator, in an action against him for money had and received (*z*).

In a case where the award was set aside for a *gross mistake* of the arbitrator, a suggestion was thrown out by Tindal, C.J., whether, as the consideration seemed to have failed for which the money expended in taking up the award was paid, the amount could be recovered from the arbitrator. He, however, expressly guarded himself against being supposed to give an opinion on the point (*a*).

Removal by misconduct: Arbitration Act, 1889.

II. *Liability for misconduct or in respect of the award.*]—By the Arbitration Act, 1889, s. 11, "where an arbitrator or umpire has misconducted himself, the court may remove him." It should be observed that this power is given to the court alone and not to the court or a judge. It does not seem, therefore, to be one of the powers that has been transferred to the master in Ord. LIV. r. 12a, made in pursuance of section 21 of the act.

No action for want of skill or care.

An action will not lie against an arbitrator for want of skill, nor for negligence in making his award, nor for the like cause against an architect broker or average adjuster employed to determine matters as a quasi arbitrator (*b*).

Arbitrator not a party to submission.

Ordinarily an arbitrator is no party to the agreement of reference, and therefore is not bound to award at all. But where he is a party to the agreement, and so engages to determine the matter, he may be liable to an action if he refuses to act (*c*).

Whether arbitrator liable in action for corrupt award.

An action, it is said, may be maintained against an arbitrator for making a corrupt or partial award (*d*).

(*y*) In re Coombs, 4 Ex. 839.

(*z*) Fernley *v.* Branson, 20 L. J. Q. B. 178; Barnes *v.* Hayward, 1 H. & N. 742; Barnes *v.* Braithwaite, 2 H. & N. 569; Dossett *v.* Gingell, 2 M. & G. 870, note 872.

(*a*) Hall *v.* Hinds, In re, 2 M. & G. 847. See In re Coombs, 4 Ex. 839.

(*b*) Turner *v.* Goulden, L. R. 9 C. P. 57; Tharsis Sulphur Co. *v.* Loftus, L. R. 8 C. P. 1; Pappa *v.* Rose, L. R. 7 C. P. 525; Stevenson *v.* Watson, 4 C. P. D. 148.

(*c*) Pappa *v.* Rose, L. R. 7 C. P. 525.

(*d*) Wills *v.* Maccarmick, 2 Wils. 148; Pappa *v.* Rose, L. R. 7 C. P. 525; Stevenson *v.* Watson, 4 C. P. D. 148.

On a motion to set aside an award in the time of Holt, C. J., the Court of Queen's Bench, though in opposition to that learned judge's opinion, who stated it to be contrary to all practice, ordered some arbitrators, who were accused of mismanagement and refusing to hear the defendant's case, to attend and be examined, saying that they deserved to be punished. The examination was made in court by affidavit as to all their proceedings, and it is stated great mismanagement appeared. It is not, however, reported whether anything was done to them in consequence (*e*).

Mandamus to arbitrators to appoint umpire and to assess costs.

Under The Companies Clauses Consolidation Act, 1845 (*f*), if two arbitrators neglect to appoint an umpire, they may, it is said, be compelled by mandamus to do so (*g*). So also a mandamus will lie to compel an arbitrator to assess costs on a reference under The Lands Clauses Consolidation Act, 1845 (*h*).

Misconduct of arbitrator a misdemeanour under the Lands and Railways Clauses Acts, &c.

If an arbitrator or umpire, after making and subscribing the declaration required by The Lands Clauses Consolidation Act, 1845 (*i*), The Railways Clauses Consolidation Act, 1845 (*k*), and The Metropolitan Sewers Act, 1848 (*l*), that he will faithfully and honestly, and to the best of his skill and ability, hear and determine the matters referred to him, "shall wilfully act contrary thereto, he shall be guilty of a misdemeanour."

Arbitrator directing trespass liable to action.

Although there be no misconduct, an arbitrator may, it seems, sometimes render himself liable by the directions of his award. Thus, on the reference of an action by a landlord against a stranger for an injury to his reversion, the arbitrator, it is said, will be guilty of a trespass if, when the tenant is no party to the submission, he, without the latter's consent, order anything to be done to the demised premises, and the party ordered carry out the directions of the award (*m*).

Liability for appointing a receiver.

If the arbitrator appoint a person as receiver to receive

(*e*) Morris *v.* Reynolds, 2 Ld. Raym. 857.

(*f*) 8 & 9 Vict. c. 16.

(*g*) Lord *v.* Copper Miners' Co., 1 Kay & John, 90, S. C. 24 L. J. Ch. 145.

(*h*) 8 & 9 Vict. c. 18; The Queen *v.* Biram, 17 Q. B. 969.

(*i*) 8 & 9 Vict. c. 18, s. 33. See the Appendix of Statutes.

(*k*) 8 & 9 Vict. c. 20, s. 134. See the Appendix of Statutes.

(*l*) 11 & 12 Vict. c. 112, s. 75. See the Appendix of Statutes.

(*m*) Angus *v.* Redford, 11 M. & W. 69, S. C. 2 Dowl. N. S. 735.

the debts due to a firm respecting whose interests he is empowered to award, it is possible that the arbitrator may incur a liability in case the receiver so appointed becomes insolvent (*n*).

Liability of arbitrator holding chattel to abide the award.

III. *Liability of the arbitrator when a stakeholder.*]—It is not uncommon for a sum of money or a chattel in dispute to be deposited in the arbitrator's hands to abide the event of the award. After depositing it, a party cannot divest it out of the arbitrator's custody, since the latter, being a stakeholder, has an authority, coupled with an interest, which cannot be revoked, and he is perfectly justified in detaining it until he has decided the question of title. Each party making claims before him has an interest in the fund or chattel dependent on the contingency of the award being wholly or partially made in his favour, and if the party depositing it afterwards become bankrupt, such contingent interest is all that passes to his assignees (*o*).

Bankruptcy of party depositing.

Interpleader on adverse claims.

On a fiat issuing after a deposit of money, nice questions often arise respecting the conflicting rights of the assignees and of the party to whom the award decrees it; therefore, if the arbitrator have not paid the sum over, when adverse claims are made upon him, he should in prudence, for security's sake, apply to the court under the Interpleader Order (*p*). In one instance, under the old Interpleader Act (*q*), the court ordered that the arbitrator, who had made his award, should, after deducting the costs to which he had been put, to be taxed by the master, pay the residue into court, and thereon be discharged, the costs to be ultimately paid by the claimant who should be unsuccessful in the issue directed to be tried (*r*).

Liability for money had and received.

In a case decided on the old bankrupt law before the 2 & 3 Vict. c. 29, when the title of the assignees had relation back to the act of bankruptcy, it was held that they had no right to recover from an arbitrator a sum of money deposited in his hands by the bankrupt (after a secret act of bankruptcy), with

(*n*) Lingood *v.* Eade, 2 Atk. 501.

(*o*) Tayler *v.* Marling, 2 M. & G. 55; Gunton *v.* Nurse, 5 Moore, 259.

(*p*) R. S. C. 1883, Order LVII.

(*q*) 1 & 2 W. IV. c. 58.

(*r*) Tayler *v.* Marling, 2 M. & G. 55.

the consent of a creditor who had made a claim on it, the arbitrator being appointed to ascertain the amount of the claim and to pay that amount to the creditor: it being proved that the arbitrator had kept the sum distinct from his own money, and after ascertaining the amount of the claim, had paid it over to the creditor without any notice of the act of bankruptcy. The assignees were held entitled to the balance remaining in the arbitrator's hands after paying the debt, but as to the portion paid over, the arbitrator was looked upon as a mere channel of conveyance, and therefore not liable (*s*).

To whom arbitrator should deliver chattel.

If, on the trial of an action for illegally taking or detaining a personal chattel, in which the defendant justifies by alleging title to the property, a verdict be taken for the plaintiff with damages the full value of the article, subject to a reference to an arbitrator, who is to decide the question of ownership, and in whose hands the chattel is deposited until the award is made; and it is agreed, that if he award for the plaintiff, the verdict shall stand as it is, but if for the defendant, that then a verdict shall be entered for the latter; and the award find that the property was the plaintiff's; the arbitrator, if the submission do not point out what is to be done with the deposit, should not deliver it to the plaintiff (for he cannot be entitled both to the thing itself and to the full compensation in damages which the verdict gives him), nor should he part with it to the defendant, until the verdict for the plaintiff has been satisfied. But after payment of the damages, he should hand it over to the defendant; for the effect of the verdict in law is, that by the payment the plaintiff's right of property is barred, and the property is vested in the defendant (*t*).

If the defendant have relied on the title of another, a stranger to the action, who, though not a party to the submission, in fact assented to the reference and the deposit of the article, the stranger has no right whatever to demand it from the arbitrator, for the award concludes him from saying that the original property was not the plaintiff's, and the

(*s*) Tope *v.* Hocking, 7 B. & C. 101.

(*t*) Gunton *v.* Nurse, 5 Moore, 259; Cooper *v.* Shepherd, 3 C. B. 266; Adams *v.* Broughton, 2 Stra. 1078, S. C. Andr. 18.

defendant, the party who is liable to the damages, is alone justified in claiming the goods (*u*).

In the case of a verdict of a jury, it is to be observed that this principle of law applies only where the damages are estimated on the footing of the full value of the thing deposited (*x*); it is presumed, therefore, that a like distinction should be made on a reference.

Liability of arbitrator in action for the chattel.

If, after the decision is made, the unsuccessful party, notwithstanding the award, demand the property, and the arbitrator refuse to deliver it to him, such refusal is perfectly justifiable, as it is in effect saying, "I cannot deliver it to you, because I have awarded that it does not belong to you;" and it does not amount to an unlawful conversion, for which an action can be sustained (*y*).

SECTION III.

OF THE LIABILITY OF THE ARBITRATOR IN EQUITY.

We now proceed to consider how far the arbitrator may be made liable in equity as a defendant on an action brought to set aside the award.

Arbitrator made defendant to bill to impeach award.

Might generally demur.

As the plaintiff must by his bill under the old law have shown some claim of interest in the defendants in the subject of the suit which could make them liable to the plaintiff's demands, the arbitrator, if he were made a party to a bill filed to impeach the award, might in general demur to the whole bill, as well to discovery as to relief (*z*); but not if the bill charged him with fraud (*a*).

Bill to impeach award for mistake.

If the award were impeachable for mistake or miscalculation, however palpable, the bill, to have it rectified, should

(*u*) Gunton *v.* Nurse, 5 Moore, 259.

(*x*) Lacon *v.* Barnard, Cro. Car. 35; Holmes *v.* Wilson, 10 A. & E. 511, note.

(*y*) Gunton *v.* Nurse, 5 Moore, 259.

(*z*) Steward *v.* E. I. Co., 2 Vern. 380.

(*a*) Padley *v.* Lincoln Waterworks Co., 2 M'N. & G. 68, qualifying Steward *v.* E. I. Co., 2 Vern. 380.

have been brought only against the party in whose favour the award was made, and not against the arbitrator (*b*).

Striking out arbitrator's name as defendant.

It is reported that in one instance, where an arbitrator accepted the office on the proviso that the parties would enter into a rule not to bring a bill in equity, and the party against whom the award was made nevertheless made the arbitrator a defendant to a bill charging corruption and partiality, Lord Chancellor King, on motion by the arbitrator, directed that his name should be struck out from being a party to the cause (*c*).

But V.-C. Stuart, in a later case, refused to give any effect to a clause in a contract precluding the parties from bringing any action or suit against the arbitrator, where the charge against him was for fraudulently refusing to give his certificate (*d*).

No demurrer when gross misconduct charged.

In some cases, however, where the award has been assailed on the ground of misconduct in the arbitrators, and they have been made parties to the suit, the court has gone so far as to order them to pay the costs (*e*). And in such instances, Lord Redesdale considered that a demurrer to the bill would not have been allowed (*f*).

In *Lord Lonsdale* v. *Littledale* (*g*), a demurrer by an arbitrator to a bill of this nature was in fact overruled, though not expressly upon the ground of the propriety of making an arbitrator a party, but because the bill charged certain specific acts, which showed combination or collusion between him and one of the parties, and made him the agent for such party, and which the court therefore thought required an answer (*h*).

Costs may be prayed against corrupt arbitrator.

When it was intended to fix arbitrators with the payment of costs in consequence of their corrupt or fraudulent behaviour, it was said that the bill ought specifically to have prayed that relief against them (*h*). No decree could be made against them for anything else than costs (*i*).

(*b*) Anon. 3 Atk. 644.

(*c*) Lingood *v.* Croucher, 2 Atk. 395, per Lord Hardwicke, C.

(*d*) Scott *v.* The Liverpool Corporation, 25 L. J. Chan. 227.

(*e*) Ward *v.* Periam, cited in Chicot *v.* Lequesne, 2 Ves. Sr. 315; Chicot *v.* Lequesne, 2 Ves. Sr. 315; Lord Lonsdale *v.* Littledale, 2 Ves. Jr. 451.

(*f*) Mitford's Plead. in Chanc. 187, 5th ed.

(*g*) 2 Ves. Jr. 451.

(*h*) 1 Daniell's Chanc. Prac. by Headlam, 287.

(*i*) Steward *v.* East India Co., 2 Vern. 380.

Action will lie though costs not prayed.

An action will lie against an engineer acting as arbitrator between a contractor to do works and the corporation employing the latter, for fraudulently withholding his certificates, under which alone the contractor was entitled to payment, though no costs be prayed against the engineer (*k*).

Arbitrator need not answer as to grounds of award, but must to charge of corruption.

When made parties, arbitrators were not bound to answer as to their reasons for making the award (*l*); and they might plead to that part of the bill in bar of such discovery, and they might plead the award in bar, though it were defective in point of law for not being final (*m*); but it was incumbent upon them as upon other defendants, if they were charged with corruption and partiality, to support their plea by an answer showing themselves incorrupt and impartial (*n*); for it would be very inequitable to leave them at liberty to plead their own award in order to cover their own misbehaviour (*o*).

A contractor filed a bill against a railway company and their engineer, whose certificates were to be conclusive as to the amount payable by the company to the contractor. The bill alleged that the amounts mentioned in the certificates were deficient, and imputed fraud and collusion to the engineer and the company, and, as evidence of the fraud, charged that certain items were of a specified value; it was held that the engineer could not by denying fraud generally in his answer, protect himself by his character of arbitrator from answering as to the particular items specified (*p*).

Arbitrator when entitled to costs.

The answer of the arbitrator on the evidence might entitle him to have the bill dismissed as against him and to have his costs (*q*); but if it appeared on evidence that he had been

Corruption

(*k*) Scott *v.* The Corporation of Liverpool, 25 L. J. Chanc. 227. See Ludbrook *v.* Barrett, 46 L. J. C. P. 798; and Batterbury *v.* Vyse, 2 H. & C. 42, S. C. 32 L. J. Ex. 177.

(*l*) Padley *v.* The Lincoln Waterworks Co., 2 M'N. & G. 68.

(*m*) Anon. 3 Atk. 644; Lingood *v.* Croucher, 2 Atk. 395.

(*n*) 1 Daniell's Chanc. Prac. by Headlam, 287; Lingood *v.* Croucher, 2 Atk. 395.

(*o*) Rybott *v.* Barrell, 2 Eden, C. C. 131.

(*p*) Padley *v.* The Lincoln Waterworks Co., 2 M'N. & G. 68. See M'Intosh *v.* The Great Western Rail. Co., 2 De Gex & S. 758; and Waring *v.* The Manchester, Sheffield, and Lincolnshire Rail. Co., 7 Hare, 482; aff. on appeal, 2 Hall & T. 239.

(*q*) Lord Lonsdale *v.* Littledale, 2 Ves. Jr. 451; Hamilton *v.* Bankin, 3 De Gex and Smale, 782; Scott *v.* Corporation of Liverpool, 27 L. J. Ch. 641, S. C. in error, 28 L. J. Ch. 230, S. C. 3 De G. & J. 334.

PART II. CH. XI. S. 3.

guilty of the corruption or collusion charged, we have previously seen that the penalty attaching to him in equity is, that he may be condemned to pay them (*r*).

proved, condemned in costs.

Award set aside on motion, proceedings irregular.

No moral misconduct.

By an order made in a suit in Chancery, certain matters were referred, and an award was made. The award was set aside on motion, on the ground that the arbitrator had improperly excluded from the meeting the son of one of the parties and a shorthand writer on his behalf. No imputation was thrown on the moral conduct of the arbitrator. The lords justices ordered the costs of the arbitrator to be paid by the party making the motion, who had brought the arbitrator before the court (*s*).

Serving notice of motion on arbitrator.

Arbitrators whose awards are sought to be set aside on motion for alleged irregularity on their parts are not necessarily parties, and, it seems, should not be served with notice of motion, and if so served and appearing may probably be entitled to ask for costs, unless they are shown to have been guilty of improper conduct (*t*).

SECTION IV.

OF TESTIMONY BY THE ARBITRATOR.

PART II. CH. XI. S. 4.

1. *The arbitrator called as a witness.*]—Though the arbitrator's whole power over the parties ends with the award, yet, as his testimony respecting matters connected with the reference is often requisite, it is advisable for him carefully to preserve the notes which he has made of the evidence taken before him. Though the notes are his own, and the court has no power to compel them to be produced, or make any order respecting them any more than with respect to a judge's minutes (*u*), yet he may require them to assist his

Arbitrator as witness.

(*r*) Lingood *v.* Croucher, 2 Atk. 395; Chicot *v.* Lequesne, 2 Ves. Sr. 315; Ward *v.* Periam, cited in Chicot *v.* Loquesne, 2 Ves. Sr. 315; Lord Lonsdale *v.* Littledale, 2 Ves. Jr. 451.

(*s*) Haigh *v.* Haigh, 31 L. J. Ch. 420, S. C. 3 De G. F. & J. 157.

(*t*) Moseley *v.* Simpson, L. R. 16 Eq. 226.

(*u*) Scougull *v.* Campbell, 1 Chitt. 283.

memory in giving an account of what took place before him.

Whether arbitrator need state grounds of award.

An arbitrator may often be called as a witness to give evidence in the courts both of law and equity respecting proceedings in the arbitration. There does not seem any privilege attaching to him in his judicial character, whether he be a legal or lay person, entitling him to refuse his testimony, though it was held by Mansfield, C.J., that he might decline to state the grounds on which he made his award.

For where, in an action on an award, the defendant called the arbitrator to prove the ground on which he made his award, in order to show that he had exceeded the limits of the submission, Mansfield, C.J., told the witness that he need not be examined, unless he chose, thinking that an arbitrator was not, after making his award, to be worried as a witness. The arbitrator in consequence declined to be examined. On a motion for a new trial, and cause shown, no objection was made to this decision (*x*).

Inquiry of arbitrator whether matter considered.

In a more recent case, where the award made no allowance to the plaintiff in respect of a certain guarantee, and the plaintiff filed a bill in the Court of Chancery in Ireland, complaining that in taking the account the guarantee had been excluded; the court said that the plaintiff might have examined each of the arbitrators, and asked them whether they had abstained from weighing the effect of the guarantee, thinking it beyond their jurisdiction, or for any other cause, or whether they had taken it into their consideration together with the other matters in difference in coming to their conclusion on the whole case. And Lord Chancellor Hart added, had the case originally come before him he should have directed a short inquiry to examine the arbitrators on that single point (*y*).

Inquiry may be whether matter beyond jurisdiction considered not as to grounds of compensation.

It was decided in the House of Lords, after much discussion in the courts below, that an arbitrator called as a witness, in an action on an award, might (per Lord Cairns) be examined as to every matter of fact, with reference to the making of the award, what claims were made and what admitted, so as

(*x*) Ellis *v.* Saltau, 4 C. & P. 327, note; Johnson *v.* Durant, 4 C. & P. 327. See Anon. 3 Atk. 644.

(*y*) Brophy *v.* Holmes, 2 Molloy, 1.

to put the court in possession of the history of the litigation up to the time of his proceeding to make the award, and (per Lord Chelmsford, Chancellor), whether in his estimate of the compensation he took into consideration any matters not included in the reference, and therefore not within his jurisdiction.

And it was laid down plainly that the defendants had no right to go farther and question the arbitrator as to the elements which he took into his consideration in determining the quantum of compensation, or to scrutinise the exercise by the arbitrator of his discretionary power to award compensation. In advising the House of Lords in accordance with the rule above stated, Cleasby, B., noted a distinction apparently approved by Lord Cairns, that this limitation of examining an arbitrator was confined to actions at law, where the rules of evidence must be attended to, but that where a summary application was made to set aside or refer back an award on the ground of mistake or misconception of the arbitrator, a written statement by the arbitrator of the reasons by which he was actuated might often be receivable (*z*).

Fuller inquiry on motion to set aside.

Valuer.

It is to be noticed that a valuer who is not an arbitrator may be examined as to the basis of his valuation, on interrogatories, in an action against himself, for want of reasonable care and skill (*a*).

Award not taken up.

Where the award has not been taken up, the arbitrators will be protected from producing the submission and from disclosing the contents or the grounds of the award, or the discussions which took place between themselves, but they ought to answer whether either party had requested them to discuss certain accounts, and must produce the documents put in evidence before them which are in their hands (*b*).

And Hannen, J., has said that an arbitrator might be asked whether he had been requested by either party to find on specific issues, he being authorised to award generally, unless so requested (*c*).

Giffard, V.-C., held that an arbitrator might be examined

(*z*) Buccleuch, Duke, *v.* Metropolitan Board of Works, L. R. 5 App. Cas. 418; same case below, L. R. 3 Ex. 306; L. R. 5 Ex. 221.

(*a*) Turner *v.* Goulden, L. R. 9 C. P. 57.

(*b*) Ponsford *v.* Swaine, 1 J. & Hem. 433.

(*c*) Wilson *v.* Hinckley, 18 L. T. N. S. 695.

on a question of fraud, or to prove whether he has mistakenly awarded on a wrong subject-matter, or been guilty of a mistake in law going directly to the basis on which the award is founded (*d*).

Arbitrator proving proceedings in reference.

The arbitrator may be a witness to prove a submission by parol, to state facts relating to the conduct of a party, which show his assent to be bound by the award (*e*), to prove what matters were matters in difference in the reference (*f*), and whether a party claimed compensation for a particular injury (*g*).

In an old case, where the award was general and purported to decide all matters in difference, the court refused to receive evidence to contradict the award, or to allow the arbitrator to be called to prove that in respect of a claim made before him, and within the submission, he had refused to award a compensation (*h*).

Proving admission of parties.

He may be called upon to prove admissions made by the parties in the course of the proceedings, other than mere admissions made for the purpose of buying peace; for there is no ground why the statement of the parties before an arbitrator should be excluded, as they are not made in confidence or with a view to a compromise, and the matter comes as adversely before him as before any other tribunal (*i*).

What admissions made before arbitrator receivable.

Lord Kenyon, at one time, made it a rule never to receive evidence of any admissions of the parties whatever which were made on a reference that was not effective; but he subsequently stated that he felt he had carried the rule too far, and that he should receive evidence of all admissions before an arbitrator which the defendant would be obliged to make in equity, and reject none but such as were mere concessions with a view to a compromise (*k*).

In a subsequent case, the same learned judge rejected the evidence of an arbitrator under the following circumstances:—

(*d*) Rhys *v.* Dare Valley Rail. Co., 37 L. J. Ch. 719, S. C. L. R. 6 Eq. 429.

(*e*) Adams *v.* Bankhart, 1 C. M. & R. 681.

(*f*) Ravee *v.* Farmer, 4 T. R. 146; Golightly *v.* Jellicoe, cited in note, 4 T. R. 146; Trimingham *v.* Trimingham, 4 N. & M. 786.

(*g*) Martin *v.* Thornton, 4 Esp. 180.

(*h*) Shelling *v.* Farmer, 1 Stra. 646.

(*i*) Slack *v.* Buchanan, 1 Peake, N. P. C. 7; Doe d. Lloyd *v.* Evans, 3 C. & P. 219; Westlake *v.* Collard, Bull. N. P. 236b, 7th ed.; Gregory *v.* Howard, 3 Esp. 113.

(*k*) Slack *v.* Buchanan, 1 Peake, N. P. C. 7.

An action, brought by a master against his servant for money had and received, coming on to be tried, the servant offered to suffer a verdict against himself, provided his master would produce his books before an arbitrator, and it did not appear by the master's cheques and entries that the servant had fully accounted. A verdict was accordingly taken by consent, and the cause referred, with power to the arbitrator to examine the parties upon oath, and to compel a production of the books. The arbitrator having examined the books, and the parties on oath, awarded in favour of the servant, who subsequently brought an action against his master for maliciously holding him to bail in the former cause. On the trial, the plaintiff's counsel called for the books, and proposed to examine the arbitrator to prove his case, but Lord Kenyon rejected the evidence, saying, "It seems to me the arbitrator ought not to be permitted to depose here as to what transpired before him, either upon the examination of the parties themselves or on an inspection of the books, upon the principle that the parties themselves could not have been examined in the former cause, nor could the plaintiff have been compelled by a judge at Nisi Prius to produce his books, and it would be a dangerous thing if such evidence were admitted to prove the arrest in that cause to be malicious, as the arbitrator might have proceeded to cut the knot rather than to unloose it, according to the strict rules of law, from a wish to do complete justice between the parties" (*l*).

But where the plaintiff said to the clerk of the defendant's attorney that he would refer the question in dispute to him as an arbitrator, and on the clerk declining the office, added a statement admitting the defendant's set-off, the court held that the statement of the plaintiff was admissible against him and might be proved by the clerk, as it was no concession to buy peace, although the clerk added that the plaintiff desired him to communicate to the defendant what he had said, with a view of inducing the latter to agree to a compromise (*m*).

Referee

A referee to report may be examined as to the grounds of his report (*n*).

(*l*) Habershon *v.* Troby, 3 Esp. 38.

(*m*) Thomson *v.* Austen, 2 D. & R. 358.

(*n*) Rust *v.* Victoria Graving Dock Co., 36 Ch. D. 777.

II. *Voluntary statements by the arbitrator.*]—It is a question deserving the deliberate consideration of the arbitrator in each particular case, under what circumstances, and to what extent he should give an explanation of the grounds of his award, in answer to inquiries by either party, made with a view of taking proceedings to impeach or defend it.

Whether arbitrator should state grounds of award to a party.

As a general rule the making such statements is considered inconvenient, and discouraged by the courts. When an arbitrator is willing that the principle of his decision should be reviewed by the courts, he should raise the question by stating a case in his award. If the parties do not during the reference think fit to ask for a case, and the losing party applies for a statement of the grounds of his decision afterwards, the courts will not notice it (*o*).

We have before seen that in many other cases the courts will refuse to receive the arbitrator's statements; when such is the case the explanation would be merely useless (*p*).

But assuming the statements available as evidence, and the arbitrator willing to answer questions, it seems advisable, as far as may be, if circumstances permit, to adopt the course followed by some arbitrators, when a verbal explanation is sought, of declining to answer inquiries, unless both parties call together to receive the explanation; for it may be remarked that a verbal ex parte communication is open to objection in some respects: since, if the arbitrator be led into conversation with a party, or with the attorney of one of the parties, alone, it is possible he may do the absent party a serious injury by an unguarded expression, which a question from the latter, had he been present, might have induced him to qualify. It is also possible that the result of the interview may not be exactly and impartially reported. To prevent misconception, the arbitrator, if he can, had better make all his communications in writing.

If so both parties should be present.

When the courts were more willing than they now are to set aside an award for mistake, we have previously seen that the affidavit of the arbitrator, admitting that the mistake had

Affidavit of mistake.

(*o*) The London Dock Co. *v.* St. Paul's Shadwell, 32 L. J. Q. B. 30.

(*p*) P. II. ch. 5, s. 8, d. 2, p. 310.

been made out to his satisfaction, was generally required by Lord Thurlow, C., before he annulled the award (*q*).

So also, the admission of the arbitrator that the award does not carry out his intention is, in many cases, required before the courts will refer back an award for amendment (*r*).

Affidavit to explain award.

We have before noticed that an affidavit will not be received from an arbitrator to explain his intention in awarding in a particular manner, the terms of the award being clear (*s*).

Affidavits of proceedings in the reference.

A narration of mere facts concerning the proceedings in the reference stands on a very different footing from an explanation of the mode in which the arbitrator has performed his judicial functions, and, when no ground of etiquette interposes, there seems no reason why an arbitrator should not depose to them as well as any one else.

Accordingly we find, on motions for setting aside awards, or in showing cause against such motions, affidavits of arbitrators are constantly used in the courts of law and equity to explain alleged irregularities, to answer charges of misconduct, to show under what circumstances particular meetings were held, and in what manner the award was executed (*t*).

Barrister arbitrator not make affidavit.

III. *When the arbitrator is a barrister.*]—When the arbitrator happens to be a barrister, he is not usually expected to make an affidavit for the purpose of either supporting or setting aside the award.

There is a well understood rule among the members of the bar, that they should decline to make affidavits respecting matters in which they are engaged professionally; in which capacity they are often considered to be acting when filling the office of arbitrator (*u*). The rule has continually met with the sanction of the courts, and when some members of the bar, in their anxiety to give a full explanation of their conduct as arbitrators, have made affidavits, the courts, on some occasions, have expressed their regret at the step they

(*q*) P. II. ch. 5, s. 8, d. 1, p. 307.
(*r*) P. II. ch. 10, s. 1.
(*s*) Gordon *v.* Mitchell, 3 Moore, 241.
(*t*) Price *v.* Williams, 1 Ves. Jr. 365; Hare, In re, 6 Bing. N. C. 158, S. C. 8 Dowl. 71; Kingwell *v.* Elliott, 7 Dowl. 423; Blundell *v.* Brettargh, 17 Ves. 232; Cleesly *v.* Peese, 8 Moore, 524; Stalworth *v.* Inns, 13 M. & W. 466.
(*u*) Dobson *v.* Groves, 6 Q. B. 637.

have taken (*x*). On a recent occasion, however, where a rule nisi had been obtained to set aside an award on a suggestion, among others, that on one matter in difference the arbitrator had failed to award, and the arbitrator, who was a barrister, felt a reluctance to make an affidavit without the sanction of the court, Erle, J., in the Bail Court, on the difficulty being mentioned to him, said that he did not in this respect see any difference between a barrister and any other arbitrator, and thought that there was no objection to his making the affidavit (*y*).

Using arbitrator's notes on motion to set aside award.

Where a matter had been referred to a barrister, and on showing cause against a motion to set aside the award, the counsel proceeded to read a copy of the arbitrator's notes, verified by his clerk, the opposing counsel objected to his doing so, on the ground that it would be in substance infringing on the rule above alluded to. It was stated that the arbitrator was willing to furnish the court with the original notes. But on Coleridge, J., saying the rule laid down by the bar was a very proper one, and that it would certainly be infringing on it if such notes were to be received, the point was not farther pressed, and the notes were not used in the argument (*z*).

Barrister declining to explain to the parties.

The same ground of professional etiquette which precludes a barrister acting as arbitrator from making an affidavit, will sometimes induce him to decline answering inquiries of the parties.

In a modern case in the Queen's Bench, where a motion was made to set aside the award of an eminent barrister, on the ground of irregularity in examining a witness of the defendant, no one being present on behalf of the plaintiff; the arbitrator in answer to a letter of the defendant's attorney, requesting him to explain the facts, and inquiring whether he would be willing to state on affidavit the circumstances and purpose of the meeting, wrote as follows: "I very deeply regret that I cannot comply with either of your requests. I feel an intense anxiety to explain under what circumstances, and for what purpose, I saw either of those gentlemen on the day you name, but I consider it would be

(*x*) Keene & Atkinson, In re, Ex. Ap. 16, 1847.

(*y*) Ex relatione of counsel.

(*z*) Doe d. Haxby *v.* Preston, 3 D. & L. 768.

improper in me to give any such explanation to any of the parties concerned. The court have the power, if they think fit, of calling upon me for an explanation, and I shall be rejoiced if they will afford me the opportunity of giving it; and that they may not be disappointed, I will make it my object to be in court, ready to give any information which may be called for, if you will let me know the day on which it is arranged to dispose of these rules." This letter was brought before the court by the affidavit of the defendant's attorney. The court, however, did not make any application to the arbitrator to explain, but on the evidence contained in the affidavits before them, set aside the award for the irregularity. In giving judgment, Lord Denman, C.J., by noticing the fact that a special pleader present at the meeting, though not professionally, who had declined to make an affidavit on the ground of professional etiquette, might with propriety have given evidence, seems, by his silence respecting the arbitrator's refusal, tacitly to have assented to the correctness of the course adopted by that latter gentleman (*a*).

Whether court can notice explanatory letter.

In one instance, where there were several arbitrators, all barristers, one of whom made an affidavit, while the other two, though declining to make affidavits, wrote letters explanatory of what were the matters in difference on the reference, Pollock, C.B., expressing his regret that the one should have made an affidavit, seemed to think that he might look upon the letters of the other arbitrators as good as affidavits, but Parke, B., doubted whether the court could notice them at all (*b*).

Court inquiring of the arbitrator the grounds of the award.

We have before seen that in some instances, though rarely, the court will direct an inquiry to be made of the arbitrator as to particular facts (*c*). When such is the case, the arbitrator should confine his answer to the points on which the court has asked information, and not go into a general history of the case (*d*).

(*a*) Dobson *v.* Groves, 6 Q. B. 637.

(*b*) Keene & Atkinson, In re, Ex. Ap. 16, 1847. See P. II. ch. 5, s. 8, d. 2, p. 313.

(*c*) See P. II. ch. 5, s. 8, d. 3, p. 304.

(*d*) Morgan *v.* Mather, 2 Ves. Jr. 15.

PART THE THIRD.

The Consequences of the Award.

Statement of the scope and contents of the third part.

In this, the last part, taking up the award as made, our employment is to record its effect, to illustrate the proper mode of performing its requisitions, to exhibit how it may be made available as a cause of action or means of defence, either in the Queen's Bench or Chancery Division, and how the award may be enforced by attachment, execution under the statutes, or by judgment and execution in the cause referred.

Having provided thus for a valid award, our attention is directed to the steps that may be taken in the case of one that is defective; and succeeding chapters make manifest how, and for what cause, an award may be summarily set aside on motion; the judgment entered pursuant to it in the cause referred annulled; or the award itself impeached in equity.

The consequences which follow on the failure of the reference are declared in the chapter that concludes the work.

CHAPTER I.

EFFECT OF THE AWARD.

Contents of the first chapter.

THIS chapter treats of the effect of an award generally, as a final judgment in law and equity; it examines how far an award concludes a party from subsequently proceeding to enforce a claim within scope of the reference, accidentally or intentionally kept back from the arbitrator's notice; it considers the effect of an award to transfer a right to property; it directs attention to the consequences of an award on particular subjects and to particular parties, and to strangers, and under the various kinds of submissions; and it shows the consequences of the bankruptcy of a party, and states the operation of a defective award.

Award a final judgment on all matters.

1. *The award a final judgment in law and equity.*]—A valid award on a voluntary reference is a final and conclusive judgment, as between the parties, respecting all the matters referred by the submission. It binds the rights of the parties for all time without appeal (*a*), except where it is provided expressly that it shall have a temporary effect only (*b*).

Certificate final.

Whether the arbitrator be appointed to make a certificate or an award, his decision in each case is equally conclusive (*c*).

Award changing nature of claim.

An award on a money claim fixing the amount due does not change the nature of the original claim, but if the claim be to have goods delivered, and the award direct the payment of money in satisfaction, the right to have the goods is gone; so if the demand be for a debt, and the award direct payment

(*a*) Day *v.* Bonnin, 3 Bing. N. C. 219; Bird *v.* Cooper, 4 Dowl. 148; Bac. Ab. Arb. E.; Stonehewer *v.* Farrar, 9 Jur. 203; Dudgeon *v.* Martin, 1 McQueen, H. L. 714.

(*b*) See the Railway Companies Arbitration Act, 1859, 22 & 23 Vict. c. 59, s. 21.

(*c*) Price *v.* Price, 9 Dowl. 334; Williams *v.* Moulsdale, 7 M. & W. 134.

in a collateral way, as by delivery of goods or performance of work, no action can be maintained for the debt (*d*).

Effect of award on a judgment.

If a judgment be referred with other matters, and an award be made, the judgment is not extinguished and null, so as to make seizing under it a trespass; but an action may be brought for breach of the agreement to abide by the award or for maliciously seizing (*e*).

In one instance the court permitted a reference to a barrister to state what rule of court, if any, should be drawn up; and after the arbitrator had certified, granted a rule of court in the terms of his certificate (*f*).

Award as a decree in equity.

In equity, on a submission by order of the court, the award used to be viewed as a decree, and as equally, if not more conclusive (*g*).

Yet in some cases the Court of Chancery, treating the award rather as a report than a final decision, would not allow an award to be made binding its officers. For where accounts were directed to be taken by the master, and liberty was by consent given to the parties to submit to arbitration any question of account, the court gave liberty to the master to adopt the arbitrator's conclusions, but would not, even by consent, make it compulsory on him to do so (*h*). And where proceedings in Chancery for the infringement of a patent, the validity of which was in question, had been referred to an arbitrator, who awarded that the patent was not illegal and void, it was held that in an action between the same parties for another infringement, the defendant was not estopped from again disputing the validity of the patent (*i*).

No estoppel.

Award treated by equity as equivalent to a verdict.

An award for the plaintiff in an action for a nuisance would in the Court of Chancery, on proceedings for an injunction to prevent the continuance of the nuisance, be regarded as highly as the verdict of a jury establishing the existence of the nuisance (*j*).

(*d*) Allen *v.* Milner, 2 C. & J. 47; Parkes *v.* Smith, 15 Q. B. 297; Commins *v.* Heard, L. R. 4 Q. B. 669.

(*e*) Barry *v.* Grogan, 16 W. R. 727.

(*f*) Brandon *v.* Smith, 22 L. J. Q. B. 321.

(*g*) Travers *v.* Lord Stafford, 2 Ves. Sr. 19; Pitcher *v.* Rigby, 9 Price, 79.

(*h*) Scale *v.* Fothergill, 8 Beav. 361.

(*i*) Newall *v.* Elliott, 1 H. & C. 797.

(*j*) Broadbent *v.* The Imperial

Damages not rent.

On a reference of an action for rent, and of a cross suit to have the agreement of lease set aside, the arbitrator awarded that the agreement was valid, but that it should be cancelled, and that the lessee should pay the party granting the agreement a certain sum. It was held that the sum awarded was by way of damages and not rent, and could not be set up as a specialty debt (*k*).

Award made after authority gone.

An award made after the time limited for making it has expired, when the delay has been occasioned by the fault of a party (*l*), or after revocation of the arbitrator's authority without sufficient grounds (*m*), had, we have seen, in certain cases, an effect in equity.

Parol award.

When a verbal award is valid and effectual has also been previously considered (*n*). How it is to be enforced by action (*o*), and whether an attachment (*p*) will issue for disobedience to it, will be discussed hereafter.

Proceeding in rem.

An agreement of reference of a claim for injuries received by the plaintiff, a diver, from the defendants' steamer in the Mersey, contained a clause that if the award were not performed, all the plaintiff's rights were reserved. The defendants not paying the sum awarded, the plaintiff was held entitled to proceed in the Court of Admiralty in rem for damages (*q*).

Award under Public Health Act, 1875.

An award in an arbitration under the Public Health Act, 1875, between one of several frontagers called upon to pay his proportion of the expense of paving a street, and an urban authority, by which the arbitrator alters not merely the assessment on the particular frontager, but the assessment in regard to all the frontagers, is not binding upon any frontager not a party to the arbitration, so as to entitle the urban authority to receive from him the sum which would be due from him on the footing of the altered assessment (*r*).

Gas Co., 7 De G. M. & G. 436, S. C. 26 L. J. Ch. 276; in H. L. 29 L. J. Ch. 377, S. C. 6 H. L. Cas. 600.

(*k*) Talbot *v.* Earl of Shrewsbury, L. R. 16 Eq. 26.

(*l*) Morse *v.* Merest, 6 Madd. 26. See P. II. ch. 3, s. 2, d. 4, p. 151, as to giving further time; P. III. ch. 12, s. 2, enforcing contract in equity.

(*m*) See P. II. ch. 3, s. 3, d. 3, p. 162, as to refusing injunction against enforcing award.

(*n*) See P. II. ch. 5, s. 1, d. 1.

(*o*) Hanson *v.* Liversedge, 2 Vent. 242, S. C. Carth. 156.

(*p*) See P. III. ch. 6, s. 1, d. 4.

(*q*) The Sylph, L. R. 2 Adm. Ecc. 24.

(*r*) Tunbridge Wells Local Board *v.* Ackroyd, 5 Ex. D. 199.

An award and payment of the compensation awarded for the lands required are conditions precedent to the right of a Drainage Board, under the Irish Act (26 & 27 Vict. c. 88), to enter upon the lands (*s*).

Award condition precedent.

An award under seal is not a deed, unless delivered as a deed, but is merely a writing under hand and seal (*t*).

Award under seal no deed.

II. *Effect of a colourable award.*]—It seems to have been not uncommon in Scotland for parties who had had matters in dispute between them, and had come to an agreement respecting them, to put that agreement into the form of a submission and decreet arbitral, for the purpose of giving it effect; and an opinion was entertained by some of the most eminent men at the Scotch bar, that a decreet arbitral might properly be used to carry an agreement into execution, and might be valid as such, though so used. A transaction of this nature, however, coming before the House of Lords, it was there decided that an agreement carried out under colour of a submission and decreet arbitral could not be looked upon as a valid submission or a valid decreet arbitral (*u*).

Colourable decreet arbitral in Scotland.

III. *Effect of an award on matters in difference not brought forward.*]—After an award has been made, no action can be maintained for any matter in difference within the scope of the submission which was not in fact brought before the arbitrator, nor can advantage be taken of it in answer to a motion for an attachment. Parties, therefore, must be careful to bring forward at the time of the reference every claim within the submission on which they intend to insist (*v*).

No action for matters within scope of submission

As an award directing mutual general releases closes all accounts between the parties up to the time of the submission, it precludes a second arbitrator, on a subsequent reference of all matters in difference, from awarding in respect of a claim

Arbitrator bound by former award.

(*s*) Hanks *v.* Arterial Drainage Co., 6 L. R. Irish, 10.

(*t*) Brown *v.* Vawser, 4 East, 584; Dod *v.* Herbert, Sty. 459; Perry *v.* Nicholson, 1 Burr. 278; Hodsden *v.* Harridge, 2 Saund. 62, b. n. See P. II. ch. 5, s. 1, d. 4, p. 252, on deed stamp requisite.

(*u*) Maule *v.* Maule, 4 Dow. 363; Routledge *v.* Carruthers, 4 Dow. 392.

(*v*) Dunn *v.* Murray, 9 B. & C. 780; Dicas *v.* Jay, 6 Bing. 519; Collins *v.* Powell, 2 T. R. 756; Clegg *v.* Dearden, 12 Q. B. 576; Smith *v.* Johnson, 15 East, 213,

which existed at the time of the former submission, and might have been decided by the former arbitrator, although in fact it was not considered nor awarded on by him (*w*).

Demand omitted.

On one occasion, where the arbitrators left out of their consideration a demand clearly within the submission, but which being admitted by the opposite party was wrongly held by the arbitrators not to be a matter in difference on which they ought to adjudicate, the court seemed to think that, supposing the award were allowed to stand, there would be a great difficulty in recovering that debt by any subsequent proceeding (*x*).

Not specifically brought forward.

An arbitrator, to whom all matters in difference were referred, awarded the compensation to be paid for the purchase of lands, which in the first instance had been wrongfully taken and holden by a railway company. This award was held to bar the landowner's claim for mesne profits, though it did not appear that any claim for them had been specifically set up before the arbitrator (*y*).

Whether suit in equity for matter omitted.

How far a suit would lie in equity in respect of a matter neglected to be brought forward, is not quite clear (*z*).

Accidental omission.

It has been said by an equity judge in Ireland, that though an award made on a submission of all matters in difference is a bar to any action respecting a claim intentionally kept back on the reference, yet it is not so, if there have been a purely accidental omission, or a positive refusal by the arbitrators to consider the claim, as not being within the submission; though if they treat it as within the submission, and decide, though wrongly, against its validity, no action respecting it can be maintained, and no relief can be had in equity (*a*).

Party made to account for item omitted.

On a reference of all matters in difference, for the purpose of winding up the affairs of a partnership, and dividing the capital, an item in the account of good debts owing to the partnership was accidentally omitted, and the award was

(*w*) Trimingham *v.* Trimingham, 4 N. & M. 786.

(*x*) Robson *v.* Railston, In re, 1 B. & Ad. 723. See P. III. ch. 9, s. 3, d. 4, matter omitted ground for setting aside award.

(*y*) Smalley *v.* Blackburn Rail. Co., 2 H. & N. 158, S. C. 27 L. J. Ex. 65.

(*z*) Jones *v.* Bennett, 1 Bro. P. C. 528. See P. III. ch. 9, s. 3, d. 7, as to discovery of new matters.

(*a*) Brophy *v.* Holmes, 2 Molloy, 1.

made on the basis of that account, directing one of the partners to receive the good debts; the court of equity, to prevent the omission from being prejudicial to the interests of those entitled to the fund, directed the appointed partner to account for what he had received of the good debts beyond the amount estimated in the award (*b*).

Award not conclude matters not in difference.

An award on a submission of all matters in difference is no bar to the recovery of a demand which, though it existed as a claim at the time of the reference, was not then a matter in difference (*c*).

Therefore, where the defendant, owing the plaintiff a sum of money for arrears of an annuity, gave him a cognovit for them, but disputed the plaintiff's claim to other sums due on a partnership account between them; and on the same day that the cognovit was given, both parties executed an agreement of reference touching the accounts and all matters in dispute; but no question respecting the arrears was raised before the arbitrators; the court held that the claim on the cognovit was not a matter in difference at the time, and that the plaintiff was not precluded by the award in his favour, or a release of all demands in general terms executed by him pursuant to it, from proceeding to enforce the cognovit (*d*).

Award no waiver of extrinsic objections.

Nothing but the questions actually referred are concluded by an award. Thus a reference of the quantum of a demand does not waive any objection to the illegality of it in an action for the sum awarded due (*e*). Nor where a verdict is found for the plaintiff, subject to a point of law, and leave is reserved to the defendant to move to enter a nonsuit, does an agreement to refer to arbitration the amount of the damages, and an award made, waive the question of legal liability, unless the defendant expressly consent to abandon it (*f*).

Effect of award on the cause referred.

IV. *Effect of an award on some special matters.*]—The effect of the award on the cause referred having already been incidentally discussed (*g*), and the proceedings in the action

(*b*) Spencer *v.* Spencer, 2 Y. & J. 249.

(*c*) Ravee *v.* Farmer, 4 T. R. 146; Golightly *v.* Jellicoe, 4 T. R. 147, n.

(*d*) Upton *v.* Upton, 1 Dowl. 400.

(*e*) Steers *v.* Lashley, 1 Esp. 166.

(*f*) Oxenham *v.* Lemon, 2 D. & R. 461.

(*g*) See P. II. ch. 6, p. 336, awarding on a cause.

to judgment and execution by virtue of the award forming the subject of a subsequent chapter (*h*), it is needless here to do more than to direct attention to the chapters which treat on these heads.

On costs.

So we may dispose of the question of costs, since the effect of the award as to costs generally has been stated at length in the second part (*i*); and special consideration has been directed to the consequences which follow when the award directs payment of the costs of the cause (*j*), and when the submission provides that costs shall abide the event (*k*).

On the rights of a married woman.

On a reference by a husband respecting a claim to chattels real or personal, in right of his wife, we have previously seen that the award operates as a sort of judgment, and is a reducing of them into possession (*l*). When a husband has contracted to sell his wife's real estate, at a price to be fixed by arbitration, how far equity will enforce the award is elsewhere considered (*m*).

On matters not referable.

When the question referred relates to transactions clearly illegal, or is such as cannot properly form the subject of a reference, the award is not binding, and cannot be enforced (*n*).

On matters criminal.

How far matters and proceedings of a criminal nature fall within this prohibition, has been fully discussed in the commencement of this work (*o*).

Award cannot transfer right to land.

v. *Effect of an award to transfer property.*]—An arbitrator cannot by his award transfer the right to an interest in lands from one to another, whether the submission be by deed or not (*p*); neither can he make partition of land between tenants in common by his award, for the land will not pass

(*h*) See P. III. ch. 8.

(*i*) See P. II. ch. 7, p. 373, awarding as to costs.

(*j*) See P. II. ch. 7, s. 1, d. 4, p. 387.

(*k*) See P. II. ch. 7, s. 2, p. 389.

(*l*) See P. I. ch. 2, s. 1, d. 3, p. 18.

(*m*) See P. I. ch. 2, s. 1, d. 3, p. 18, husband forced to procure wife's conveyance; P. III. ch. 4, s. 1, d. 2, valuation made carelessly.

(*n*) Steers *v.* Lashley, 6 T. R. 61; Thorp *v.* Cole, 4 Dowl. 457, S. C. 2 C. M. & R. 367, S. C. in error, 1 M. & W. 531. See P. I. ch. 1, s. 1, d. 1, p. 5.

(*o*) See P. I. ch. 1, s. 2, p. 11.

(*p*) Rolle Ab. Arb. A.; Marks *v.* Marriott, 1 Ld. Raym. 114; Smalley *v.* Blackburn Rail. Co., 2 H. & N. 158, S. C. 27 L. J. Ex. 65; Henry *v.* Kirwan, 9 Ir. C. L. Rep. 459.

by it, but he must direct the parties to execute conveyances to each other of the allotted portions (*q*).

Yet it is said, in an old case, that if a dispute be between two respecting the title to a lease for years of land, and they submit the matter to arbitration, and the arbitrator award, that one party shall have the land, or shall have the term, this is a good gift of the interest in the term; but if the award be that one shall permit the other to enjoy the term, this is no good gift of the interest in it (*r*). This case, however, seems in effect only to show, that the award is conclusive as between the parties, on a question of disputed title, not that it has power to transfer the right from one to the other.

May decide title as between parties.

When it is necessary for the party to whom the arbitrator has awarded property to make out a title to it as against a stranger to the submission, then it is clearly seen that the award has not the effect of a conveyance.

Not give title as against stranger.

An action between the owner of land and a party holding by his permission, but claiming to hold as bailiff and not as tenant, was referred to an arbitrator, who was to say what was to be done by the parties respecting the land. He awarded, that the holding was as tenant, that the tenancy should cease on the delivery of the award, and that possession of the land should be delivered up to the owner one month after.

Award that party held as tenant no effect on issue between landlord and creditor.

On an issue between the landlord and an execution creditor of the tenant, whether the crops growing on the land (which had been seized by the creditor after the delivery of the award, but before the month had expired or the landlord taken possession) were the property of the tenant or not, the court held that the award had not the effect of transferring to the landlord the property in the land, or in the growing crops which would have passed with the land (*s*).

Though an award in an action of ejectment determining the right, and ordering the land to be delivered up to the lessor of the plaintiff, was held to be conclusive in favour of the plaintiff's claim; on a second action of ejectment between

Title in ejectment.

(*q*) Johnson *v.* Wilson, Willes, 248.

(*r*) Trusloe *v.* Yewre, Cro. Eliz. 223; 2 Leon. 104.

(*s*) Thorpe *v.* Eyre, 1 A. & E. 926.

the same parties, in giving that judgment, the court, in explanation of the effect of the award, said that the award could not have the operation of conveying the land, but that there was no reason why the defendant might not conclude himself by agreement from disputing the title of the lessor in ejectment, and that as the parties had consented that the award should be conclusive as to the right to the land, that was sufficient to bind them in the action of ejectment (*t*). Commenting on this case in the one previously quoted, Patteson, J., said the effect of the award here was, that the land *had always been* the property of the claimant, but that in the case before him the award found that the property in the land, so far as the possession during the term was concerned, was in the tenant, and then he added, "Is there any instance in which an award has been held to *transfer* property?" (*u*).

An award of a sum of money to the plaintiff as a compensation for his lands, which had been irregularly taken by a railway company, and in full satisfaction of all matters in difference, is a bar to a subsequent action for mesne profits of the land (*v*).

Award cannot transfer personal property.

The following case shows that personal property cannot be transferred by an award.

An award ordered that a tenant should deliver up to his landlord on a certain day a stack of hay left on the premises by the tenant, on the tenant being paid or allowed a certain sum in satisfaction; it was held that the property in the hay did not pass to the landlord on his tender of the money by mere force of the award, against the consent of the tenant, who refused to accept the money or deliver up the hay, and therefore that the landlord could not maintain trover for it, but that his remedy was on the award: though had the tenant accepted the money, that would have been a ratification of the award, and an assent to the transfer of the property (*w*).

Award by statute may operate as a conveyance.

An award made under an act of parliament differing from an award under a private submission, often has the effect of

(*t*) Doe d. Morris *v.* Rosser, 3 East, 15.

(*u*) Thorpe *v.* Eyre, 1 A. & E. 926.

(*v*) Smalley *v.* The Blackburn Rail. Co., 2 H. & N. 158, S. C. 27 L. J. Ex. 65.

(*w*) Hunter *v.* Rice, 15 East, 100.

transferring property of its own force without any subsequent act of the parties.

Award under Inclosure Act.

Thus, under the old general Inclosure Act (stat. 41 G. III. c. 109), the legal title to an allotment of land is acquired by the award of the commissioners, when duly executed and proclaimed, without any conveyance.

Whether title given by allotment before award.

It is to be observed, that by that act the title does not vest by the mere allotment of the land to the party. It is the subsequent award that conveys the title (*x*). Even where a local act gave the parties power to inclose or fence in their allotments, and to sell and convey their interests in them before the execution of the award, it was held, that the legal freehold did not pass to the allottee before the execution of the award (*y*).

Title passed under Artizans' Dwellings Act on final award.

The right of property in a dwelling taken compulsorily under the Artizans' Dwellings Act, 1875 (*z*), did not pass until the final award (*a*). When the purchase-money found by the award was paid into court and the title accepted there was a right to enter into possession at once. Where, on appeal to a jury, the purchase sum was raised beyond the sum awarded, interest at 4 per cent. on the extra sum was payable from the date of the first payment to that of the second (*b*).

Award extinguishing right to tithes.

The right to tithes may be extinguished by an award under a statute directing commissioners to set out, allot, and award portions of the waste in lieu of tithes; but it does not under this provision, pass by the mere allotment before the award is made (*c*).

When title to compensation money complete.

It may be noticed, that the legal title to the purchase-money or compensation-money to be ascertained by the award of a commissioner under an inclosure act is not complete until the award be made. Therefore, if a person entitled to such money assign away his interest before the award is made, he is not a necessary party to a bill filed by the assignee for the recovery of the money (*d*).

(*x*) Farrer *v.* Billing, 2 B. & A. 171. See 1 & 2 G. IV. c. 23.

(*y*) Farrer *v.* Billing, 2 B. & A. 171; Greathead *v.* Morley, 3 M. & G. 139.

(*z*) 38 & 39 Vict. c. 66, repealed by 53 & 54 Vict. c. 70.

(*a*) Barnet *v.* Metropolitan Board of Works, Justice of Peace, 29 July, 1882.

(*b*) Shaw *v.* Birmingham Corporation, 27 Ch. D. 614.

(*c*) Ellis *v.* Arnison, 5 B. & A. 47.

(*d*) Cator *v.* The Croydon Canal Co., 4 Y. & C. 405.

When title to land passes by allotment.

In some instances, however, the legislature by the use of appropriate words gives the seisin and legal estate upon the allotment only, and before the execution of the award (*e*).

Award a parliamentary declaration.

Under a statute, which directed that the herbage of certain closes should be and remain to the use and benefit of such persons as the commissioners should appoint, an award assigning the herbage to the surveyors of the highways for a certain township, and their successors for the time being, was held good, as amounting to a parliamentary declaration of the parties who were to hold it; although the award would have been bad as a common law conveyance, since surveyors of the highways are not a corporate body. The lord of the manor in whom the fee of the soil was vested, was held to be a trustee for the surveyors for the time being as to the herbage (*f*).

Effect of the award on infants.

VI. *Effect of an award on the parties and strangers.*]—As an examination of the effect of an award on parties and others occupies many pages elsewhere in this work, we must refer to them for an exposition of the effect of an award on infant parties (*g*), on corporations and corporate property (*h*), on parties added on the reference of a cause, and on those who have in fact become parties by acquiescence in the reference (*i*); on agents (*k*), or attorneys (*l*), who have referred matters respecting their principals' interests; on executors, both when themselves parties to references relating to their testator's estate, and when only interested as representing a deceased party to the submission (*m*); on trustees (*n*), or assignees of bankrupts and insolvents (*o*); on public officers,

Corporations.

Parties added.

Agents.

Attorneys.

Executors.

Trustees.

Assignees.

Public officers.

(*e*) Doe d. Harris *v.* Saunder, 5 A. & E. 664; Doe d. Duke of Beaufort *v.* Neeld, 3 M. & G. 271; Kingsley *v.* Young, 17 Ves. 468; 18 Ves. 207.

(*f*) Johnson *v.* Hodgson, 8 East, 38.

(*g*) See P. I. ch. 2, s. 1, d. 4, p. 18; P. III. ch. 4, s. 1, d. 2.

(*h*) Att.-Gen. *v.* Clements, 1 Turn. & R. 58. See P. I. ch. 2, s. 1, d. 6, p. 22; P. III. ch. 4, s. 3, d. 2, charitable corporations; P. III. ch. 6, s. 1, d. 3, attachment against corporations.

(*i*) See P. I. ch. 2, s. 1, d. 7, p. 22; P. III. ch. 4, s. 1, d. 2, stranger consenting to award.

(*k*) As to agents, see P. I. ch. 2, s. 2, d. 1, p. 23.

(*l*) As to solicitors, see P. I. ch. 2, s. 2, d. 2, p. 25.

(*m*) See P. I. ch. 2, s. 2, d. 4, p. 29, reference by executors; P. III. ch. 6, s. 1, d. 3, liability to attachment; P. II. ch. 3, s. 3, d. 7, p. 166, liability of party dying.

(*n*) See P. I. ch. 2, s. 2, d. 5, p. 32.

(*o*) See P. I. ch. 2, s. 3, d. 1, p. 33.

in whose name by statute a company are to sue and be sued (*p*); and on those who are strangers to the submission (*q*).

Strangers to submission.

By the code civile in force in the Mauritius an award binds the judgment creditors of the parties as it binds the parties (*r*).

Creditors.

Where the defendant had been arrested, a reference of the cause on the trial (a juror being withdrawn by consent) was held not to entitle the defendant to be discharged out of custody at the plaintiff's suit, even after the award was made; since, as neither the submission by rule of court, nor the award, made any provision for his discharge, the intention of the arbitrators seemed to be that all things should remain in statû quo, until the award was performed (*s*).

Award no discharge of defendant from arrest.

In one instance, where, after an award made, the plaintiff proceeded in the cause referred, and obtained a verdict, the court refused to set aside the verdict, and left the defendant to his remedy by action on the arbitration bond (*t*).

Proceeding with cause after award.

If a party, pending a reference, assign his contingent right under the award, and after an award in his favour, receive the sum awarded from his opponent, an action for money had and received will lie against him at the suit of the person to whom he has assigned his claim; and if the one who has parted with his interest pay the arbitrator's charges on taking up the award, and receive from the party against whom the award has been made, not only the sum awarded, but also that amount of the costs of the award for which the latter is made liable, the amount of the costs so paid over, as well as the sum awarded, may be recovered by the assignee in the same action (*u*).

Assigning contingent right before award made.

The effect of the award on the arbitrator, whether it gives him a right to remuneration (*x*), and what liability it may impose on him in respect of directions contained in it (*y*), or in respect of money or chattels deposited with him to abide

Effect of award on the arbitrator.

(*p*) See Corpe *v.* Glyn, 3 B. & Ad. 801.

(*q*) See P. II. ch. 8, s. 4, p. 443; P. III. ch. 4, s. 1, d. 2, liability of stranger in equity; P. III. ch. 3, s. 5, d. 3, p. 556, award as evidence affecting strangers.

(*r*) Martin *v.* Boulanger, 8 App. Cas. 296.

(*s*) Apsley *v.* Crosley, Barnes, 54.

(*t*) Potter *v.* Day, Pract. Reg. C. B. 47.

(*u*) Smith *v.* Jones, 1 Dowl. N. S. 526.

(*x*) See P. II. ch. 11, s. 1, p. 492.

(*y*) See P. II. ch. 11, s. 2, d. 2, p. 495.

his decision (z), is examined in the concluding chapter of the previous part.

Award not avoided by bankruptcy of a party.

VII. *Effect of award on a party bankrupt.*]—The validity of the award is not necessarily affected by a party, after entering into the submission, becoming bankrupt before the execution of the award (a); but it may, nevertheless, in many cases, be enforced by action (b), by attachment (c), or by entering up judgment and issuing execution in the cause referred (d), as in other cases.

Effect of Bankrupt and Insolvent Acts on award of a debt.

If, however, nothing but the question of the liability of a party to a debt, or of the amount of a debt owing by him, be referred, and he after the reference, but before the award, become bankrupt, and obtain his certificate, or be discharged under the Insolvent Debtors Act, the fact of the arbitrator having awarded against him cannot preclude him from claiming the benefit of the statutes of bankruptcy or insolvency to relieve himself from liability in respect of all debts from which, had there been no reference, the statutes would have protected him. In such case the award will be set aside (e), or if the bankrupt have been taken on an attachment before he has obtained his certificate, he will, after obtaining it, be entitled to be discharged out of custody (f).

On costs not provable.

But if the award, besides ordering the payment of a debt from which the bankrupt is protected by the certificate, also direct him to pay costs from which he is not so protected, the award will be enforced against him as to the costs (g).

Sum awarded good petitioning creditor's debt.

An award of a sum certain creates a debt which is provable under a commission of bankruptcy, and is a good petitioning creditor's debt (h).

(z) See P. II. ch. 11, s. 2, d. 3, pp. 497, 499.

(a) Edwards, Ex parte, 3 Morrell's Bank. Rep. 79. See P. II. ch. 3, s. 3, d. 4, p. 162, revocation by bankruptcy.

(b) Taylor *v.* Marling, 2 M. & G. 55.

(c) Hemsworth *v.* Brian, 1 C. B. 131. See P. III. ch. 6, s. 3, d. 3, showing cause against attachment.

(d) Andrews *v.* Palmer, 4 B. & A. 250. See P. III. ch. 8.

(e) R. *v.* Bingham, 2 Tyrw. 46.

(f) R. *v.* Davis, 9 East, 317; Baker's case, 2 Stra. 1152.

(g) R. *v.* Davis, 9 East, 317; Haswell *v.* Thorogood, 7 B. & C. 705.

(h) Antram *v.* Chace, 15 East, 208.

Where, after an award for the plaintiff in an action for the balance of an account, the defendant, before judgment was entered on the verdict taken subject to the reference, committed an act of bankruptcy by filing a declaration of insolvency, and giving notice thereof immediately to the plaintiff, the court allowed the plaintiff to prove as a creditor for the amount awarded and for interest and costs (*i*).

Penalty in arbitration bond good petitioning creditor's debt.

When a party fails to perform the award, the arbitration bond being forfeited, the penalty becomes a debt sufficient, until the award be set aside, as a petitioning creditor's debt, to support a commission of bankruptcy. The mere filing a bill in Chancery to impeach the award will not suspend its effect, or make the debt insufficient (*k*).

Solicitor's lien on sum awarded.

VIII. *Effect of an award on the solicitor's lien for costs.*]— The attorney of the plaintiff in the cause referred has a lien for his costs upon a sum awarded to the plaintiff, as he has upon a sum recovered by verdict and judgment, and if, after notice of the lien, the defendant pay the money to the plaintiff, instead of to the plaintiff's attorney, the latter may compel a repayment to himself by summary application to the court, and he will not be prejudiced by a collusive release from the plaintiff to the defendant (*l*). But the attorney's right to apply personally seems limited to the case of an attempt to defraud him.

Enforcing lien by rule of court in case of fraud

Not unless claim free from doubt.

An arbitrator awarded that the plaintiff had no claim on the defendant in the action, but ordered a third person, party to the reference, to pay the plaintiff a sum of money and the costs of the reference. The plaintiff having subsequently become a bankrupt, his attorney, who claimed a lien for his costs on the sum awarded, applied for a rule calling on the third party to pay him the amount, the latter having declined to do so, as the bankrupt's assignee would not sanction the payment; the court refused the motion, on the ground that as such a rule would, under the 1 & 2 Vict. c. 110, s. 18, have the conclusive effect of a judgment, it would not be granted unless the claim were free from all doubt,

(*i*) Harding, Ex parte, 5 De Gex, M. & G. 367.

(*k*) Lingood, Ex parte, 1 Atk. 240.

(*l*) Ormerod *v.* Tate, 1 East, 464; Symonds *v.* Mills, 8 Taunt. 526.

which the court did not consider it to be in the case before them (*m*).

Attorney cannot have a rule to pay him the amount on which he claims a lien.

In the above case the court also expressed a doubt whether the attorney could enforce his lien by applying for a rule calling on the opposite party to pay. In a later case the court decided he could not. There the arbitrator found a verdict for the defendant in the cause, but directed him to pay the plaintiff a sum of money in respect of the matters in difference, and ordered the plaintiff at the same time to pay the defendant the costs of the cause, which were to abide the event of the award. The defendant, deducting his costs of the cause, paid the plaintiff's attorneys the balance. They claimed a lien of the whole sum awarded, but the court refused to grant them a rule to compel the defendant to pay them the amount he had deducted (*n*).

When lien paramount to claim of assignees of party bankrupt.

If an uncertificated bankrupt brought an action for work done by him subsequent to his bankruptcy, his attorney, if the action were referred, had a lien for his costs of the action and reference on the amount awarded to the bankrupt paramount to the claim of the assignees; and if in consequence of a claim by the assignees the defendant refused to pay the amount to the bankrupt, and an action were commenced in the bankrupt's name on the award, the defendant might obtain an interpleader rule calling on the assignees to contest their right as against the attorney (*o*).

Effect of award.

The award in a cause seems to have the same effect as a judgment on the attorney's lien for costs (*p*).

See the cases in the notes under the rules before the Judicature Acts, as to the effect of an award of set-off on the attorney's lien for costs (*q*).

Alteration in award by the court.

IX. *Effect of altering an award.*]—The court has no power to alter or amend the award (*r*).

(*m*) Holcroft *v.* Manby, 2 D. & L. 319.

(*n*) Dunn *v.* West, 10 C. B. 420.

(*o*) Jones *v.* Turnbull, 2 M. & W. 601.

(*p*) Cowell *v.* Betteley, 10 Bing. 432. See Figes *v.* Adams, 4 Taunt. 632.

(*q*) Doe d. Swinton *v.* Sinclair, 5 Dowl. 26; Domett *v.* Hellyer, 2 Dowl. 540; Caddell *v.* Smart, 4 Dowl. 760; Brearey *v.* Kemp, 24 L. J. Q. B. 310; Pringle *v.* Gloag, 10 Ch. D. 676.

(*r*) Hall *v.* Alderson, 2 Bing. 476; Wood *v.* Duncan, 7 Dowl. 91; Moore *v.* Butlin, 7 A. & E. 595.

By the arbitrator.

Notwithstanding the many old decisions, which show that an arbitrator, after once publishing his award, could not alter its terms to correct an error, the Court of Chancery on one occasion held valid a second award, the first award by mistake not having been drawn up as the arbitrator intended to award, and therefore not expressing his mind (*s*).

Amending clerical error, Arbitration Act, 1889.

But the Arbitration Act, 1889, empowers him now to correct in an award "any clerical mistake or error arising from any accidental slip or omission" (*t*).

By a party.

A material alteration by a party interested in the award would probably have a very serious effect, and might avoid the instrument altogether (*u*).

By a stranger.

Where there was a mistake in the recital of the umpirage in the Christian name of one of the arbitrators who appointed the umpire, an alteration made by a stranger subsequently to the publication of the award by striking out the wrong and inserting the right Christian name, the court held did not vitiate the award, but left it in the state in which it was before the alteration, the mistake being immaterial. The court, however, added, that if the alteration had been made in any material part it would have been fatal (*x*). In an earlier case, however, just cited, where the alteration by the arbitrator, though in a material point, was treated simply as nugatory, it was likened to a spoliation by a stranger, as if that was simply void (*y*).

Material alteration.

(*s*) Mordue *v.* Palmer, W. N. (1870) 206. See P. II. ch. 3, s. 1, d. 3, p. 141.

(*t*) 52 & 53 Vict. c. 49, s. 7 (c).

(*u*) Henfree *v.* Bromley, 6 East, 308; Pigott's case, 11 Rep. 27 a.

(*x*) Trew *v.* Burton, 1 C. & M. 533.

(*y*) Henfree *v.* Bromley, 6 East, 308.

CHAPTER II.

PERFORMANCE OF THE AWARD.

PART III. CH. II.

How the award is to be performed forms the subject of the present chapter.

Contents of the second chapter.

The first section shows generally what sort of performance is required; the second is confined to an examination of the proper mode of compliance with an award directing the execution of a deed, such as a conveyance or a release.

SECTION I.

WHAT A SUFFICIENT PERFORMANCE OF THE AWARD.

PART III. CH. II. S. 1.

An award is to receive a liberal and sensible construction, and as far as possible to be governed by the intent of the arbitrator; therefore, if the arbitrator award a thing to be done, without saying within what time, the party shall have a reasonable time, because it must be presumed that the arbitrator intends all things necessary to the doing the thing he directs; and a reasonable time is necessary (*a*).

Performance within a reasonable time.

Though an award cannot be made part at one time and part at another; yet it may be performed part at one time and part at another; for the nature of the thing may require performance at different places and times (*b*).

Performance at several times.

Each party is bound to perform the award, and to comply with its directions, as far as regards himself.

As the making the award is as much within the knowledge of one as of the other, no notice of its being made is necessary

Party bound to take notice of award.

(*a*) Bac. Ab. Arb. F.; Freeman *v.* Bernard, 1 Salk. 69.

(*b*) Bac. Ab. Arb. F.

to impose the duty of obedience (*c*). As to the notice of his report being ready to be given by a referee under the Rules of Court, see ante, p. 368.

Stakeholder not bound to take notice of award.

But if money or any other chattel be deposited in the hands of a stakeholder to abide the award, it is not his duty to take notice of the award, but he should retain the property in his possession until the arbitrator's judgment has been communicated to him (*d*).

Party must obey award substantially.

The party directed to do any act must substantially comply with the requisitions of the award.

Award to pay money to wife.

In an action by a husband and wife (the husband being made a party unwillingly) respecting the right of the wife to an annuity, the award ordered the arrears of the annuity to be paid to the wife; it was held to be no answer to an attachment for non-payment to her, that her husband had previously demanded them, and that they had been paid to him, it being evident that the payment to the husband was clearly collusive, and it having been known to the party in default that it was intended by all parties that the wife should enjoy the fruits of the action, if the decision were in her favour (*e*).

To keep drain cleansed.

An award by commissioners under an inclosure act directed that the owners of lands, over which a certain drain passed, should cleanse and keep the same of a sufficient width and depth to carry off the water "intended to run down the same." The occupier of a close by which the drain passed, and whose lands were drained by it, subsequently, for the better draining of his lands, opened a sough or under-drain into the awarded drain. It was held that this method of draining not being contemplated by the award, the owner of land lower down, across which the drain ran, was not bound to keep the awarded drain of sufficient capacity to carry off the additional water which was poured into it by the sough (*f*).

Party must comply as far as is lawful and possible.

The award must be performed by the parties as far as they lawfully can; and if several matters be directed to be

(*c*) Child *v.* Horden, 2 Bulst. 143; Gable *v.* Moss, 1 Bulst. 44; Archb. Pl. & Ev. 90, 2nd ed.; Bell *v.* Twentyman, 1 Q. B. 766.

(*d*) Wilkinson *v.* Godefroy, 9 A. & E. 536.

(*e*) Wynne *v.* Wynne, 4 M. & G. 253, S. C. 1 Dowl. N. S. 723.

(*f*) Sharpe *v.* Hancock, 7 M. & G. 354.

done, all within the arbitrator's power to order, it is no answer to an attachment for non-performance of the award that as to one of the matters it is out of the party's power to do it, or that compliance would subject him to an action, if he have done nothing to show his willingness to obey the award.

Award to remove weirs.

Hence, where an umpire directed a defendant to prostrate some weirs of which he was a proprietor, and also another weir in which he had only a share, and then said he made his award only to extend so far as any right or interest the defendant possessed, it was held by the court that it was the defendant's duty to obey as far as he could, and that if he could not remove his share of the latter weir without being liable to an action for trespass, that would be an answer to that part of the award (*g*).

To reinstate premises pulled down.

If an award directing a party to reinstate premises, which he has wrongfully pulled down, and to restore them exactly as before, would be a violation of the provisions of a building act passed subsequent to their original erection, the party is bound, under the order to reinstate, to erect the premises anew, but in conformity with the provisions of the statute, the increased expense of such erection having been cast upon him by his own conduct (*h*).

To dig for coal.

Where the lessees of some lands and coal mines found or to be found, covenanted to sink for coal as far as could and ought to be accomplished by persons acquainted with the nature of collieries and as in such cases was usual and customary, and immediately to erect such fire-engines as should be necessary; an award, ascertaining the damages occasioned by their default to do so, further directed, that the lessees should sink to and through the coal mines demised, and erect fire-engines thereon ready and complete for working the mines and getting the coals, according to the terms of the lease, before a certain day; it was held that they had sufficiently performed the award on their showing that they had sunk for coal as far as they could and ought in the judgment of persons of competent skill in such works, and as far as was

(*g*) Doddington *v.* Bailward, 7 Dowl. 640.

(*h*) Doddington *v.* Hudson, 1 Bing. 410.

usual and customary in such cases, and that no coal could be got worth working (*i*).

Party to pay must tender money.

Upon an award for the payment of money at a particular time and place, the party who is to pay ought to come and tender the money at the time and place, even if the other party be not there to receive it (*k*).

Must seek out party entitled.

A sum directed by an award to be paid for arrears of rent of a house is a sum in gross payable without demand, and the party directed to pay must seek out him who is to receive it (*l*).

Must get costs taxed.

So where the award orders the defendant to pay the plaintiff on a specified day his costs of suit, to be taxed by the proper officer, it is incumbent on the defendant to procure them to be taxed ready for payment on the day (*m*).

When not paying rent a breach of award.

If the arbitrators award that the defendant shall "enjoy a house, paying rent to the plaintiff," the arbitration bond is forfeited if the defendant fail in the payment. The payment of the rent is not a mere condition, on non-performance of which the estate of the defendant is to cease (*n*). But if the award be that one shall make a lease for years to the other, rendering certain rent to the lessor, and the lessor make the lease, but the rent be not paid, the non-payment of the rent is no breach of the arbitration bond, but distress or an action of debt for the rent are the proper remedies. If, however, the award direct the lessee to pay the rent the bond is forfeited by non-payment (*o*).

When proceeding in suit a breach.

An award directing all suits between A. and B. to cease is not broken by A. prosecuting a suit against B. and others jointly (*p*).

Entering continuance.

An award that the plaintiff should not prosecute nor proceed in an action in the same term, was held not to be broken by the entry of a continuance from term to term, for without such entry the party could never afterwards have gone on with his action (*q*).

By attorney.

If the award be that he shall not continue the action, it is a breach if he continue it by attorney,

(*i*) Hanson *v.* Boothman, 13 East, 21.

(*k*) Doyley *v.* Burton, 1 Lord Raym. 533.

(*l*) Furser *v.* Prowd, Cro. Jac. 423.

(*m*) Candler *v.* Fuller, Willes, 62.

(*n*) Parsons *v.* Parsons, Cro. Eliz. 211.

(*o*) Anon. F. Moore, 3, pl. 8.

(*p*) Barnardiston *v.* Fowler, 10 Mod. 204.

(*q*) Gray *v.* Gray, Cro. Jac. 525.

PART III. CH. II. S. 1.

but not so if the attorney enter the continuance without his privity (*r*).

The court has no power to order an award to be delivered up to be cancelled on paying the amount awarded (*s*).

SECTION II.

PERFORMANCE OF AN AWARD DIRECTING THE EXECUTION OF A DEED.

PART III. CH. II. S. 2.

Where the arbitrator directed that, on payment of the mortgaged debt, the mortgagee should reassign the mortgaged land, the duty of reassigning was held to attach, without any request from the mortgagor. And this distinction was taken by the court, that no request was necessary, because the reassignment might have been made without the presence of both parties, but that it would have been otherwise had the duty been to reinfeoff, because the intended feoffee must have been present to receive the livery (*t*).

Whether request to execute the deed necessary.

Who to prepare and tender the conveyance for execution.

When the award orders conveyances of real or personal property, difficulties often arise as to which of the parties is to prepare and bear the expense of the instruments, and tender them for execution.

In an old case, it is said, if a man be awarded to convey an estate to another person by such a time, he is to procure the conveyances to be made; or to convey an estate to another by such conveyances as shall be approved of by such a counsel, he is certainly to prepare the conveyances, and to procure them to be approved of by that counsel (*u*).

Copyhold.

In a more modern instance, where the award directed the lessor of the plaintiff to pay the defendant a certain sum for a piece of copyhold land, and that the defendant, in consideration of that sum, should, at the costs and charges of the

(*r*) Gray *v.* Gray, Cro. Jac. 525.
(*s*) Symonds *v.* Mills, 8 Taunt. 526.
(*t*) Rosse *v.* Hodges, 1 Ld. Raym. 233.
(*u*) Candler *v.* Fuller, Willes, 62.

former, surrender the land to his use, and that on such surrender being made and delivered to him, he should pay the defendant the price awarded; it was decided by the court that it was the defendant's business to prepare and execute the surrender, or at all events to give notice that she would attend on the steward of the manor to make it. It was proved that the defendant was requested to make the surrender, and that an offer was made to pay the price awarded, and the costs of the surrender, upon the surrender being effected by the defendant; and the court granted an attachment against her (*x*).

It being referred to an arbitrator to decide whether a contract subsisted for the purchase of some land, and the award finding that the contract was in force, and directing the defendant to perform it, and to pay a certain sum on the conveyance of the land by the plaintiff to him, it was held that in order to bring the defendant into contempt for non-performance, the plaintiff should have executed and tendered a conveyance to the former and asked for the money (*y*).

Both this case and the preceding one (*z*) were decided on what was supposed to be the general rule respecting the duty of a vendor on a contract for sale, to prepare and tender the conveyance for the execution of the vendee. But it seems, from Sir Edward Sugden's work on Vendors and Purchasers, that the rule, which never was sanctioned by the practice of conveyancers, has ceased to be law.

Ordinary rule on a contract for sale of lands.

The effect of what is there stated may be thus abridged: When the contract for sale of lands is silent respecting the preparation and costs of the conveyance, it seems now to be settled law, notwithstanding ancient cases, and many dicta to the contrary, that it is the duty of the purchaser, at his own expense, to prepare and tender the conveyance to the vendor for execution. If the agreement expressly require the purchaser to prepare and bear the expense of the conveyance, it was always clear that the vendor need not tender a conveyance. But when the conveyance is to be prepared at the expense of the vendor, and there is nothing in the agreement

(*x*) Doe d. Clarke *v.* Stillwell, 8 A. & E. 645.
(*y*) Standley *v.* Hemmington, 6 Taunt. 561.
(*z*) Doe d. Clarke *v.* Stillwell, 8 A. & E. 645.

to show who is to prepare it, it has been decided that the duty of preparing, as well as paying for the instruments, falls on the vendor (*a*).

Deed tendered should be drawn according to award.

Very often the direction in the award is to assign upon request. When such is the case, the instrument of which execution is requested should precisely agree with the terms of the award, or refusal to execute it would probably be no breach.

An award directed the defendant to assign, according to law, a certain interest to one Duncan, upon request. The assignment tendered to the defendant for execution was an assignment to Duncan, his executors, administrators, and assigns; it was objected that the assignment tendered was too large in its terms, and Lord Ellenborough was inclined to think a personal assignment to Duncan himself might be meant; the case, however, was ultimately compromised (*b*).

Demanding execution by agent.

If an arbitrator direct a party to execute a deed, it is no excuse for non-performance that the deed was tendered for execution by a person not authorized by power of attorney to make the demand. It is sufficient if the person presenting the instrument were authorized so to do, and an attachment will issue on refusal. Demanding payment of money awarded is considered by the court to stand on a very different footing from demanding execution of a deed (*c*).

Award to execute release on payment.

If one party be ordered to pay a sum of money, and the other, on the receipt thereof, to execute a release, the latter by refusing the sum cannot free himself from his liability to perform the award, but must execute the release on the money being tendered to him (*d*).

Death of party before payment.

If the award direct payment to be made to a party or his assigns within a specified period, and that on the payment each party should give the other a release, and the party who is to receive the money die before the time has expired, payment must be made to his personal representatives, though

(*a*) Sugd. Vend. and Purch., vol. 1, p. 262, 11th ed.; 14th ed., p. 241. See the cases there cited.

(*b*) Russell *v.* Headington, 1 Stark. 13.

(*c*) Kenyon *v.* Grayson, 2 Smith, 61.

(*d*) Squire *v.* Grevett, 2 Ld. Raym. 961; Linnen *v.* Williamson, Rolle Ab. Arb. K. 16, p. 254; Lumley *v.* Hutton, Cro. Jac. 447; Simon *v.* Gavil, 1 Salk. 74.

not named in the award, and the representative is bound to give a release of all demands the deceased has against the other (*e*).

Award of release to time of award.

Where an arbitrator exceeds his authority in awarding a release of all claims until the time of the award, instead of limiting it to the date of the submission, if the party execute a release to the time of the submission, this is a good performance of the award (*f*).

Delivering release to stranger for plaintiff's use.

If the defendant, being ordered to execute a release to the plaintiff, deliver a release properly executed to a stranger, to the use of the plaintiff, which the latter refuses to accept, such tender and refusal may be pleaded as a good performance of the award, if no particular place be mentioned for the delivery (*g*).

Award to execute indemnity.

If the arbitrator direct a party to execute a bond or covenant indemnifying another against the costs of an action, and the party execute the bond or covenant, the remedy on the arbitration bond is gone; and in case of a failure to save the party harmless, proceedings must be taken on the indemnity bond or covenant (*h*).

Award that plaintiff shall stand acquitted of a suit.

In debt on bond for non-performance of an award, "that a suit in Chancery shall cease, and that the plaintiff shall stand acquitted of it," it was a sufficient plea that the defendant did not prosecute the suit, and that the plaintiff "staret inde quietus," for the award orders no act to be done by the party, but says that by virtue of the award he shall stand acquitted. The mere filing a fresh bill in Chancery for the same matter was no breach of the award, for until a subpœna issued on the bill the party was not damnified. But if one, being bound to save another harmless, obtain a process against him, this is a clear breach of the award (*i*).

Award to acquit of a debt.

On an award that one "shall acquit the other of such a debt or suit," it is not sufficient to save the latter harmless, but the party directed to acquit ought to procure an actual

(*e*) Dawney *v.* Vesey, 2 Vent. 249.

(*f*) Stevens *v.* Matthews, 1 Ld. Raym. 116; Marks *v.* Marriott, 1 Ld. Raym. 114.

(*g*) Alford *v.* Lea, 2 Leon. 110, S. C. Cro. Eliz. 54; Freeman *v.* Drew, 2 Leon. 181.

(*h*) Phillips *v.* Knightly, 1 Barnard, 463.

(*i*) Freeman *v.* Sheen, Cro. Jac. 339, S. C. 2 Bulst. 93; 2 Rolle, Rep. 7.

discharge (*k*). So, if one has a rent-charge out of the lands of another, and as touching this they submit to an award, and the arbitrator award for the latter "quod staret quietus" of the rent, he who has the rent ought to release the same to the other, for to be quit of the rent supposes the demand not in being (*l*).

(*k*) Freeman *v.* Sheen, Cro. Jac. 339, S. C. Bulst. 93.

(*l*) Freeman *v.* Sheen, 2 Bulst. 93, per Doddridge, J.; Bac. Ab. Arb. F.

CHAPTER III.

THE AWARD AS A GROUND OF ACTION OR DEFENCE AT LAW.

Contents of the third chapter.

Of the various modes of enforcing awards, the most universal is that by action at common law. An award may either form the ground of an action, or may be used to resist a claim attempted to be asserted by action. Both these uses are considered in the present chapter.

The first section shows how to enforce an award by action.

Section two points out how to state an award in pleading.

The effect of an award when pleaded as a defence is examined in the third section.

The fourth declares what sort of answer may be pleaded to defeat a claim or invalidate a defence resting on an award pleaded by an opponent.

The fifth section, after discussing the mode of proof of the submission and award, investigates the effect of an award in evidence, as between the parties, and as regards strangers; and concludes by pointing out how an award put in evidence may be impeached by evidence in reply.

SECTION I.

HOW TO ENFORCE AN AWARD BY ACTION.

An action lies to enforce award.

1. *An award a ground of action.*]—An award may be enforced as of right by action, whether the submission be by parol, by writing not under seal (*a*), by bond (*b*), or deed (*c*),

(*a*) Hodsden *v.* Harridge, 2 Saund. 62 b. n.

(*b*) Winter *v.* White, 3 Moore, 674; Ferrer *v.* Oven, 7 B. & C. 427.

(*c*) Tomlin *v.* Mayor of Fordwich, 6 N. & M. 594.

by judge's order (*d*), order of Nisi Prius (*e*), rule of court (*f*), or order of equity (*g*).

When action only remedy.

If the award be one giving compensation for land taken under the Lands Clauses Acts an action seems the only remedy (*h*), and that will not lie until after a conveyance of the land has been executed (*i*). As to an action for the costs, see ante, p. 474. So it is the only remedy when the submission cannot be made, or has not the effect of, a rule of court, and no statute provides for a special mode of enforcement. When the validity of an award is doubtful, the court will neither enforce it nor set it aside summarily, but will leave the parties to their action, except when the objections to the award are such as cannot be raised in an action (*j*).

Costs of reference need not be taxed before action.

When the award gives the costs of the reference but does not fix the amount, they need not be taxed before an action be commenced to recover them. But it seems they ought to be taxed before trial (*k*).

Semble not costs of award alone.

This necessity of having the costs taxed does not seem to exist when the costs of the award paid to the arbitrator are alone sought to be recovered from the defendants and there is no suggestion that his charges are excessive (*l*).

Action for costs of award.

Where two parties agree to employ an arbitrator, and one pays a sum to take up the award, he may, in the absence of any provision to the contrary, recover a moiety from the other party in an action for money paid (*m*).

II. *Enforcing award by action.*]—In an action on an award

(*d*) Still *v.* Halford, 4 Camp. 17: Stalworth *v.* Inns, 13 M. & W. 466; Wharton *v.* King, 1 Moo. & Rob. 96; Lievesley *v.* Gilmore, 35 L. J. C. P. 351, S. C. L. R. 1 C. P. 570.

(*e*) Bonner *v.* Charlton, 5 East, 139.

(*f*) Tremenhere *v.* Tresillian, 1 Sid. 452; Carpenter *v.* Thornton, 3 B. & A. 52.

(*g*) Dowse *v.* Coxe, 3 Bing. 20.

(*h*) Buccleuch, Duke *v.* Metropolitan Board of Works, L. R. 5 App. Cas. 418, S. C. below, L. R. 3 Ex. 306; on appeal, L. R. 5 Ex. 221; Newbold *v.* Metropolitan Rail. Co., 14 C. B. N. S. 405.

(*i*) East London Union *v.* Metropolitan Rail. Co., L. R. 4 Ex. 309.

(*j*) Stalworth *v.* Inns, 13 M. & W. 466; Hall and Hinds, In re, 2 M. & G. 847. See post, P. III. ch. 6, s. 1, p. 593.

(*k*) Holdsworth *v.* Wilson, 32 L. J. Q. B. 289, S. C. 3 B. & S. 1, reversing Holdsworth *v.* Barsham, 31 L. J. Q. B. 145, S. C. 2 B. & S. 480; Lewis *v.* Rossiter, 44 L. J. Ex. 136; Sharpe *v.* Metropolitan District Rail. Co., 4 Q. B. D. 645; in H. L. 5 App. Cas. 425.

(*l*) Threlfall *v.* Fanshawe, 19 L. J. Q. B. 334. See P. II. ch. 7, s. 1, d. 3, p. 385.

(*m*) Marsack *v.* Webber, 6 H. & N. 489.

since the Judicature Acts, the statement of claim to be endorsed on the writ of summons may be: "The plaintiff claims £ , for money payable under an award;" or "£ , for damages for non-compliance with the award of X. Y." Under the old law different forms of action were applicable to different cases. The old action of assumpsit lay to enforce an award when the submission was not under seal (*n*), for each instalment of money awarded (*o*), against parties contracting jointly or severally (*p*), and against executors (*q*). An assignee of an interest under the award could not sue in his own name (*r*); but a bare trustee could (*s*); so could one party sue the other to recover a moiety of the costs of taking up the award (*t*).

Assumpsit.

An action of debt lay on an award of a sum of money, whether the submission was by deed, writing not under seal, rule of court, or by parol, against a party or his executor (*u*).

Debt.

If the submission were by bond, an action of debt for the penalty in case of non-performance of the award was always maintainable (*x*). This was the case, though the time for making the award were enlarged by deed, for altering the condition does not defeat the bond (*y*). But this form of action did not lie if the time were enlarged by agreement not under seal (*z*).

Debt on the arbitration bond.

Where the defendant had entered into a recognisance con-

Scire facias.

(*n*) Hodsden *v.* Harridge, 2 Saund. 62 b. n.; Purslow *v.* Baily, 2 L. Raym. 1039; Tilford *v.* French, 1 Sid. 160; Squire *v.* Grevett, 6 Mod. 34, S. C. 2 Ld. Raym. 961; Lupart *v.* Welson, 11 Mod. 171.

(*o*) Cooke *v.* Whorwood, 2 Saund. 336, e.; Rudder *v.* Price, 1 H. Bl. 547; 1 Chitt. Pl. 103, 6th ed.

(*p*) Mansell *v.* Burredge, 7 T. R. 352. See Genne *v.* Tinker, 3 Lev. 24; Johnson *v.* Wilson, Willes, 248; Duke of Northumberland *v.* Errington, 5 T. R. 522.

(*q*) Dowse *v.* Coxe, 3 Bing. 20.

(*r*) Day *v.* Smith, 1 Dowl. 460.

(*s*) Banfill *v.* Leigh, 8 T. R. 571.

(*t*) Bates *v.* Townley, 2 Ex. 152.

(*u*) Purslow *v.* Baily, 2 Lord Raym. 1039; Hodsden *v.* Harridge, 2 Saund. 62 b. n.; Winter *v.* White, 3 Moore, 674, S. C. 1 B. & B. 350; Hampton *v.* Boyer, Cro. Eliz. 557; Freeman *v.* Bernard, 1 Ld. Raym. 247; Bowyer *v.* Garland, Cro. Eliz. 600; Riddell *v.* Sutton, 5 Bing. 200, S. C. 2 M. & P. 345; 3 & 4 W. IV. c. 42, ss. 13, 14; Riddell *v.* Sutton, 5 Bing. 200.

(*x*) Ferrer *v.* Oven, 7 B. & C. 427.

(*y*) Greig *v.* Talbot, 2 B. & C. 179.

(*z*) Brown *v.* Goodman, 3 T. R. 592, cited in the notes.

ditioned to abide by the award of A. B., and A. B. declined to act, by a rule of court a new arbitrator, C. D., was by consent substituted, and the latter made his award: the court held that a scire facias on the recognisance was not maintainable, since the defendant, by disobeying the award of C. D., had not forfeited the recognisance, which was to abide by the award of A. B. (*a*).

Covenant.

Where the submission was by deed, an action of covenant lay for the breach of any part of the award, though debt lay only for the non-payment of money (*b*). If a person covenanted to abide an award, and he or she revoked the submission, an action lay for the breach of covenant (*c*).

Case.

If a person were directed by an award to cleanse a drain, and he wrongfully neglected to do so, a party injured might have brought an action on the case (*d*).

Changing the venue.

III. *Points of practice in actions to enforce awards.*]—The cases in the notes relate to the old practice as to changing the venue (*e*), and as to affidavits of debt to hold to bail (*f*).

Affidavit of debt.

Interest on sum awarded.

Where money due on a balance of account is awarded to be paid at a particular time and place, if duly demanded there on the day, interest from that day may be recovered, together with the principal, in an action on the award (*g*). So, where no particular time is mentioned, interest will run from the time the sum is demanded (*h*). Interest, however, can only be recovered in an action, and not on a motion for an attachment (*i*). It could not be levied on an execution

(*a*) R. *v.* Bingham, 1 Tyrw. 262, S. C. 3 Y. & J. 101.

(*b*) Tomlin *v.* Mayor of Fordwich, 6 N. & M. 594; Charnley *v.* Winstanley, 5 East, 266; Marsh *v.* Bultcel, 5 B. & A. 507; 2 Chitt. Pl. 255, notes, 6th ed.

(*c*) Charnley *v.* Winstanley, 5 East, 266. See Le Bret *v.* Papillon, 4 East, 502; Marsh *v.* Bulteel, 5 B. & A. 507; Brown *v.* Tanner, 1 C. & P. 651, S. C. M'Lel. & Y. 464; Marsh *v.* Bulteel, 5 B. & A. 507.

(*d*) Sharpe *v.* Hancock, 7 M. & G. 354.

(*e*) Whitburn *v.* Staines, 2 B. & P. 355; Stanway *v.* Heslop, 3 B. & C. 9; 2 Archb. Pr. 958, 7th ed.; Mondel *v.* Steele, 8 M. & W. 640; Greenway *v.* Carrington, 7 Price, 564; Martin *v.* Daws, 1 D. & L. 279.

(*f*) Armstrong *v.* Stratton, 1 Moore, 110; Driver *v.* Hood, 7 B. & C. 494; Anon. 1 Dowl. 5.

(*g*) Pinhorn *v.* Tuckington, 3 Camp. 468. See 3 & 4 W. IV. c. 42, s. 28; Marquis of Anglesey *v.* Chafey, Manning's Digest, title Interest, A. a, pl. 19, cited in Churcher *v.* Stringer, 2 B. & Ad. 777.

(*h*) Johnson *v.* Durant, 4 C. & P. 327.

(*i*) Churcher *v.* Stringer, 2 B. & Ad. 777.

issued on a judgment entered up pursuant to the award (*j*); nor on an execution under the statute 1 & 2 Vict. c. 110 (*k*).

Under the Judicature Rules, Order XLII. r. 16, interest at 4 per cent. may be levied from the date of entering judgment. These words seem large enough to give interest when the judgment is entered pursuant to an award.

Interest, Companies Act, 1862.

No interest is payable on the amount of an award settling the price to be paid for the purchase of the interest of a dissentient member, under the Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 161, 162, except from the date when payment of the amount awarded is demanded, and such interest is properly charged at 4 per cent. (*l*).

Computing principal and interest.

After interlocutory judgment in an action on an award for a sum certain, the court used to refer it to the master to compute the amount of damages, instead of directing a writ of inquiry (*m*).

Writ of inquiry.

Leave was given to the plaintiff, in debt on bond conditioned to perform an award, after judgment for him upon an issue of nul tiel record to a plea of judgment recovered, to execute a writ of inquiry under the statute 8 & 9 W. III. c. 11, s. 8, after a writ of error allowed, and to sign a new judgment on the terms of paying costs, and putting the defendant in statû quo (*n*).

SECTION II.

HOW TO STATE AN AWARD IN PLEADING.

Pleading award.

1. *Averments in a pleading stating an award.*]—The mode of pleading has been so altered, in consequence of the Judicature Acts, that much of the old law relating to pleading award has become obsolete. Yet, as points of pleading often involve principles of law which survive all changes of form, it has been thought better to retain the cases in the notes indicating

(*j*) Lee *v.* Lingard, 1 East, 400.
(*k*) Doe d. Moody *v.* Squire, 2 Dowl. N. S. 327.
(*l*) United States Direct Cable Co., In re, 4 L. J. Ch. 665.
(*m*) Meggison *v.* ——, Tidd. Pr. 571, 9th ed.
(*n*) Hanbury *v.* Guest, 14 East, 401.

their bearing generally. The old pleadings setting forth an award used to recite the existence of differences (*q*), the submission to arbitration (*r*), the appointment of arbitrators (*s*), and that all proceedings were taken and the award made in all formal requisites in pursuance of the submission (*t*), especially as to time and delivery of the award (*u*); also, that its terms were authorized by the submission (*x*).

It was usual, and sometimes was necessary, to aver that the defendant had had notice of the award (*y*), and had not performed it before action commenced (*z*), and had been requested to obey it (*a*). It was requisite to allege readiness

(*q*) 1 Chitt. Pl. 297, 7th ed.; 2 Chitt. Pl. 298, notes, 7th ed.; 2 Chitt. Pl. 176, 298, 7th ed.

(*r*) 2 Chitt. Pl. 228, 7th ed.; Hodsden *v.* Harridge, 2 Saund. 61 m, notes, 61 n.; Biddle *v.* Dowse, 6 B. & C. 255; Roper *v.* Levi, 21 L. J. Ex. 28; Thomlinson *v.* Arriskin, 1 Com. Rep. 329; Hanson *v.* Liversedge, 2 Vent. 242.

(*s*) Dilley *v.* Polhill, 2 Stra. 923; Bates *v.* Townley, 1 Ex. 572.

(*t*) Mansell *v.* Burredge, 7 T. R. 352; 2 Chitt. Pl. 298, notes, 7th ed.; Lupart *v.* Welson, 11 Mod. 171; Sutcliffe *v.* Brooke, 15 L. J. Ex. 118, S. C. 3 D. & L. 302; Everard *v.* Paterson, 2 Marsh, 304; Henderson *v.* Williamson, 1 Stra. 116; Hinton *v.* Cray, 3 Keb. 512; Wilson *v.* Constable, 1 Lutw. 536.

(*u*) Skinner *v.* Andrews, 1 Saund. 169, S. C. 1 Lev. 245, S. C. 2 Keb. 361, 388, S. C. 1 Sid. 370; Bissex *v.* Bissex, 3 Bur. 1730; Bac. Ab. Arb. G.; Rowsby *v.* Manning, 3 Mod. 331, S. C. Carth. 158; 1 Show, 98, 242; Doyley *v.* Burton, 1 Ld. Raym. 533; Anon., 2 Ld. Raym. 533; Anon. 2 Ld. Raym. 989; Busfield *v.* Busfield, Cro. Jac. 577; Freeman *v.* Bernard, 1 Ld. Raym. 247; Bradsey *v.* Clyston, Cro. Car. 541; Robison *v.* Calwood, 6 Mod. 82; Marks *v.* Marriot, 1 Ld. Raym. 114; Oates *v.* Bromhill, 6 Mod. 176, S. C. 1 Salk. 75; Jenkinson *v.* Allisson, 1 Freem. 415, contrà, S. C. 3 Keb. 513; Wilson *v.* Wilson, cited in Veale *v.* Warner, 1 Saund. 327 c, note m.; Dresser *v.* Stansfield, 14 M. & W. 822; 2 Chitt. Pl. 256, note, 6th ed.; Veale *v.* Warner, 1 Saund. 327 b, n.; Elborough *v.* Gates, 2 Lev. 68.

(*x*) Craven *v.* Craven, 7 Taunt. 642; Doyley *v.* Burton, 1 Ld. Raym. 533; Pascoe *v.* Pascoe, 3 Bing N. C. 898; 2 Chitt. Pl. 256, notes, 6th ed.; Perry *v.* Nicholson, 1 Burr. 278; Smith *v.* Kirfoot, 1 Leon. 72; Wood *v.* Wilson, 2 C. M. & R. 241; Tilford *v.* French, 1 Sid. 160; Leake *v.* Butler, Litt. 312; Foreland *v.* Marygold, 1 Salk. 72; Bac. Ab. Arb. G.; Leach *v.* Morris, 1 Mod. 36, contrà. See 2 Chitt. Pl. note *h*, where it is said if there be a condition precedent to the payment of the money, it, and performance of it, should be averred in the declaration: Tomlin *v.* Mayor of Fordwich, 6 N. & M. 594; Hanson *v.* Liversedge, 2 Vent. 242; Thomlinson *v.* Arriskin, 1 Com. Rep. 329.

(*y*) Fraunce's case, 8 Rep. 92 b; Hodsden *v.* Harridge, 2 Saund. 62, n. 4; Child *v.* Horden, 2 Bulst. 144; Gable *v.* Moss, 1 Bulst. 44; Juxon *v.* Thornhill, Cro. Car. 132. See Brooke *v.* Mitchell, 6 M. & W. 473.

(*z*) Naters *v.* Sutton, 11 Jur. 87; Owen *v.* Waters, 2 M. & W. 91; Shepherd *v.* Shepherd, 3 D. & L. 199; Granger *v.* Dacre, 12 M. & W. 431; Abbott *v.* Aslett, 1 M. & W. 209.

(*a*) Waters *v.* Bridge, Cro. Jac.

to perform concurrent acts (*b*) and performance of conditions precedent (*c*). Assignees of insolvents need not allege the consent of the creditors to this reference (*d*), nor in suing executors was it necessary to state that they had assets (*e*).

Debt on arbitration bond.

In debt on a bond conditioned for the performance of an award, the plaintiff had to set out the award in his declaration or replication (*f*).

Assigning breaches.

The plaintiff had to assign breaches under the statute 8 & 9 W. III. c. 11, and could not have judgment for the penalty, and take out execution for the sum awarded, though there was only a single sum to be paid on the bond, namely, the amount of damages ascertained by the award (*g*).

And yet the breach, when assigned, was not issuable nor traversable, nor could the defendant give any answer to it (*h*).

Breach assigned not traversable.

Still the want of assigning a breach was matter of substance, and bad on general demurrer (*i*). The same was the case if the plaintiff assigned a bad breach, and it would not be aided after verdict (*k*).

Demurrer for not assigning breach.

When the award to pay a sum of money and costs was bad as to the costs, a replication in an action on the bond assigning as a breach the non-payment of the money only was good (*l*). So on an award that the defendant and a stranger shall do an act, assigning a breach in the neglect of

What a good assignment of a breach.

639; Rowe *v.* Young, 2 B. & B. 165, per Bailey, J., 233; Lambard *v.* Kingsford, Lutw. 558; Rodham *v.* Stroher, 3 Keb. 830.

(*b*) Rowe *v.* Young, 2 B. & B. 165, per Bailey, J., 234; Phillips *v.* Knightly, 1 Barnard. 84, S. C. Fitzg. 53.

(*c*) Driver *v.* Hood, 7 B. & C. 494, S. C. 1 M. & R. 324; Birks *v.* Trippet, 1 Saund. 32.

(*d*) Sutcliffe *v.* Brooke, 3 D. & L. 302. See P. I. ch. 2, s. 3, d. 1, p. 33, reference by trustees of bankrupts and insolvents.

(*e*) Dowse *v.* Coxe, 3 Bing. 20. See P. II. ch. 3, s. 3, d. 8, p. 169, effect of clause preventing death from being a revocation.

(*f*) Furlong *v.* Thornigold, 12 Mod. 533, S. C. Foreland *v.* Hornigold, 1 Lord Raym. 715; Foreland *v.* Marygold, 1 Salk. 72.

(*g*) Welch *v.* Ireland, 6 East, 613; Att.-Gen. *v.* Elliston, 1 Stra. 191; Com. Dig. Pleader, F. 4; Meredith *v.* Alleyn, 1 Salk. 138; Hayman *v.* Gerrard, 1 Saund. 102; Com. Dig. Pleader, F. 14; Shelley *v.* Wright, Willes, 9; Barret *v.* Fletcher, Yelv. 152; Lee *v.* Elkins, 12 Mod. 585; Ormelade *v.* Coke, Cro. Jac. 354.

(*h*) Heard *v.* Baskerville, Hob. 232; Brickhead *v.* Archbishop of York, Hob. 197; Morgan *v.* Man, T. Raym. 94; Gayle *v.* Betts, 1 Mod. 227; Bac. Ab. Arb. G.

(*i*) Barret *v.* Fletcher, Cro. Jac. 220, S. C. Yelv. 152; Heard *v.* Baskerville, Hob. 232; Brickhead *v.* Archbishop of York, Hob. 197.

(*k*) Com. Dig. Pleader, F. 14; Pit *v.* Wardal, Godb. 164.

(*l*) Addison *v.* Gray, 2 Wils. 293; Fox *v.* Smith, 2 Wils. 267.

PART III. CH. III. S. 2.

the defendant only was sufficient, when the direction as to the stranger was void (*m*).

When needless to assign breach in replication.

On a bond to perform an award, if the defendant pleaded in effect traversing the submission, or any other collateral matter, the plaintiff might join issue thereon without assigning a breach (*n*). So, if the defendant showed an award, and pleaded performance of part only, and issue were taken thereon (*o*).

If the defendant pleaded any plea admitting the award and excusing non-performance, as if he pleaded a release of all demands after the award, whereby he offered a special point in issue, it was sufficient for the plaintiff to answer the release, or other special matter alleged by the defendant, without assigning any breach (*p*).

Nice points also arose as to when the replication should conclude with a verification (*q*).

SECTION III.

THE EFFECT OF AN AWARD PLEADED AS A DEFENCE.

PART III. CH. III. S. 3.

An award must be pleaded specially as a defence when it operates as a discharge of the right to sue (*r*).

Rule as to pleading performance.

If an action were brought for a debt, an award respecting

(*m*) Oldfield *v.* Wilmer, 1 Leon. 140, 304, S. C. Owen, 153; Pit *v.* Wardal, Godb. 164; Bac. Ab. Arb. G.

(*n*) Com. Dig. Pleader, F. 15; Bac. Ab. Arb. G.; Kind *v.* Carter, 1 Sid. 290; Strike *v.* Benstey, 1 Lutw. 525.

(*o*) Genne *v.* Tinker, 3 Lev. 24; Com. Dig. Pleader, F. 15.

(*p*) Jeffery *v.* Guy, Yelv. 78; Baily *v.* Taylor, Yelv. 24.

(*q*) Fisher *v.* Pimbley, 11 East, 188; Veale *v.* Warner, 1 Saund. 326b, n. 1; Seal *v.* Crowe, 3 Lev. 164.

(*r*) 2 Chitt. Pl. 146, notes, 6th ed.; Allen *v.* Milner, 2 C. & J. 47; 3 Chitt. Pl. 105, notes, 7th ed.; Rolle Ab. Arb. X. 1, p. 266; Gascoyne *v.* Edwards, 1 Y. & J. 19; Crofts *v.* Harris, Carth. 187; Freeman *v.* Bernard, 1 Salk. 69, S. C. 1 Lord Raym. 247; Purslow *v.* Bailey, 1 Salk. 76, S. C. 6 Mod. 221; 2 Lord Raym. 1039; Allen *v.* Harris, 1 Lord Raym. 122; Bac. Ab. Arb. G.; Freeman *v.* Bernard, 1 Salk. 69, S. C. 1 Lord Raym. 247; Clapcott *v.* Davy, 4 Lord Raym. 611; Com. Dig. Accord. D. 2, 3; Rolle Ab. Arb. Z. 267; Bac. Ab. Arb. G.; Dighton *v.* Whiting, 1 Lutw. 51; Linch *v.* Dacy, 1 Keb. 848; Hare *v.* George, Cro. Eliz. 66; Clapcott *v.* Davy, 1 Lord Raym. 611.

the claim, ascertaining the amount of the debt, and directing payment, could not be pleaded in bar to the action without alleging performance; for the money until paid was due in respect of the original debt: as, for instance, if the claim were for tolls, the sum awarded was due for tolls still. But if the claim were of a different nature, as, for example, to have goods delivered, and the award directed payment of money in satisfaction of the demand, the right to have the goods was gone, and the only right remaining was the substituted right to have the money awarded. So, if the demand were for a debt, and the award directed, not payment in money, but payment in a collateral way, as by delivery of goods or performance of work, it seems the right to have payment in money was extinguished. In like manner, if the claim were for unliquidated damages, an award of a sum certain in satisfaction was, it is apprehended, a good bar without alleging performance (*s*).

Award negativing plaintiff's claim.

By a deed the defendant was to pay the plaintiff 6,800*l.*, of which 4,800*l.* was to be subject to reduction in certain events, and it was also agreed that if any difference should arise respecting the deductions, it should be referred to an arbitrator to award what amount, not exceeding 4,800*l.*, should be deducted. The arbitrator awarded that the whole 4,800*l.* should be deducted. To covenant by the plaintiff on the deed for the 6,800*l.*, a plea of the award was held a good bar as to 4,800*l.* (*t*).

A plea, except as to a certain sum, that an arbitrator had awarded that sum as the sum due in respect of the causes of action was held good (*u*).

Award a bar where accord and satisfaction a bar.

In all actions where accord and satisfaction was a good defence, an award might be pleaded in bar (*x*).

To an action for trespass a defendant might sometimes plead an award made on a submission between the plaintiff and a stranger. An award between A. and B. for a trespass done by C.'s cattle, when in the possession of A., is a good

(*s*) Allen *v.* Milner, 2 C. & J. 47; Roulstone *v.* Alliance Insurance Co., 4 L. R. Irish, 547.

(*t*) Parkes *v.* Smith, 15 Q. B. 297.

(*u*) Commins *v.* Heard, L. R. 4 Q. B. 669.

(*x*) Com. Dig. Accord. D. 1; Blake's case, 6 Rep. 43 b; Bac. Ab. Arb. G.

bar to an action by B. against C. for the same trespass (*y*). So, to an action for a trespass, the defendant may plead that the trespass was committed by himself and another, and that the matter was afterwards submitted to arbitration by the plaintiff, the defendant, and the other trespasser, and determined by an award (*z*).

When an award may be pleaded by a stranger.

Payment on void award.

If a man paid money on a void award, and it was accepted, it might have been pleaded as an accord and satisfaction (*a*).

Award as to part of demand.

An award which does not extend to the whole of the thing demanded is not a good plea to an action on the demand (*b*).

Plea of award on parol submission no discharge of bond.

To an action on a bond for money, a plea that after the money became due the plaintiff and the defendant, by parol, submitted to an award, that the arbitrator awarded the defendant to pay the plaintiff a certain sum, and that he had tendered the sum, was held bad on demurrer, the debt being due by specialty (*c*).

Pleading award to further maintenance of the action.

If a cause were referred after issue joined, and the plaintiff nevertheless proceeded with the action, and after an award in the defendant's favour, took it down to trial, the award might have been pleaded as a plea to the further maintenance of the action (*d*).

Replication departure.

A replication in replevin justifying a distress under a power to distrain given by an award, was a departure from an avowry relying on the common law right to distrain for rent service (*e*).

(*y*) Com. Dig. Accord. D. 1; Rolle Ab. Arb. B. 1, p. 268.

(*z*) Tomlinson *v.* Arriskin, 1 Com. Rep. 328; Bac. Ab. Arb. G.

(*a*) Bacon *v.* Dubarry, 1 Salk. 70.

(*b*) Clapcott *v.* Davy, 1 Lord Raym. 611; Farrer *v.* Bates, Al. 4; Bac. Ab. Arb. G.

(*c*) Luddington *v.* White, Sty. 350.

(*d*) Lowes *v.* Kermode, 8 Taunt. 146; Storey *v.* Bloxham, 2 Esp. 503.

(*e*) Pascoe *v.* Pascoe, 3 Bing. N. C. 898.

SECTION IV.

HOW TO ANSWER IN PLEADING AN AWARD PLEADED.

Defeating award pleaded.

1. *Traversing the submission.*]—It is not intended in this section to enumerate all the kinds of defences which may be pleaded to defeat a claim resting on an award. Those only are discussed which have some special reference to the subject of arbitration.

Traversing the submission.

If a defendant in an action to enforce an award deny that he entered into any submission, or into the submission set out in the statement of claim, he must traverse the fact.

Plea of no award.

II. *Old plea no award made.*]—Anciently, the plea of no award meant strictly that no award at all had been made (*f*).

But in later times it was held to mean that no award had been made pursuant to the submission, and it might have been shown under that plea that the arbitrators did not execute the award together (*g*); or that the award was not made within the time alleged in the declaration as limited for the making of the award; or that a matter in difference duly notified to the arbitrator had not been awarded on (*h*).

Not every objection to award open on plea of no award.

But he would have failed on an issue on such a plea if he relied on the fact that the award (though according to the submission) was bad for showing on its face that the arbitrator had exceeded his jurisdiction (*i*); or that the two arbitrators had made their award without exercising their own judgment, but according to the opinion of a third person,

(*f*) House *v.* Launder, 1 Lev. 85; Harding *v.* Holmes, 1 Wils. 122; Morgan *v.* Man, 1 Lev. 127, S. C. T. Raym. 94; Roberts *v.* Marriot, 2 Saund. 183, S. C. 1 Lev. 300; Com. Dig. Pleader, F. 7; Keilway, 175; Skinner *v.* Andrews, 1 Lev. 245; Roberts *v.* Eberhardt, 27 L. J. C. P. 70, reversed in error, 28 L. J. C. P. 74; Fisher *v.* Pimbley, 11 East, 188. See Hickes *v.* Cracknell, 3 M. & W. 72; Spooner *v.* Payne, 16 L. J. C. P. 225. See also Beckett *v.* Midland Rail. Co., 35 L. J. C. P. 163, S. C. L. R. 1 C. P. 241; Mitchell *v.* Staveley, 16 East, 58; Hinton *v.* Cray, 3 Keb. 512; Gisborne *v.* Hart, 5 M. & W. 50; Perry *v.* Mitchell, 2 D. & L. 452.

(*g*) Wade *v.* Dowling, 4 E. & B. 44.

(*h*) Harrison *v.* Creswick, 13 C. B. 399; Roberts *v.* Eberhardt, 27 L. J. C. P. 70, S. C. 3 C. B. N. S. 482; King *v.* Bowen, 8 M. & W. 625; Elsom *v.* Rolfe, 2 Smith, 459; Dresser *v.* Stansfield, 14 M. & W. 822; Armitage *v.* Coates, 4 Ex. 641; Linsey *v.* Ashton, Godb. 255.

(*i*) Adcock *v.* Wood, 6 Ex. 814.

by whose decision they had beforehand agreed to be bound (*j*); or that the award had been set aside (*k*); or that the arbitrator gave him no opportunity of being heard (*l*).

Misconduct or mistake of arbitrator not pleadable.

III. *Misconduct or mistake of arbitrator whether pleadable.*]—To an action on an award, the defendant could not formerly plead collusion with a party or other misconduct of the arbitrator in avoidance of the award (*m*), or a mistake of the arbitrator (*n*).

But as a bill in equity lay to set aside an award for certain misconduct and mistakes of an arbitrator, and as all equitable defences may now be relied on, such misconduct and mistakes might probably now be pleaded as a defence (*o*).

Plea must show how award performed.

IV. *Pleading performance of the award.*]—In debt on bond for non-performance of an award, the defendant could not plead generally that he had performed it, but he must show the award, and how he had performed it (*p*).

Plea of Statute of Limitations.

V. *Other pleadings to defeat the award.*]—In debt on an award under the hand and seal of the arbitrator, a plea that the cause of action did not accrue within six years was formerly held bad, since the Statute of Limitations, 1 J. I. c. 16, s. 3, did not apply to awards under hand and seal, which were said to be quasi specialties, or, it is presumed, to any awards at all (*q*). However, the plea would have been good after 3 & 4 W. IV. c. 42, which provided, by s. 3, "All

(*j*) Whitmore *v.* Smith, in error, 7 H. & N. 509, S. C. 31 L. J. Ex. 107, reversing the judgment of the Exchequer, reported 5 H. & N. 824, S. C. 29 L. J. Ex. 402.

(*k*) Roper *v.* Levi, 21 L. J. Ex. 28.

(*l*) Thorburn *v.* Barnes, 36 L. J. C. P. N. S. 184, S. C. L. R. 2 C. P. 384.

(*m*) Whitmore *v.* Smith, 31 L. J. Ex. 107, S. C. 7 H. & N. 509; Wills *v.* Maccarmick, 2 Wils. 148; Brazier *v.* Bryant, 10 Moore, 587; Chicot *v.* Lequesne, 2 Ves. Sr. 315; Veale *v.* Warner, 1 Saund. 327 a, n. 3; Grazebrook *v* Davies, 5 B. & C. 534; Braddick *v.* Thompson, 8 East, 344; Dyer *v.* Dawson, cited in Heming *v.* Swinnerton, 1 Coop. C. C. 420, notes; Riddell *v.* Sutton, 5 Bing. 200, S. C. 2 M. & P. 345.

(*n*) Hall & Hinds, In re, 2 M. & G. 847, see note, p. 852; Johnson *v.* Durant, 2 B. & Ad. 925.

(*o*) Judicature Act, 1873, 36 & 37 Vict. c. 66, s. 24.

(*p*) Anon. F. Moore, 3, pl. 9; Genne *v.* Tinker, 3 Lev. 24; Veale *v.* Warner, 1 Saund. 324 a, 1, 3; Furser *v.* Prowd, Cro. Jac. 423; Anon. 1 Vent. 87; Hagh *v.* Chadwick, 2 Keb. 667.

(*q*) Hodsden *v.* Harridge, 2 Saund. 61 m, S. C. 2 Keb. 462. See Bac. Ab. Arb. 228, 5th ed., contrà.

actions of debt upon any award, where the submission is not by specialty," shall be commenced and sued within three years after the end of the session in which the act passed, or within six years after the cause of such action, but not after.

Plea of revocation by will of party.

A plea that the defendant revoked the authority of the arbitrator before the award was made, was a good answer to any claim on the award, when the submission was one that was revocable (*r*).

By marriage of female party.

The marriage of a female party to the submission pending the reference might have been pleaded as a revocation of the arbitrator's authority (*s*).

By bankruptcy or insolvency.

But the bankruptcy or insolvency of a party before the award is executed could not be pleaded as a revocation (*t*), though bankruptcy and insolvency may sometimes bar the claim on the award (*u*).

Pleading excess.

A plea to an action on an award under the Lands Clauses Consolidation Act, 1845, that the indivisible sum awarded included damages and compensation for things in respect of which the umpire had no jurisdiction to give compensation was a good plea (*x*).

Plea of foreign attachment.

In debt on bond, where the award was to pay money by a particular day, a plea that a foreign attachment in London issued the same day the money was payable, and that by virtue of it the money awarded was attached in the defendant's hands the day after, was held bad, because the penalty was due when the money was not paid by the day. But Holt, C. J., said the plea would have been a good plea to an action of debt on the award, or to an action on the bond, if the attachment had been executed before the penalty had been incurred, but not to an action of debt on the bond after breach (*y*).

Of waiver of the award.

An agreement not under seal to waive and abandon the

(*r*) Marsh *v.* Bulteel, 5 B. & A. 507.

(*s*) Charnley *v.* Winstanley, 5 East, 266. See P. II. ch. 3, s. 3, d. 5, p. 163.

(*t*) See P. II. ch. 3, s. 3, d. 4, p. 162.

(*u*) See P. III. ch. 1, d. 7, p. 526.

(*x*) Buccleuch, Duke of, *v.* Metropolitan Board of Works, L. R. 3 Ex. 307; on app. L. R. 5 Ex. 221; in H. L. L. R. 5 App. Cases, 418; Beckett *v.* Midland Rail. Co., L. R. 1 C. P. 241.

(*y*) Ingram *v.* Bernard, 1 Ld. Raym. 636. See Robbins *v.* Scandard, Sid. 327. See Coppell *v.* Smith, 4 T. R. 312.

award could not be pleaded in answer to an action on an arbitration bond. The only remedy was by cross action against the plaintiff for suing on the bond in breach of the agreement (*z*).

Parol accord and satisfaction though submission by deed.

But where the declaration stated that by deed between the parties it was agreed that it should be referred to arbitration what sum should be paid the plaintiff by the defendant, and that it was awarded that a certain sum should be paid by instalments, and that the defendant had only paid part; a plea that after breach of the award by non-payment of the first instalments it was agreed that the defendant should desist from doing a certain act, and pay a less sum at different dates in lieu of the sum awarded, and that he had paid such less sum, and that the plaintiff had accepted it in satisfaction, was held good; as the deed of submission was merely inducement, and the action was on the award, and that therefore an accord and satisfaction not under seal was good (*a*).

Not made within reasonable time.

Where the submission contained no limit as to time, a plea to an action on the award, that the arbitrators did not make their award within a reasonable time, was held bad (*b*).

Replication claim not covered by award pleaded.

To a plea of an award, the plaintiff replied that the subject-matter of his action was not included in the reference; and though the submission was of all matters in difference, and the cause of action existed at the time of the submission, the plaintiff was allowed to show that it was not referred (*c*).

Demurrer to pleading stating bad award.

If the plaintiff set out an award bad on its face as stated in the pleadings, the defendant had to demur (*d*). Demurrers are now abolished (*e*), but a party may raise by his pleading any point of law, and that may be disposed of separately (*f*).

(*z*) Braddick *v.* Thompson, 8 East, 344.

(*a*) Smith *v.* Trowsdale, 3 E. & B. 83.

(*b*) Curtis *v.* Potts, 3 M. & S. 145.

(*c*) Ravee *v.* Farmer, 4 T. R. 146.

(*d*) Gisborne *v.* Hart, 5 M. & W. 50; Cargey *v.* Aitcheson, 2 B. & C. 170; Fisher *v.* Pimbley, 11 East, 188.

(*e*) Ord. XXV. r. 1.

(*f*) Ord. XXV. r. 2. See, as to special case, Ord. XXXIV. r. 2.

SECTION V.

EFFECT OF AN AWARD IN EVIDENCE.

Execution of submission by all parties must be proved.

1. *Proof of the submission and award.*]—In an action on an award the submission of all the parties, if traversed, must be proved. If the submission be by agreement in writing, bond, or deed, evidence must be given by the plaintiff of the execution of the instrument by himself and by every party to it, though they are not parties to the action (*g*). The like necessity is imposed on a defendant who relies on an award as a defence. As in the case of contracts for other purposes, the execution used to be proved by the attesting witness, if there were one, unless his absence was sufficiently accounted for (*h*).

Rule of court no evidence of submission by agreement.

A submission, in writing, and attested, was not sufficiently proved by evidence of a rule making the agreement a rule of court under the statute 9 & 10 W. III. c. 15; for the character of the instrument was not changed by being made a rule of court for the particular purpose of summary enforcement. As it was a contract deriving its force from the consent of the parties, and not from the rule, it required to be proved like any other contract (*i*).

But evidence of submission by judge's order.

But a submission by a judge's order was properly evidenced by the rule of court; for the judge's order was itself a judicial act, and when made a rule was not altered in character, only in form, and the submission became a submission by rule of court just as much as if it had originally been so without a judge's order (*k*).

Performance evidence of submission.

An award ordered the defendant to sign a memorandum by which he undertook not to pirate the plaintiff's inventions: proof that he had signed a memorandum in terms according with the direction of the award was held sufficient evidence of his having submitted to the arbitration (*l*).

(*g*) Ferrer *v.* Oven, 7 B. & C. 427; Antram *v.* Chace, 15 East, 208; Brazier *v.* Jones, 8 B. & C. 124; Kingston *v.* Phelps, 1 Peake, N. P. 299.

(*h*) Spooner *v.* Payne, 4 C. P. 328, S. C. 16 L. J. C. P. 225.

(*i*) Berney *v.* Read, 7 Q. B. 79.

(*k*) Berney *v.* Read, 7 Q. B. 79; Still *v.* Halford, 4 Camp. 17.

(*l*) Stuart *v.* Nicholson, 3 Bing. N. C. 113.

Evidence of appointment of third arbitrator.

The recital in the award that the two arbitrators had appointed a third to act with them pursuant to the submission, was held no evidence of the appointment of the third. Nor could proof of the fact of his having acted with the other arbitrators in the course of the arbitration, and of his having signed the award, supply the proof of a formal appointment, since the mere suffering the third person to sit along with them and to sign the award would not be sufficient to vest in him any authority (*k*).

Admission by plaintiff.

A statement made by a plaintiff that he had before submitted his claim in the action to arbitration, and that the arbitrator had awarded against him, is evidence against him of the submission and award (*l*).

Primâ facie evidence of valid award.

On a submission by rule of court, the production of the rule of court and award (with proof of the execution of the latter) was primâ facie evidence in assumpsit on the award on the part of the plaintiff, and sustained the declaration, unless the validity of the award were impeached by evidence dehors on the part of the defendant (*m*).

An award purporting to be made by three, but signed by two only, of the arbitrators, was held to support an averment alleging it made by the two (*n*).

When notices under Inclosure Act presumed given.

On an indictment for non-repair of a road, an award under an Inclosure Act, which empowered the commissioners, on giving certain notices to the parties to be affected, to adjudge to which parish particular roads should belong, was tendered in evidence by the defendant parish to show that the road had been awarded to be in another parish; but as there was evidence of repair and other admissions by the defendants subsequent to the award, the court refused to receive the award without proof of the notices, since the usage contrary to the award rebutted the primâ facie presumption that all the proper steps had been taken (*o*).

Order of justices to support award presumed.

Where an award under an Inclosure Act, after reciting the consent and concurrence of two justices (necessary by the act), stopped up a footpath, the court presumed the existence

(*k*) Still *v.* Halford, 4 Camp. 17.
(*l*) Murray *v.* Gregory, 5 Ex. 486.
(*m*) Gisborne *v.* Hart, 5 M. & W. 50.
(*n*) White *v.* Sharp, 12 M. & W. 712.
(*o*) R. *v.* Haslingfield, 2 M. & S. 558.

of the justices' order, though none could be found, the subsequent enjoyment not being inconsistent with the award (*p*).

Award conclusive as evidence.

II. *Valid award conclusive as evidence.*]—The effect of an award in evidence as between the parties is most conclusive, and while unimpeached precludes other evidence being given to contradict it (*q*).

Evidence under account stated.

As arbitrators are not agents to state an account, but judges to decide disputes, an award was not evidence as an account stated (*r*), unless adopted and acted on (*s*).

Award conclusive on title to land.

In ejectment a previous award between the same parties, respecting the title to the land, was conclusive evidence of the right (*t*).

On amount of damages.

In covenant for non-repair, a verbal award determining the amount of damages prevented the plaintiff proving any different amount (*u*).

When against executor, as to assets.

In an action of assumpsit against an executor who pleaded "plene administravit" alone, an award on a submission between the plaintiff and the defendant as executor, respecting the matters in difference between the plaintiff and the testator, which ascertained the amount due from the testator's estate to the plaintiff, but did not direct the defendant to pay it, could not be offered by the plaintiff in evidence as an admission of assets by the defendant to defeat the plea (*x*). But if the arbitrator ordered the executor to pay the amount, the award would, it seems, have been conclusive evidence of assets in his hands, which he would not be permitted to contradict (*y*).

Award in action not evidence on indictment of party.

An indictment having been brought against a plaintiff for perjury, alleged to have been committed by him in deposing, in an affidavit, that the defendant in the action, the prosecutor of the indictment, was indebted to him in a certain sum; the

(*p*) Manning *v.* The Eastern Counties Railway Company, 12 M. & W. 237.

(*q*) Sybray *v.* White, 1 M. & W. 435; Whitehead *v.* Tattersall, 1 A. & E. 491; Bailey *v.* Lechmere, 1 Esp. 375.

(*r*) Bates *v.* Townley, 2 Ex. 152; Koen *v.* Batshore, 1 Esp. 194.

(*s*) Salmon *v.* Watson, 4 Moore, 73.

(*t*) Doe d. Madkins *v.* Horner, 8 A. & E. 235; Doe d. Greville *v.* Roper, Woodfall's Land. and Ten. 788, 5th ed.; Doe d. Morris *v.* Rosser, 3 East, 15. See Richards *v.* Bassett, 10 B. & C. 657.

(*u*) Whitehead *v.* Tattersall, 1 A. & E. 491.

(*x*) Pearson *v.* Henry, 5 T. R. 6.

(*y*) Worthington *v.* Barlow, 7 T. R. 453.

award of an arbitrator, to whom the action for the supposed debt had been referred, directing a verdict for the defendant, was held not to be admissible in evidence for the crown on the trial of the indictment, on the ground that the decision of the arbitrator in respect of the action was no more than a declaration of his opinion, and that there was no instance of such a declaration of opinion being received as evidence of a fact against the party to be affected by the proof of it, in any criminal case (*z*).

Award under Lands Clauses Act.

An award assessing compensation under the Lands Clauses Act, 1845, seems no evidence on an issue, whether the compensation awarded was in respect of matter for which compensation could be given (*a*).

Award no evidence against strangers.

III. *Effect of an award as evidence as to strangers.*]—It is laid down as a universal rule, that it is only as regards the parties to the submission, or those claiming under them, that an award has any force at all. No instance, it is said, can be proved in which strangers have been held to be in any way affected in their rights by an award, as evidence either of right or of reputation (*b*).

Not evidence of right against strangers.

Hence, in an ejectment on the several demises of a mortgagor and mortgagee (the lessor of the plaintiff at the trial relying on the title of the mortgagee), the defendant was not allowed to give in evidence an award in his favour respecting the same land, made on a submission between himself and the mortgagor subsequent to the mortgagee; although under that award the defendant had obtained and kept possession of the land, and the mortgagee had been present at one meeting in the reference, not however taking any part in it (*c*).

Award for tenant, no evidence for landlord.

An award had been made in favour of the plaintiff's tenant in an action brought by him for an injury to the leased premises against the defendant's landlord. In an action by the plaintiff against the defendant for the injury to the reversion, the court, affirming *Evans* v. *Rees* (*d*), held that the award was inadmissible for the plaintiff, either as

(*z*) R. *v.* Fontainemoreau, 11 Q. B. 1028. See 2 Pitt Taylor on Evidence, 1417, 7th ed.

(*a*) Rhodes *v.* Airdale Drainage Commissioners, 1 C. P. D. 402.

(*b*) Evans *v.* Rees, 10 A. & E. 151.

(*c*) Doe d. Smith *v.* Webber, 1 A. & E. 119.

(*d*) 10 A. & E. 151.

evidence of reputation, or on the ground of privity of interest, as the award, had it been the other way, would not have been evidence against the plaintiff, and it could not, therefore, when in her favour be used for her (*e*).

Award in a cause not evidence for the crown against party.

We have just seen that the award in a cause, deciding that the plaintiff has no claim, cannot be given in evidence by the crown against the plaintiff on an indictment of the latter for perjury, for alleging in an affidavit that the defendant was indebted to him, although the defendant be the prosecutor of the indictment (*f*).

Award not evidence of reputation against stranger.

Upon an indictment for non-repair of a highway, which it was alleged the defendant was bound to repair ratione tenuræ, an award on the question of liability, made under a submission by a former tenant for years of the land, was held not receivable in evidence as an adjudication on the point, since an award only binds the parties to the submission. Neither was it considered admissible as evidence of reputation, for evidence of the statements of witnesses before the arbitrator, even if they were deceased, would not have been admissible as having been made "post litem motam," and the arbitrator's opinion, formed on those statements, and expressed in his award, could not be entitled to more credit (*g*). The latter objection, indeed, applies equally to the verdict of a jury; so the courts, remarking that the rule of a verdict being evidence of reputation stands more upon authority than principle, refuse to extend it further; and though for many purposes an award is equivalent to a verdict, yet they will not consider it so for this; nor on an issue respecting the boundary between two parishes in adjoining counties, will they admit as evidence of reputation an award inter alios professing to set out the boundary (*h*).

Award evidence for stranger.

In some particular instances an award may be available in evidence for a person who is not a party to the submission.

In an action for false imprisonment against a servant of the East India Company, the defendant was allowed to give in evidence, in mitigation of damages under the general issue, a release given by the plaintiff to the East India

(*e*) Lady Wenman *v.* Mackenzie, 5 E. & B. 447, S. C. 25 L. J. Q. B. 44.

(*f*) R. *v.* Fontainemoreau, 11 Q. B. 1028. See above, p. 555.

(*g*) R. *v.* Cotton, 3 Camp. 444.

(*h*) Evans *v.* Rees, 10 A. & E. 151.

Company, in pursuance of an award between the plaintiff and the company, in which the plaintiff was awarded a large compensation for injuries done him by the company's servants, particularly by the defendant; the matters in difference in terms comprehending the claim in action (*i*).

Award evidence for arbitrator.

An award respecting the right to a chattel deposited with the arbitrator, precludes the party against whom the award is made from maintaining trover against the arbitrator for refusing to deliver up the chattel to him, since the award deciding against him is evidence that the withholding the chattel is no unlawful conversion (*k*).

Bad faith not abiding by award.

Where an award, reducing the rateable value of the premises of a company, ordered the excess of old poor-rates to be allowed out of the next rate, but the overseers nevertheless distrained for the full rate, and the company replevied, the court, considering the proceedings by the overseers contrary to good faith, directed the replevin bond to be given up to the company (*l*).

Award acted on, evidence affecting strangers.

An award acted on may sometimes be admissible as evidence between strangers.

Award respecting right to tolls.

In a case at Nisi Prius, before Lord Tenterden, C. J., an award of the time of Henry VIII. between the Corporation and University of Cambridge, regulating the amount of toll payable to the Corporation, was held inadmissible as evidence of reputation respecting the right to tolls in an action between the lessee of the Corporation and a third party, there being no proof that it had been acted on; yet a deed respecting the same question and founded on the award was admitted. In the same case, another award of the same reign, by which certain parties were discharged of toll to the Corporation of Cambridge in consideration of a specified annual payment, was admitted in evidence, the plaintiff undertaking to prove payment of the composition; but on his failing to do so, the evidence of the latter award also was struck out (*m*).

Stranger acquiescing in award.

Where a tenant under a sixty years' lease, having been

(*i*) Shelling *v.* Farmer, 1 Stra. 646.

(*k*) Gunton *v.* Nurse, 5 Moore, 259.

(*l*) Leicester Waterworks Company *v.* Cropstone Overseers, 32 L. T. 566.

(*m*) Brett *v.* Beales, 1 Moo. & M. 416.

served with a notice of an award made between two parties who had claimed rights (paramount to that of his lease) to enter and possess the lands to recover rent charge in arrear, attorned and paid rent to the one to whose claim the award gave priority, it was held, on proof of these facts, that he became tenant to the latter from year to year (*n*).

On an issue respecting the title to some growing crops seized by a creditor of the tenant of the land, an award between the landlord and tenant directing the tenancy to cease, and the tenant to deliver up possession, was held admissible in evidence, though of itself it could not transfer the property in the crops to the landlord (*o*).

Award acted on, an estoppel.

The right to a farm being in dispute, the parties agreed to be bound by the decision of an arbitrator, and he awarded against the one who had previously received rent as landlord from the tenant. Notice of the award was given to the tenant, and with the sanction of the losing claimant the tenant was directed in future to pay his rent to the successful party as his landlord. Afterwards, the former landlord, being dissatisfied with the award, distrained on the tenant for rent. It was held in an action of replevin, that though the tenant was estopped from saying that his landlord had no title, the tenant here was at liberty to prove these circumstances in evidence, to show that his landlord's title had determined, and that the loser was estopped from setting up his title of landlord, having himself induced the tenant to pay rent to another person (*p*).

Evidence impeaching award.

IV. *Impeaching by evidence award put in evidence.*]—When an award is tendered in evidence the opposite party may offer evidence in reply to impeach its validity, and so, doing away with its binding effect, allow proof to be given of the matters professed to be determined by it (*q*).

Proving matter not awarded on.

Thus, an award on a reference of all matters in difference being offered in evidence by the defendant, the plaintiff is at liberty to prove that on some of the matters referred the arbitrator has not awarded (*r*).

(*n*) Doe d. Chawner *v.* Boulter, 6 A. & E. 675.

(*o*) Thorpe *v.* Eyre, 1 A. & E. 926.

(*p*) Downs *v.* Cooper, 2 Q. B. 256.

(*q*) Whitehead *v.* Tattersall, 1 A. & E. 491.

(*r*) Ingram *v.* Milnes, 8 East, 444.

Issues undecided.

To illustrate this principle further, it may be observed, that though a submission by rule of court referring an action, and an award determining the action generally, is primâ facie evidence of a good award, yet evidence may be offered by a defendant, under a plea of "no award," to show that there are several issues in the action referred which the award has not determined, consequently that it is not final, and therefore of no effect (*s*).

Showing matter not within reference.

The court will grant a new trial, if the judge at Nisi Prius reject evidence offered to show that the subject-matter of the action to which the award is offered as an answer was not included in the reference or determined by the award (*t*).

Evidence to contradict award.

In an old case, however, where the defendant in mitigation of damages put in evidence a release by the plaintiff made in pursuance of an award on a submission between the plaintiff and another, the court would not allow the plaintiff to give evidence to contradict the general terms of the award and release, which included the ground of action, and to show that the arbitrators had on certain grounds refused to take into consideration the claim in the action (*u*).

Evidence of misconduct or mistake of arbitrator.

The same principle which prohibited the pleading the mistake or misconduct of the arbitrator precluded the defendant from giving evidence on those grounds (*x*); but as all equitable defences may now be relied on in an action, such evidence might probably often be considered admissible at the present day (*y*).

The question whether, in an action for 246*l.*, the defendant was entitled to a set-off for the like sum of 246*l.* in respect of some silk, having been submitted to the arbitrator, and decided in the negative by the award, the defendant in an action on the award, to which he had pleaded a set-off, proposed to give evidence of a claim for the silk less than 246*l.*, and to show that the arbitrator had decided against his claim, simply because he had held himself bound by the words of the submission to decide against the defendant,

(*s*) Dresser *v.* Stansfield, 14 M. & W. 882.

(*t*) Ravee *v.* Farmer, 4 T. R. 146; Rhodes *v.* Airdale Drainage Commissioners, 1 C. P. D. 380, S. C. 45 L. J. C. P. 337.

(*u*) Shelling *v.* Farmer, 1 Stra. 646.

(*x*) Wills *v.* Maccarmick, 2 Wils. 148; Dyer *v.* Dawson, cited in Heming *v.* Swinnerton, 1 Coop. C. C. 420, notes; Swinford *v.* Burn, Gow. N. P. 5.

(*y*) See ante, p. 555.

unless a set-off was proved of the exact value of 246*l.*; the court, however, rejected the evidence, holding that in an action on the award the decision of the arbitrator could not be impeached for a mistake (*z*).

In one instance at Nisi Prius, in an action of assumpsit on the award, the defence relied on was, that the irregular conduct of the umpire in examining one of the parties in the absence of the other vitiated the award. No objection, however, seems to have been made on the part of the plaintiff to the reception of the evidence or to the nature of the defence (*a*).

Evidence, submission obtained by fraud of party.

It was said, in a case decided before the modern rules of pleading, that if the submission were obtained by fraud, and an action were brought on the award, the defendant might plead no submission, and prove the fraud in evidence, which would authorise him to treat it as no submission; or that he might plead no award, and show that the submission was obtained by fraud (*b*). But he could not, it seems, under any plea, be permitted to give evidence that the award was made as it was in consequence of fraudulent conduct of the parties interested (*c*).

Proving no liability under award.

A submission provided that if the arbitrator should award that the defendants, who were executors, should purchase the plaintiff an annuity, he should and might award it with a proviso, that in case of a deficiency of assets the sum should abate. The arbitrator awarded the annuity without any proviso. On the general issue in assumpsit on the award, before the Judicature Acts, the court allowed the defendants to prove a deficiency of assets, holding that the arbitrator ought to have inserted the proviso, and that the defendants ought not to be the worse off for his neglect (*d*).

(*z*) Johnson *v.* Durant, 2 B. & Ad. 925.

(*a*) Matson *v.* Trower, Ry. & M. 17.

(*b*) Sackett *v.* Owen, 2 Chitt. 39.

(*c*) Dyer *v.* Dawson, cited in Heming *v.* Swinnerton, 1 Coop. C. C. 420, notes.

(*d*) Crump *v.* Adney, 1 C. & M. 355.

CHAPTER IV.

THE AWARD AS A GROUND IN OLD TIMES OF PROCEEDINGS OR DEFENCE IN EQUITY.

PART III. CH. IV.

Contents of the fourth chapter.

THE present chapter endeavours to point out in what cases and in what manner an award could be rendered available in equity in old times. It remains of interest, as common law courts may now adopt a similar procedure in most cases.

In the first section the inquiry is made when a suit would have lain to have specific performance of an award decreed.

The second section sets forth the effect of an award as a defence to procedure in equity respecting the matters referred, or to set the award aside.

The third section discusses the more summary modes, in which the assistance of equity to enforce an award might have been obtained.

SECTION I.

ENFORCING AN AWARD BY ACTION IN EQUITY.

PART III. CH. IV. S. 1.

Whatever the submission.

1. *When specific performance decreed.*]—This chapter was written when specific performance could be decreed only by Chancery. It has been thought advisable to leave it as it is, as a chapter on specific performance, for the assistance now of practitioners in the Queen's Bench Division as well as in the Chancery Division. Whatever was the nature of the submission, the jurisdiction of equity over the award seems to have attached.

Unless an award had been made, the court of equity could

not decree specific performance of an agreement, one part of which had been left to be determined by arbitration (*a*).

Though the submission were by order of Nisi Prius, which was afterwards made a rule of a court of common law, and so performance was capable of being enforced by attachment from that court, Chancery might still entertain an action for specific execution of the award (*b*). Even where the submission was by agreement containing a clause for making it a rule of a court of law under the statute, so that the Court of Chancery had no jurisdiction to set the award aside, yet it was held that a bill for specific performance might be filed, when the award was such as equity would execute (*c*).

Performance of award enforced as of a contract.

An action in equity would lie to enforce specific performance of an award, when the thing ordered by the award to be done was such as a court of equity would specifically enforce if it had been agreed on by the parties themselves. For as by the submission the parties had contracted to do what the arbitrator should direct, when the latter had made his decision, the award was considered in equity as amounting to an agreement by the parties on the terms pointed out by him, and would be enforced against a party as the party's own agreement (*d*).

Not award for payment of money.

As equity would not interfere in the case of a breach of contract when a court of common law could give a complete remedy by damages, so it would not execute an award which directed nothing but the payment of money, any more than it would decree specific performance of a contract for such a purpose (*e*).

Award to do specific acts.

But when the arbitrator directed a party to perform anything in specie, as to make a lease or to convey an estate, or

(*a*) Darbey *v.* Whitaker, 4 Drew. 134; Tillett *v.* The Charing Cross Bridge Co., 26 Beav. 419; Baker *v.* The Metropolitan Rail. Co., 11 Nov. 1862, 1 N. R. 8.

(*b*) Nickels *v.* Hancock, 7 De G. M. & G. 300; Wood *v.* Griffith, 1 Wils. C. C. 34, S. C. 1 Swanst. 43.

(*c*) Walters *v.* Morgan, 2 Cox, 369; Auriol *v.* Smith, 1 Turn. & R. 121; Hawksworth *v.* Brammall, 5 M. & C. 281.

(*d*) Walters *v.* Morgan, 2 Cox, 369; Wood *v.* Griffith, 1 Wils. C. C. 34, S. C. 1 Swanst. 53; Gervais *v.* Edwards, 2 Dru. & War. 80; Nickels *v.* Hancock, May 2, 1855; Lords Justices, 3 C. L. & E. Rep. Ch. 689.

(*e*) Walters *v.* Morgan, 2 Cox, 369; Hall *v.* Hardy, 3 P. W. 187.

to do anything in respect of lands, a court of equity would execute the award as a common agreement (*f*).

But specific performance would not be granted unless the court could give relief to both parties. Therefore it would not be allowed if the award directed one party to grant a lease and the other to keep a way in repair, and to pay certain sums from time to time as they might become due, which matters were not the subject of a decree for specific performance (*g*).

Award as to price of land taken under the Lands Clauses Act.

A contract for the purchase of land by a company is complete when notice to take the land has been given under the Lands Clauses Consolidation Act (8 & 9 Vict. c. 18), and the value has been fixed by an arbitrator appointed by the landowner and the company. Such a contract would be enforced in equity, notwithstanding the special provisions contained in the act respecting compulsory purchases (*h*).

Not award inconsistent with submission.

Not part of award.

The court would not enforce an award when the submission and award together constituted an unwise and unreasonable agreement, nor one which was incapable of being worked out consistently with the terms of the submission; and it is very doubtful whether it would enforce part of an award when it could not enforce the whole (*i*).

Old rule, ratification or part performance requisite.

Formerly, it was held that when the submission was by private agreement out of court, the courts of equity would not entertain a bill for a specific performance of the award (though it contained directions other than for the payment of money), unless after it had been made the parties had acquiesced in it, or agreed to execute it, or one party had performed his part (*k*). And so late as the year 1704, a bill being exhibited to have execution of an award, which had been performed by neither party, a demurrer was allowed, on the ground that there was no precedent

(*f*) Walters *v.* Morgan, 2 Cox, 369; Hall *v.* Hardy, 3 P. W. 187; Henry *v.* Kirwan, 9 Ir. C. L. Rep. 459.

(*g*) Blackett *v.* Bates, L. R. 1 Ch. 117, S. C. 35 L. J. N. S. Ch. 324, overruling S. C. below, 2 Hem. & M. 270; 34 L. J. N. S. Ch. 515.

(*h*) The Regent's Canal Co. *v.* Ware, 26 L. J. Chanc. 566, S. C. 23 Beav. 575; Mason *v.* The Stokes Bay Rail. Co., 32 L. J. Ch. 110.

(*i*) Nickels *v.* Hancock, 7 De G. M. & G. 300.

(*k*) Bishop *v.* Bishop, 1 Rep. in Chanc. 75, 141; Thompson *v.* Noel, 1 Atk. 60; Eyre *v.* Good, 2 Rep. in Chanc. 18, 34.

that a court of equity had ever carried such awards into execution (*l*).

Award enforced on part performance.

But when there had been a part performance, the courts of equity from very early times felt justified in decreeing a complete execution.

Thus, in Charles the Second's time, where a bill to enforce an award on a submission out of court had been dismissed on demurrer by the Master of the Rolls, Lord Chancellor Jeffries, on a rehearing, reversed the decision, and decreed that, as the award had been part executed and assented to, it should be confirmed, and that the defendant should perform the same (*m*). So where land had been enjoyed under an award, the court confirmed the title of the plaintiff, and decreed a perpetual injunction against a lease, under which the defendant had commenced an action of ejectment (*n*). On the same principle, it was held, on awards by private submission directing one party to convey an estate or to deliver a lease, and the other to pay a sum of money, that a bill would lie, when the lease had been delivered up, to enforce performance of the rest of the award (*o*); and on the other hand, to compel a conveyance when the defendant had received the money, in consideration whereof he was to have conveyed the estate (*p*).

Though an award were not good in strictness of law, yet if there had been an assent, and a part performance, the Court of Chancery sometimes enforced it (*q*).

In an old case, an award ordered that a party should have certain lands, and that if any doubts arose the arbitrators would explain the same. Long after the award had been executed, and possession of the lands delivered pursuant to it, it was contended that the party only took a life interest under the award; but the arbitrators having declared that they meant to give him a fee, and that the word "heirs" had been left out of the award by mistake, the court decreed that the plaintiff, the purchaser from the party entitled by the award, should enjoy the land absolutely in fee (*r*).

(*l*) Bishop *v.* Webster, 1 Cas. in Eq. Ab. 51, pl. 9.

(*m*) Norton *v.* Mascall, 2 Rep. in Chanc. 304.

(*n*) Poole *v.* Pipe, 3 Rep. in Chanc. 11, 20.

(*o*) Church *v.* Roper, 1 Rep. in Chanc. 75, 141.

(*p*) Hall *v.* Hardy, 3 P. W. 187.

(*q*) Norton *v.* Mascall, 2 Vern. 24.

(*r*) Scott *v.* Wray, 1 Rep. in Chanc. 45, 85.

In another case, where the plaintiff had paid part, and tendered the rest of the amount awarded due for a mortgage debt, but not within the time specified by the award, and brought a bill to have a reconveyance of the mortgaged lands pursuant to the award; the court, as the period fixed for payment had elapsed before the plaintiff had paid the money, decreed that the award was to be dissolved, that the master, allowing for the money paid, should ascertain what was due to the defendant, and that the defendant, on payment to him of what the master found due, should reconvey the estate (*s*).

What not sufficient part performance.

Although a defendant had to some extent acted on the award by nominating trustees, and electing to take licences pursuant to it, it was held that there had not been such an acquiescence in the award as to justify the court in enforcing a specific performance against him on that ground, no one appearing to have been misled by his acts (*t*).

Offering penalty in lieu of performance.

Where an agreement for the sale of lands, at a price to be fixed by arbitration, was secured by a penalty, the court of equity, after the price had been determined by the award, would decree a specific performance of the contract, and not compel the purchaser to accept the penalty in discharge of it (*u*).

Proceedings in court of law no bar to bill.

It was no ground to prevent the Court of Chancery decreeing a specific performance that the Court of King's Bench had granted an attachment against the defendant for non-performance of the award, in refusing to execute an authority to sell an estate, and had discharged the attachment on receiving their officer's report that the defendant had not been guilty of a contempt (*x*).

Whether lapse of time a bar.

Mere lapse of time, even twelve years' delay, was held in an old case no bar to a specific performance of an award (*y*).

But in more recent cases it has been said that the court would not compel specific performance of an award, unless the parties came as promptly as the nature of the case would permit (*z*).

It seems probable that delaying to file a bill for a year, the

(*s*) Ewes *v.* Blackwall, Cas. temp. Finch, 22.

(*t*) Nickels *v.* Hancock, 7 De G. M. & G. 300.

(*u*) Belchier *v.* Reynolds, 2 Ld. Kenyon, Part 2, 87.

(*x*) Wood *v.* Griffith, 1 Wils. C. C. 34, S. C. 1 Swanst. 43.

(*y*) Sweet *v.* Hole, Cas. temp. Finch, 384.

(*z*) Eads *v.* Williams, 24 L. J. N. S. Ch. 531.

time being occupied in attempting, ineffectively, to set the award aside in a court of law, would have been a bar to a specific performance (*a*).

Scire facias on submission by recognizance.

On a submission by recognizance, an award has sometimes been enforced in equity by scire facias on the recognizance (*b*).

Discovery.

We have before seen, that on a voluntary submission, an action for discovery would not lie in aid of the arbitration, though it was otherwise on a compulsory reference (*c*).

Directions invalid in law.

II. *When award invalid or inequitable.*]—Directions in an award, which are contrary to law, could not be enforced in equity. When the parties agreed by parol that the arbitrator should determine whether a long lease should be granted of certain premises, and he directed a lease to be made, though the award were in writing, the agreement was held to be within the Statute of Frauds, and specific performance of that part of the award which awarded the lease could not be enforced (*d*).

Statute of Frauds.

Directing a perpetuity.

When an award directed, among other things, that the defendant should enjoy an estate tail in certain lands, but should do no act to bar the plaintiff's reversion in the same, the court refused to decree the restraining clause of the award, on the ground that Chancery would not decree a perpetuity, and held the defendant's demurrer as to that part to be good (*e*).

Unreasonable award.

Though equity would not compel the specific performance of an *agreement* it deemed unreasonable, it would nevertheless enforce an *award*, although it might consider it unreasonable; on the ground that the parties give to the act of an arbitrator an authority which cannot be given to their own acts (*f*).

Inequitable award.

In an old case, however, Lord Nottingham, C., said that on a reference by order of Chancery, if the award appeared inequitable, the court would not decree it. And where

(*a*) Blackett *v.* Bates, 35 L. J. N. S. Ch. 324, overruling S. C. below, 2 Hem. & M. 270; 34 L. J. N. S. Ch. 515.

(*b*) Carter *v.* Carter, 1 Vern. 259.

(*c*) Street *v.* Rigby, 6 Ves. 815; British Empire Shipping Co. *v.* Soames, 26 L. J. Ch. 759, S. C. 3 Kay & J. 433. See p. 96.

(*d*) Walters *v.* Morgan, 2 Cox, 369.

(*e*) Bishop *v.* Bishop, 1 Rep. in Chanc. 75, 141.

(*f*) Wood *v.* Griffith, 1 Wils. 34, S. C. 1 Swanst. 43.

Affecting infant.

exceptions were taken to an award, and the other side moved that it might be decreed, the Lord Chancellor set it aside, as it ordered payment to an infant, and that a bond should be given by the guardian, that the infant, when at full age, should convey certain lands, the learned judge holding it unreasonable, on the ground that the infant might die or refuse to convey, and that so it was not mutual. He also added he would never decree an award which would bind an infant (*g*).

In the following case, however, the award was decreed good. There was a submission by the plaintiff on the one part, and the defendant, an infant, and his guardian, on the other part; and the arbitrator awarded that, during the plaintiff's life and the infant's minority, the plaintiff and defendant should be at liberty promiscuously to dig lead ore from certain mines, and that the profits should be divided equally between them. A bill was brought to confirm the award, and the same Lord Chancellor, being of opinion that the infant was bound by it, indemnified the trustees for what they had done, and decreed according to the prayer of the bill, that the award should be established (*h*).

Affecting married woman's lands.

A specific performance of an agreement to sell an estate at a price determined by an arbitrator was in one instance refused, where some of the parties to be bound were married women (one of whom also had not executed the submission), and the valuation did not appear to have been made with due care and attention, which were more especially requisite when the estate of a married woman was intended to be taken away from her (*i*).

In another case, the defendant, on certain terms, agreed to set out for the plaintiff a piece of land to build on. After the plaintiff had built on it, the defendant refused to confirm the agreement, and the matter was referred to arbitration. On a bill to enforce the agreement and the award, which directed the defendant to convey the land, the defendant pleaded to the award, that he and his wife were jointly seised

(*g*) Cavendish *v.* ——, 1 Cas. in Chanc. 279, S. C. 1 Eq. Cas. Ab. 50; Evans *v.* Cogan, 2 P. W. 450.

(*h*) Bishop of Bath and Wells *v.* Hippesley, cited in Harvey *v.* Ashley, 3 Atk. 607.

(*i*) Emery *v.* Wase, 5 Ves. 846, S. C. on appeal, 8 Ves. 505. See P. I. ch. 2, s. 1, d. 3, p. 18, forcing husband to procure wife's conveyance.

of the land, and that she was no party to the submission. The court held this a good plea in bar to the award, but nevertheless decreed that the defendant should convey the land according to the agreement (*k*).

Subsequent consent of strangers to award.

In general, strangers to the submission could not be affected by the award, but where they consented subsequently to be bound by its terms, equity, it seems, could enforce it against them.

Where an award directed a widow, tenant for life of lands under her husband's will, to convey them in fee, and her married daughters, who were entitled to the reversion in fee, though not parties to the reference, afterwards assented to the award, the Lord Chancellor, on a bill being brought, after the mother's death, against the daughters and their husbands, to have the award enforced, held that the consent of the daughters, as they were married, could not bind them (though if they had been sole they would have been bound), and he refused to compel them to convey the lands (*l*).

Laches of stranger.

In one case, a party having a claim on property which he knew was the subject of a reference between the plaintiff and defendant, having suffered the award to be made without bringing forward his claim, was held to be bound by the award, and the plaintiff was decreed entitled to a specific performance of the award, without any consideration for the rights of the stranger (*m*).

Stranger cannot enforce award.

A stranger to the submission could not avail himself of the award.

On a submission out of court between two partners, the award ordered some wines, part of the stock in trade of the firm, to be deposited in the hands of a third party, to be delivered to the partners respectively, in proportion to the amount of the debts of the firm each should pay off. The moiety of the wines having been seized in execution on a judgment in an action against one of the partners for a private debt, it was held that no bill would lie at the suit of the partnership creditors to set aside the execution, and to have the benefit of the award by having the wines again

(*k*) Berry *v.* Wade, Cas. temp. Finch, 180.

(*l*) Evans *v.* Cogan, 2 B. W. 450.

(*m*) Govett *v.* Richmond, 7 Sim. 1.

PART III. CH. IV. S. 1.

deposited in the hands of the third person, since the creditors were no parties to the submission (*n*).

Demurrer when award set forth void.

If on a suit to enforce an award, the award appeared bad on its face, as for uncertainty, the objection to its validity must be taken on demurrer (*o*). So if there were an illegal direction in the award, not vitiating the rest of it, a demurrer would be allowed to so much of the action as prayed the performance of the award in that respect (*p*).

Injunction to prevent breach of award.

An award would sometimes be enforced by an injunction preventing a party to it from acting contrary to it. Thus an arbitrator had among other things to set out a road for a party from a certain bridge. After making his award setting out the road from the bridge, the other party, a railway company, proposed to remove the bridge, but the court, considering such a course in fraud of the reference, restrained them by injunction (*q*).

To restrain continuing nuisance.

Where an award gave damages for injury to a market garden by neighbouring gas-works, the evil continuing, the court granted a perpetual injunction to restrain the gas company, notwithstanding the arbitrator had power to say what should be done, and had given no directions respecting the works (*r*).

SECTION II.

PLEADING AN AWARD IN BAR TO AN ACTION IN EQUITY.

PART III. CH. IV. S. 2.

An award might have been pleaded in a bar to a bill which sought to disturb the matter submitted to arbitration.

Pleading award to bill to set it aside.

It might also have been pleaded to a bill to set aside the award and open the account (*s*).

(*n*) Thompson *v.* Noel, 1 Atk. 60.

(*o*) Hopcraft *v.* Hickman, 2 S. & S. 130.

(*p*) Bishop *v.* Bishop, 1 Rep. in Chanc. 75.

(*q*) Wood *v.* The North Staffordshire Rail. Co., 13 Jur. 466.

(*r*) Broadbent *v.* The Imperial Gas Co., 7 De G. M. & G. 436, S. C. 26 L. J. Ch. 276, affirmed in H. L. 29 L. J. Ch. 377, S. C. 6 H. L. Ca. 600.

(*s*) Pusey *v.* Desbouvrie, 3 P. W. 315, per Lord Talbot, C.; Farringdon *v.* Chute, 1 Vern. 72.

To merits and discovery.

A plea of an award was held not only good to the merits of the case, but to the discovery sought by the bill; for a defendant to the bill was not obliged to set out the whole account between himself and the plaintiff after an award in his favour in relation to that very account; for that is conclusive on all parties, till an error is shown in taking the account, or partiality, or improper conduct in the arbitrator (*t*).

Whether the award made after bill filed pleadable.

The question, whether an award made under an agreement, entered into after the bill had been filed, to refer the matter of the suit to arbitration, could be set up in bar to the bill by plea put in, in the nature of a plea puis darreign continuance at law, was much considered by Lord Eldon in *Rowe* v. *Wood* (*u*), and his opinion appears to have been eventually adverse to such a form of proceeding, the effect of which he considered might have been much more effectually obtained by a motion to stay proceedings in the cause. In *Dryden* v. *Robinson* (*x*), the question was again raised, and although in the marginal note it is stated as the opinion of the court that an award made under such circumstances may be pleaded, yet upon reference to the case it will be found that no such decision was come to. After the bill was filed, some of the parties had agreed to refer the subject of the suit, and an award was made; but as all the parties to the suit were not parties to the submission, although the plaintiff was a party to it, and as part of the prayer of the bill was for the execution of the trusts of a deed, under which some of the parties to the suit were interested, who were not parties to the submission, a plea of the award was ordered to stand for an answer, with liberty to except (*y*). The case, therefore, of *Dryden* v. *Robinson* (*z*), it is said, can hardly be considered as an authority, especially in the face of the decision of *Rowe* v. *Wood* (*a*), confirmed as the latter was by the House of Lords on appeal (*b*). It should, however, be observed that in *Rowe* v. *Wood* (*c*), there was

(*t*) Tittenson *v.* Peat, 3 Atk. 529.
(*u*) 1 J. & W. 315, S. C. 2 Bligh, P. C. 595. See Daniell's Chanc. Pract., 6th ed., 487.
(*x*) 2 S. & S. 529.
(*y*) Dryden *v.* Robinson, 2 S. & S. 529.
(*z*) 2 S. & S. 529.
(*a*) 1 J. & W. on appeal, 2 Bligh, P. C. 595.
(*b*) Daniell's Chanc. Pract., 6th ed., 487.
(*c*) 1 J. & W. 315; 2 Bligh, P. C. 595.

only an agreement pleaded, some of the terms of which were to be settled by arbitration, but there was no averment that any award had been made.

Denying by plea and answer corruption charged in bill.

When the bill to set aside the award impeached it on the ground of fraud, corruption, or mistake, whether of the arbitrator or of a party, it was necessary that those charges should be denied, both by averments in the plea, and by an answer in support of it; and every other matter stated in the bill as a ground for impeaching the award must have been denied in like manner (*d*).

Whether plea of award good, corruption denied in answer only.

It was often laid down that to a bill stating corruption of the arbitrator, a plea of the award merely, leaving the charge of corruption untouched, was insufficient (*e*), and that an award nakedly pleaded is an "exceptio ejusdem rei cujus petitur dissolutio," and was therefore no bar without the denial of the corruption and partiality.

Thus, where a bill charged the defendant with fraudulent concealment and deception of the arbitrator, and the defendant pleaded the award alone, and did not put in any answer, the court held it impossible that the plea could be allowed, as the fraud was not denied (*f*).

Some doubt was thrown on the propriety of averments denying the matter charged in the bill being put into the plea, for the Court of Exchequer in two instances (*g*), where the bills were filed for the purpose of setting aside awards, charging that they had been obtained corruptly, and pleas were put in, setting up the award, and negativing the charges of corruption, held the pleas to be bad, as not bringing the cases to one point, and said the plea should merely set up the award, and not contain averments denying the charge of corruption, but that the answer supporting the pleas should deny those charges. On a subsequent occasion, however, Lord Eldon, C., expressed his disapprobation of the ruling of the Court of Exchequer in those cases (*h*), saying it was

(*d*) 1 Daniell's Chanc. Pract. by Headlam, 636, 637; see pp. 486, 487, 6th ed.; Mitford's Plead. in Chanc. 304, 5th ed.

(*e*) Evans *v.* Harris, 2 Ves. & B. 361, 364; Butcher *v.* Cole, cited in Edmundson *v.* Hartley, 1 Anst. 99.

(*f*) Gartside *v.* Gartside, 3 Anst. 735.

(*g*) Pope *v.* Bish, 1 Anst. 59; Edmundson *v.* Hartley, 1 Anst. 97.

(*h*) Bayley *v.* Adams, 6 Ves. 586.

difficult to support those cases, and "that there was hardly one point of equitable proceedings with regard to pleas which it was not extremely difficult to reconcile to them" (*i*).

On a bill to impeach an award and for an account against the arbitrators and the party, a plea by the latter of the award as to the account was held good, but the plea by the arbitrators of the submission, as to a discovery of several particulars, and as to relief against them, was overruled as covering too much, viz., several particulars which might tend to show partiality in their proceedings (*k*).

Answer must deny charges.

The answer supporting the plea should have specifically denied the charges in the bill impeaching the award.

If the defendant swore that the accounts taken by the arbitrators were true accounts, but did not answer to particular concealments and frauds charged in the bill, the court would overrule the plea (*l*).

Where to a bill to set aside an award, on the ground of collusion and want of notice to the plaintiff to attend at the making of the award, the plea stated the arbitration, that the plaintiff had full notice, that an agent from him attended, and that there was a full discussion before the award was made, and there was also an answer containing averments of the fairness of the transaction, Lord Kenyon, M.R., held the plea good (*m*).

On a bill to set aside an award, suggesting fraud of the arbitrator, the defendant pleaded the award, and insisted it was a fair award. The court, as the answer of the defendant was very loose, and the submission provided for amending any errors of the arbitrators, directed the plea to stand for answer, with liberty to except (*n*).

Plea of award and release.

To a bill to open an account for fraud, a plea of an award and release was ordered to stand for an answer, with liberty to except (*o*).

After receiving the sum awarded, on a reference of all

(*i*) 1 Daniell's Chanc. Pract. by Headlam, 564; Bayley *v.* Adams, 6 Ves. 586, 598.

(*k*) Godfrey *v.* Bercher, Vin. Ab. Arb. 139, pl. 38.

(*l*) South Sea Co. *v.* Bumstead, 2 Eq. Cas. Ab. 80, S. C. 3 Vin. Ab. Arb. 140, pl. 39.

(*m*) Butcher *v.* Cole, cited in Edmundson *v.* Hartley, 1 Anst. 99.

(*n*) Kampshire *v.* Young, 2 Atk. 154.

(*o*) Burton *v.* Ellington, 3 Bro. C. C. 961.

PART III. CH. IV. S. 2.

matters in difference, the plaintiff executed a general release, but afterwards brought a bill, suggesting that the arbitrator had awarded on one matter only, and praying for a general account as to all but that one matter. The defendant pleaded the release, but so informally that the plea was overruled; but the benefit of the plea was reserved to him at the hearing (*p*).

Award no plea for stranger to submission.

An award made, and a release given pursuant thereto, could not be pleaded as a defence to a suit by those who were no parties to the submission (*q*).

SECTION III.

ENFORCING AN AWARD BY SUMMARY PROCEEDINGS IN EQUITY.

PART III. CH. IV. S. 3.

Making award in a suit an order of Chancery.

1. *Whether the award must have been made an order of court before enforcement.*]—Much discussion arose in old times as to whether, when a reference was made by an order of the Court of Chancery, in a cause in that court, it was necessary to make the award an order of that court, before an order could be made founded on the arbitrator's directions (*r*).

Practice since the Judicature Acts.

Since the Judicature Acts, the desire to render the practice of all the courts uniform has led to several decisions in Chancery that it is not necessary to make an award on a reference of an action by order of the Chancery Division a rule of court before enforcement (*s*).

Motion to make award order of court requires notice.

By an order of Chancery made in a suit, all matters in difference mentioned or referred to in the pleadings were submitted to arbitration, and it was ordered that either party should be at liberty to apply to the court to have the award made an order of court. The defendant gave notice of

(*p*) Jones *v.* Bennett, 1 Bro. P. C. 528.

(*q*) Davis *v.* Rea, Cas. temp. Finch, 441.

(*r*) Ormond *v.* Kynnersley, 2 S. & S. 15; Turner *v.* Turner, MSS. case, cited in Heming *v.* Swinnerton, 1 Coop. C. C. 421, notes; Haggett *v.* Welsh, 1 Sim. 134; Salmon *v.* Osborn, 3 M. & K. 429; Wood *v.* Taunton, 11 Beavan, 449.

(*s*) Jones *v.* Wedgewood, 19 Ch. D. 56; Jones *v.* Jones, 14 Ch. D. 595; Forest, In re, 19 Ch. D. 57, notes; Wood *v.* Birch, W. N. (1890) p. 126.

motion to have the award made an order of court, and that the plaintiff should pay a sum awarded. It was contended for the plaintiff that the motion to make the award a rule of court was a motion of course, and that the order for payment of the money could not be made until after the award had been made a rule of court, and the plaintiff been allowed an opportunity of moving to set it aside. The defendant argued, that the motion was one requiring notice, and could only be met by a cross motion to impeach the award. Vice-Chancellor Wigram, after consultation with the registrars, and making inquiries respecting the practice, decided that, considering the consequences of making an award an order of court, it was necessary that the motion should be a special motion, and that it required notice, but in consequence of the previous uncertainty as to the practice, he allowed the plaintiff until the next term to make a cross motion to set aside the award (*t*). The practice that it required notice, and should not be an ex parte motion, was followed in a later case, but Stirling, J., held that an award in a suit may be made a rule of court on an ex parte motion (*u*).

Making award under statute order of Chancery.

Awards under the statute of Will. III., now repealed, according to the usual practice, had to be made orders of court before proceedings could be taken to enforce them (*x*).

On one occasion, a submission under the statute of William and the award were made orders of Chancery by an ex parte application; notwithstanding which the court set the award aside for irregular conduct of the arbitrator (*y*).

Award cannot be made a record at law.

It may not be unimportant to observe that at common law there is no mode of proceeding known by which an award can be made a matter of record (*z*); but where the submission is made a rule of court, the court compels performance of the award just as if it were part of the rule (*a*).

Enforcing on motion award under statute of Will. III.

II. *Motion to enforce award.*]—When the submission was by agreement to be made a rule of a court of equity under

(*t*) Wilkinson *v.* Page, 1 Hare, 276.

(*u*) Wood *v.* Birch, W. N. (1890) 126. See Lipscomb *v.* Palmer, 30 L. J. Ch. 160.

(*x*) Cudlip *v.* Smedley, 12 W. R. 200. See next division.

(*y*) Harvey *v.* Shelton, 7 Beav. 455.

(*z*) Jones *v.* Williams, 8 M. & W. 349; Gifford *v.* Bury Town Council, 20 Q. B. D. 368.

(*a*) Anon., 1 Salk. 71.

the statute of Will. III., the party neglecting or refusing to perform the award might, under the express provisions of the act, have been compelled on motion to obey the directions of the arbitrator (*b*), but not if the award were bad on its face (*c*).

Award not a judgment or decree.

In the first case on the statute, decided in 1703, five years after the act passed, it was determined in Chancery, after consultation with the judges of the courts of common law, that the award on a submission under the statute was not in the nature of a judgment or decree, for the purpose of being enforced by any other summary process than the process of contempt given by the act; and that, therefore, as this died with the person, the remedy under the statute was lost on the death of the party, and could not be enforced by scire facias against the heir or executor (*d*). It might have been enforced against the latter by attachment in certain cases (*e*).

Arbitration Act, 1889.

By the Arbitration Act, 1889 (*f*), s. 1, submissions on reference by consent out of court are now, generally, to have the same effect as if they had been made orders of court.

The steps to be taken on a reference under the statute Will. III. (differing from those requisite for awards under orders in a suit) were as follows:

Old practice enforcing award.

Before any proceedings were commenced to enforce the award the submission must have been made an order of court.

Submission and award must be made orders.

We have before stated that the old practice was for the award to be made an order of court before steps could be taken to compel obedience (*g*).

Notice of motion to make award order.

To obtain the order making the award an order of court, a notice of motion must have been given to the other parties, or counsel must have consented on their behalf (*h*).

Cross motion to set aside award.

At this stage of the proceedings the party might impeach the award by a cross motion (*i*).

Service of award and demand of performance.

After the submission and award had been made orders of court, a copy of the award should have been personally served

(*b*) 9 & 10 W. III. c. 15, s. 1.

(*c*) Auriol *v.* Smith, 1 Turn. & R. 121.

(*d*) Webster *v.* Bishop, Prec. in Chanc. 223, S. C. 2 Vern. 444.

(*e*) Joseph *v.* Webster, 1 Russ. & M. 496. See post, P. III. ch. 6, s. 1.

(*f*) 52 & 53 Vict. c. 49.

(*g*) 2 Smith's Chanc. Pract. 451, 3rd ed.; Harvey *v.* Shelton, 7 Beav. 455. See the preceding division, p. 574.

(*h*) 2 Smith's Chanc. Pract. 452, 3rd ed.; Wilkinson *v.* Page, 1 Hare, 276.

(*i*) Wilkinson *v.* Page, 1 Hare, 276.

on the party liable, and performance demanded, either by the party entitled, or by some one acting under a power of attorney from him. If obedience were not then made to the award, a notice of motion for an order to direct the party to do that which he was awarded to do, within a certain fixed period, should have been served on the recusant, according to the practice of the court (*k*).

Notice of motion for order to obey award.

The notice of motion might have been given for any day in term, or for a seal day during the sittings out of term, or by special leave of the court first obtained, authorising the party to give such notice, for any day in vacation (*l*). This leave might be obtained on an ex parte application.

Motion may be made in term or vacation.

On the day mentioned in the notice, or soon after, according to the practice of the court (*m*), in case the party served did not appear, the court would on affidavit of the service of the copy of the award, of the demand of the performance, of the non-performance, and of the service of the notice of motion, make an order directing the party to do what the award directed within a specified time (*n*).

Order to obey award within specified time.

When the above-mentioned order had been obtained, a copy of it must have been served personally on the recusant.

Personal service of the order.

If he still failed to obey, notice of motion for an order on him to perform what the award directed within four days after service thereof, or to stand committed to the Queen's prison, must have been served on him.

Notice of motion to obey or be committed.

On affidavit of the service of the first order, of the demand, of the disobedience, and of the service of the last-mentioned notice of motion, an order would have been drawn up in accordance with such notice.

Order to obey or to stand committed.

Upon affidavit of personal service of such last-mentioned order, of a fresh demand and non-payment, the applicant was entitled to an order, upon a motion as of course, that the recusant do stand committed until he shall have done the act which the award required him to do. This order would

Order absolute for committal.

(*k*) Smith's Chanc. Prac. 1st ed. 399, 3rd ed. 458; 2 Daniell's Chanc. Pract. by Headlam, 1456; Smith's Handbook of Chancery Practice, pp. 45, 59.

(*l*) 2 Daniell's Chanc. Pract. by Headlam, 1453, 1454.

(*m*) 2 Daniell's Chanc. Pract. by Headlam, 1459.

(*n*) 2 Smith's Chanc. Pract. 1st ed. 399, 3rd ed. 458; 2 Daniell's Chanc. Pract. by Headlam, 1025.

then be drawn up, and the recusant committed to the Queen's prison accordingly (*o*).

Party imprisoned until he obey.

There he would be confined until he purged his contempt by obedience to the award, and paid the costs of his contempt (*p*).

This statement of the ancient practice is retained as an assistance in the construction of any new rules modifying it.

Enforcing on motion award under order of equity in a suit.

When the submission was by order of a court of equity made in an action in equity, performance of the award might be enforced in a summary manner.

Making award order of court.

We have seen in the preceding division that the latest as well as the older decisions hold it unnecessary to make the award an order of court before taking steps to enforce it (*q*), though that course is still sometimes pursued.

Where an award had been made an order of court after notice to the defendant, and never appealed against, and had been accepted by the defendant and obeyed by him for a time, on an application being made by the plaintiff for the continuance of the payments awarded, Jessel, M.R., refused to allow the defendant to raise the objection that the award was ultra vires and bad on its face (*r*).

The mode of enforcing was the following:

Notice of motion.

A notice of motion was given for an order on the party to perform the award, specifying what he was required to do.

Order of court to perform award.

On affidavit of the service of the notice, an order would be made directing him to do the acts awarded within a specified time (*s*).

Enforced as other orders in a suit.

This order would be enforced by the process of the court in the same manner as other orders or decrees in a suit. A statement of the general mode of proceeding in such cases being foreign to the object of this work, and to be found in the works on the practice of the Court of Chancery, it may be sufficient shortly to mention, that the order must have been duly served according to the practice (*t*). If

Service of order.

(*o*) Smith's Handbook of Chanc. Pract. 45. The order is thus drawn up, Ex relatione of an officer of the Registrar's Office.

(*p*) 1 Smith's Chanc. Pract. 208, 3rd ed.

(*q*) See ante, p. 574.

(*r*) Jones *v.* Jones, 14 Ch. D. 593.

(*s*) 2 Smith's Chanc. Pract. 3rd ed. 458; 2 Daniell's Chanc. Pract. by Headlam, 1025; Birdsall *v.* Bradley, 9 L. T. N. S. 436.

(*t*) 2 Daniell's Chanc. Pract. by Headlam, 1025.

obedience were not paid to it within the time limited, an attachment was issued (either in term time or vacation), without any order of the court, upon production to the record and writ clerk of an affidavit of the due service of the order (*u*). Since the Judicature Acts it would seem that the attachment cannot be issued without leave of the court or a judge, to be applied for on notice to the party (*x*).

Attachment on disobedience.

Whether the award were made in a suit, or on a submission under the statute of Will. III., the statute 1 & 2 Vict. c. 110, s. 18, gave a speedy and summary method of enforcing payment of money awarded (*y*).

Enforcing payment of sum awarded under stat. of Victoria.

That section gave to all decrees and orders of courts of equity, whereby any sum of money, costs, charges, or expenses should be payable to any person, the effect of judgments in the superior courts of common law.

By virtue of the orders of the Court of Chancery made under that statute (*z*), the party who was entitled to the sum awarded, and who had obtained an order for payment, might, after the lapse of one month from the time when such order for payment was duly passed and entered, sue out a writ of fieri facias or elegit for the amount (*a*).

Fieri facias and elegit under orders of Chancery.

On an arbitration under the Public Health Act, 1875, the costs, per Pearson, J., may be taxed in the Chancery Division, following the common law practice, without a special order to tax (*b*).

Taxing costs.

Performance of the award may also be summarily enforced by proceedings under the Arbitration and Judicature Acts, as stated hereafter, p. 630.

Enforcing under Arbitration and Judicature Acts.

The Court of Chancery would not generally order money to be paid out of court upon motion, the proper mode of obtaining it being by petition; but where the rights of the parties in a cause had been ascertained by arbitration, though no

Motion to pay money out of court.

(*u*) 2 Daniell's Chanc. Pract. by Headlam, 1026; Bac. Ab. Arb. H.; Hide *v.* Petit, 1 Cas. in Chanc. 91, 185. See Knox *v.* Simmonds, 3 Bro. C. C. 58.

(*x*) See Order XLIV. rule 2 (1883).

(*y*) See P. III. ch. 7, as to proceeding on the statute in the common law courts.

(*z*) General Orders, May 10, 1839.

(*a*) Smith's Handbook of Chanc. Pract. 45, 369; 2 Daniell's Chanc. Pract. by Headlam, 1013.

(*b*) Clark *v.* Corporation of Bath, W. N. (1884), 127.

decree had been made, the payment of money out of court was ordered upon motion (*c*).

Motion by defendant to dismiss plaintiff's suit pursuant to award.

Where the defendant moved in the Exchequer that a suit in equity in that court be dismissed pursuant to an award, the court said they could not act on the award, and that if the plaintiff refused to dismiss his bill, if that were the meaning of the award, the remedy against him was by attachment in that court of which the submission was a rule (*d*).

Enforcing award in charity suit on petition.

The Court of Chancery would not act under an award made in a charity cause, without the consent of the Attorney-General, or a reference to the master to see whether it was for the benefit of the charity; and Lord Eldon, C., observed that in those cases where the information could not be filed without the consent of the Attorney-General, the same principle required his authority and consent throughout (*e*).

In another case affecting a charity, the same learned judge remarked, that formerly the Court of Chancery was more in the habit of giving effect to awards than at his day it was accustomed to do (*f*).

Charitable corporation compelled to renew lease.

An information having been filed against a charitable corporation, the matters in the suit were referred to arbitration. The award, made and confirmed by decree of court, in 1716, ordered the corporation to grant certain leases on lives renewable on fines. A petition having been presented, in 1823, before Lord Eldon, C., to compel the corporation to renew a lease pursuant to the award, the Lord Chancellor expressed great doubts whether, in the case of a charity, he had any jurisdiction to enforce the award, yet nevertheless directed the lease to be granted, as the lands had been enjoyed under the award ever since it had been made; and as Lord Hardwicke, C., had twice assumed the jurisdiction, and acted on the very award under similar circumstances, he should, notwithstanding his own doubts, consider the award as not to be disturbed except by the House of Lords (*g*).

(*c*) Smith's Handbook of Practice in Chancery, 56; Oliver *v.* Burt, 1 Beav. 583; Bromley, In re, 13 L. J. Ch. 320.

(*d*) Hutchinson *v.* Hodgson, 2 Anst. 361.

(*e*) Attorney-General *v.* Hewitt, 9 Ves. 322.

(*f*) Attorney-General *v.* Clements, 1 Turn. & R. 58.

(*g*) Ibid.

CHAPTER V.

MAKING THE SUBMISSION A RULE OF COURT.

Subject of the fifth chapter.

THIS chapter is confined to setting forth the practical steps to be taken in the preliminary proceeding of making the submission a rule of court, though this is now rarely necessary to be done.

Section one treats of making the submission a rule of the High Court.

In section two the practice, both at law and equity, of making the submission or appointments of the arbitrators a rule of court under the Lands Clauses Consolidation Act, is considered.

SECTION I.

MAKING THE SUBMISSION A RULE OF COURT.

The practice of making a submission to arbitration a rule of court arose first in the time of Charles II. It was done for the purpose of rendering any misconduct under the submission, or any refusal to act on the award, a contempt of court, and to give the court jurisdiction over the award and the parties to the submission (*a*). This practice applied only to references of suits or causes in court. But being found by experience to be convenient, the stat. 9 & 10 Will. III. c. 15, extended it to arbitrations by agreement out of court.

As that statute has been repealed by the Arbitration Act, 1889 (*b*), which by sect. 1 provides for a submission, in a

(*a*) Per Blackburn, J., Buccleuch, Duke *v.* Metropolitan Board of Works, L. R. 5 Ex. 230.

(*b*) 52 & 53 Vict. c. 49.

reference out of court, having the same effect in all respects as if it had been made an order of court, it seems hardly necessary to retain a statement of the effect of the cases on the point. But they are referred to in the note (*c*).

Submission in an action.

When the submission was by judge's order, or order of Nisi Prius, either party could at any time, in term or vacation (*d*), by application ex parte to the court in which the action was brought, make it as of course a rule of court. The power of the courts to make such submissions rules of court does not arise from any statute, but depends on their inherent jurisdiction over judicial proceedings before them (*e*).

Practice making submission rule.

The course adopted on a reference by order of a judge or of Nisi Prius was simply to annex the order of reference to the motion paper given to counsel. No affidavit was necessary, unless there had been an enlargement of the time by the arbitrator. In vacation, as well as in term, there must have been a motion paper signed by counsel. The rule in each case was absolute in the first instance (*f*).

(*c*) Cases on making submissions rules of court at law: Harrison *v.* Grundy, 2 Stra. 1178; Perring and Keymer, In re, 3 Dowl. 98; Davis *v.* Getty, 1 S. & S. 411; Mayor of Bath *v.* Pinch, 4 Scott, 299; Bottomley *v.* Buckley, 4 D. & L. 157; Kirkus *v.* Hodgson, 8 Taunt. 733, S. C. 3 Moore, 64; Ross *v.* Ross, 16 L. J. Q. B. 138, S. C. 4 D. & L. 648; Ansell *v.* Evans, 7 T. R. 1; —— *v.* Mills, 17 Ves. 419; Glaysher, Ex parte, 3 H. & C. 442, S. C. 34 L. J. Ex. 41; Newton *v.* Hetherington, 19 C. B. N. S. 342; Willcox *v.* Storkey, L. R. 1 C. P. 671; Smith *v.* Symes, 5 Madd. 75; Pownall *v.* King, 6 Ves. 10; Fetherstone *v.* Cooper, 9 Ves. 67; Nichols *v.* Roe, 3 M. & K. 431; Dierden, In re, 10 L. T. N. S. 690; Rudd *v.* Coe, Barnes, 55; Aldington *v.* Chesshyre, 15 C. B. N. S. 375; Henshaw *v.* Falk, 12 L. T. N. S. 638; Clarke *v.* Elwick, 10 Mod. 332, S. C. 1 Stra. 1; Weston *v.* Faulkner, 1 Price, 308; Anon., Barnes, 58; Todd, Ex parte, W. W. & D. 577; Milstead *v.* Craufield, 9 Dowl. 124; R. *v.* Price, 2 C. & M. 212; Evans *v.* Thompson, 5 East, 188; Roberts *v.* Evans, 6 B. & S. 1, S. C. 34 L. J. Q. B. 7; Welsh, In re, 1 Dowl. N. S. 331; Gripe *v.* Wilkie, 20 W. R. 112; Carter *v.* The Burial Board of Tonge, 29 L. J. Ex. 293, S. C. 5 H. & N. 523. Cases on making the submission a rule in Chancery: Davey *v.* Railway Passengers' Assurance Co., 49 L. J. Ch. 568; Oglesby's Arbitration, W. N. 150 (1879); Harvey *v.* Shelton, 7 Beav. 455; Wilkinson *v.* Page, 1 Hare, 267; Lewis *v.* Eley, May, 1823, cited in Heming *v.* Swinnerton, 1 Coop. C. C. 423, notes; 16 L. J. Ch. 287.

(*d*) Taylor, In re, 5 B. & A. 217.

(*e*) Aston *v.* George, 2 B. & A. 395; Little *v.* Newton, 1 M. & G. 976.

(*f*) 2 Archb. Pract. 1598, 14th ed.

It does not seem necessary to make a judge's order or order of Nisi Prius a rule of court now. To make a submission by agreement out of court a rule of court, it used to be necessary to have an affidavit of the due execution of the submission, and a half-guinea motion paper signed by counsel, which were taken to chambers, and the rule was drawn up thereon. If the submission were lost, a verified copy would suffice (*g*).

Dating rule.

Whether the submission were made a rule by the common law authority of the court or under the statute of William, the rule, if delivered out in vacation, must have been dated on the day of the month and week on which it was delivered out, but should have been entitled as of the term immediately preceding the vacation (*h*). The liberty of drawing up a rule in vacation was very convenient, for when a cause had been the subject of the reference, judgment might often have been entered and execution issued in vacation for the amount awarded (*i*); and even where that remedy was not applicable, time was gained for making the demand and serving the rule of court during the vacation, so as to enable the party to make application for an attachment, or execution under the statute of Victoria, on the first day of the next term (*k*).

Making submissions rules under public acts.

Certain public acts require that submissions to arbitration under them shall be made orders of court; this may still be a necessary step in such cases. The Arbitration Act, 1889 (*l*), enacts in s. 24, that its provisions shall apply to references under any other act, "except in so far as this act is inconsistent with the act regulating the arbitration, or with any rules or procedure authorized or recognized by that act."

Under Common Law Procedure Act.

A compulsory reference by judge's order under the Common Law Procedure Act, 1854, did not need to be made a rule of court to enable the court to deal with it (*m*).

(*g*) Short *v.* Frank, 3 Jur. 341; Parker *v.* Bach, 17 C. B. 512. As to the practice when the submission was withheld, see Thomas *v.* Philby, 2 Dowl. 145; Lord Borton *v.* Mesham, 8 Dowl. 867; Smith and Blake, In re, 8 Dowl. 131; Midland Rail. Co. and Heming, In re, 4 D. & L. 788; 11 Jur. 904; Plews *v.* Middleton, 6 Q. B. 845; Bligh *v.* Cottal, 3 N. R. 117; Gething *v.* Fotheringham, 13 W. R. 90.

(*h*) Badman *v.* Pugh, 5 M. & G. 381.

(*i*) Cremer *v.* Churt, 15 M. & W. 310.

(*k*) Taylor, In re, 5 B. & A. 217.

(*l*) 52 & 53 Vict. c. 49.

(*m*) Bennett *v.* Watson, 29 L. J. Ex. 357, S. C. 5 H. & N. 831; Talbot *v.* Fisher, 2 C. B. N. S. 741.

SECTION II.

MAKING A SUBMISSION UNDER THE LANDS CLAUSES CONSOLIDATION ACT A RULE OF COURT.

PART III. CH. V. S. 2.

Making submission under the Lands Clauses Act a rule of court.

By the Lands Clauses Consolidation Act, 1845, where the parties do not agree on a single arbitrator, each party is to appoint one, and such appointment "shall be deemed a submission to arbitration on the part of the party by whom the same shall be made" [s. 25]; and the "submission to any such arbitration may be made a rule of any of the superior courts on the application of either of the parties" [s. 36]. If this is not altered by s. 24 of the Arbitration Act, 1889, referred to at the end of the preceding section, the following pages showing the practice for making the submission a rule of court may be useful.

Entitling affidavits in Chancery.

When the parties proceed in Chancery, the affidavits verifying the submission, or the appointment of the arbitrators, and all other proceedings, should be entitled, "In the matter of the arbitration between A. B. and C. D., and in the matter of the" act or acts which warrant the application to the court (*n*).

Appointments of both arbitrators must be made a rule.

In order to make the submission to arbitration a rule of court, it was necessary that the appointments of both arbitrators should be produced, and verified by affidavits according to the practice of the Queen's Bench (*o*).

Both appointments to be produced.

The same practice, it is understood, prevailed in the offices of the other courts of law (*p*). It is to be observed that there has been no decision of the courts of law as to the necessity of producing both the appointments.

In the courts of equity a party will be compelled to produce the appointment of his arbitrator, or a verified copy, for the purpose of the submission being made a rule of court (*q*), or the production will be dispensed with by special order (*r*).

(*n*) Re Law, 5 Beav. 509.

(*o*) Ward *v.* Great North of England Rail. Co., T. T. 1847, Bail Court.

(*p*) Ex relatione of the officers of the Queen's Bench Rule Office.

(*q*) Huddersfield *v.* Jacomb, L. R. 17 Eq. 476.

(*r*) Hawley *v.* North Staffordshire Rail. Co., 2 De Gex & S. 33.

Advisable to make the appointments of the arbitrators in duplicate.

The cases already cited show the great practical difficulty which either party may often have in obtaining possession of the appointment of his opponent's arbitrator, when he wishes to make the submission a rule of court, and the delay, expense, and inconvenience to which this difficulty may subject him. A method, it is suggested, may be found to remedy this difficulty, and to enable either party at pleasure to make the submission a rule of court.

If each party took the precaution at the time of the reference of requesting the other party to make the appointment of his arbitrator in duplicate, and if they were mutually to furnish each other with one of the duplicate parts (and not a mere copy), there seems no reason why on producing the appointment of his own arbitrator and the duplicate original appointment of his opponent's arbitrator, and properly verifying both of them, the submission might not be made a rule of court. It is believed that the officers of the courts would not hesitate to draw up the rule on such documents.

Another advantage of this course would be to enable each party to see what his opponent called upon his arbitrator to do, so that if there were any material difference between his own and his opponent's appointment, the error might be rectified before any steps were taken in the reference.

Appointment of umpire need not be made rule of court.

On a motion in the Queen's Bench to set aside an award made by an umpire under the Lands Clauses Consolidation Act, the party showing cause objected that the appointment of the umpire had not been made a rule of court, but the Court of Queen's Bench overruled the objection, holding that step unnecessary (*s*).

The practice on making submissions to arbitration orders of court under the Railways Clauses Consolidation Act, 1845, the Railway Companies Arbitration Act, 1859, the Companies Clauses Consolidation Act, 1845, and the Public Health Act, 1875, would probably be analogous to that under the Lands Clauses Consolidation Act, 1845.

See, as to making copy of submission a rule of court of law, p. 583. See P. I. ch. 3, s. 7, d. 6, p. 103, as to submissions under the Lands Clauses Act.

(*s*) Bradshaw's Arbitration, 12 Q. B. 562.

CHAPTER VI.

ENFORCING THE AWARD BY ATTACHMENT.

PART III. CH. VI.

THE summary method of enforcing performance of an award by attachment is set forth in this chapter.

Contents of the sixth chapter.

The first section examines to what cases this mode of proceeding is applicable, and, when applicable, under what circumstances the courts in the exercise of their discretion will grant or refuse it.

The second points out the steps necessary to be taken by the party seeking this remedy; namely, demanding performance of the party charged to obey, and serving him with the proper documents, in order to bring him into contempt, and so amenable to the process of the court.

In the third section, the course of the motion for the attachment is considered, and the law is investigated respecting the affidavits to ground the motion, the motion, the defence that may be set up in answer, the result of the application, and the proceedings consequent on the party in contempt being arrested under the attachment.

SECTION I.

IN WHAT CASES AN ATTACHMENT WILL BE GRANTED.

PART III. CH. VI. S. 1.

1. *When submission is or has effect of an order of court.*]—It is only when the submission has been made a rule of court, or has effect of having been made an order of court, that the party who refuses or neglects to perform what the award orders is considered as disobedient to the order of court, as much as if the award were part of the order, and is conse-

When submission a rule not performing award contempt of court.

quently guilty of a contempt of that court. The process, therefore, by which the courts punish contempts, called an attachment, will be issued against him to compel his obedience to the directions of the arbitrator, under the penalty, in ordinary cases, of imprisonment until he comply (*a*).

Attachment at common law.

Before the time of Charles II., though an attachment would issue, when the submission was by judge's order or rule of court, to compel the party to submit to the arbitrator, or to punish him for a breach of the submission, it was not considered by the courts of common law that obedience to the award, when made, could be enforced by the same process. But in the reign of that monarch, though the courts at first hesitated about granting applications for attachments for non-performance of the award, yet they ultimately allowed them; and the granting the remedy by attachment was in William the Third's reign spoken of as the settled practice of the courts (*b*).

Attachment in equity.

In the courts of equity no such difficulty seems to have been felt about granting attachments for non-performance of the award, when the submission was by an order in equity (*c*).

Attachment under the statute of Will. III.

So convenient a remedy was it found, that the statute 9 & 10 W. III. c. 15, was passed to extend to all submissions respecting matters of a civil nature, which should contain consent clauses for making them rules of court, the same compulsory method of enforcement which had previously been confined to submissions concerning matters respecting which actions or suits had been commenced.

Arbitration Act, 1889.

That statute has been repealed by the Arbitration Act, 1889 (*d*), but by its first section it is enacted that on references by consent out of court the submission generally shall have the same effect in all respects as if it had been made an order of court.

Attachment lies when submission

At the present day, as a general rule, whenever the submission can be, or has the effect of having been, made a rule

(*a*) Bac. Ab. Arb. H.; Anon. 1 Salk. 71.

(*b*) Clemenhere *v.* Tresilian, 2 Keb. 645; Stiles *v.* Triste, 1 Keb. 130, 138, S. C. Sid. 54, S. C. T. Raym. 35; Darbyshire *v.* Cannon, 1 Mod. 21; Holt *v.* Berry, 3 Keb. 844; Anon. 1 Salk. 71; Forster *v.* Brunetti, 1 Salk. 83; Hall *v.* Mister, 1 Salk. 84; Anon. 12 Mod. 257; Veale *v.* Warner, 1 Saund. 237 c.

(*c*) Bac. Ab. Abr. H.; Hide *v.* Petit, 1 Cas. in Chanc. 91, 185.

(*d*) 52 & 53 Vict. c. 49.

can be made a rule.

of court, the award is capable of enforcement by attachment; and the converse holds also, so that whenever the submission cannot be made an order of court, as where it is merely verbal (*e*), or where, if in writing by agreement out of court, it contains words showing an intention that it should not be made an order of court (*f*), no attachment can be granted, even though a cause be the subject-matter referred (*g*), for the court has no jurisdiction where there is no rule of court (*h*).

No attachment when cause abates by death.

If by matter subsequent the submission, after having been made a rule, ceased to be valid as a rule of court, the like result followed. Therefore, where a cause before issue joined was referred by a judge's order, and the arbitrator found that the plaintiff had no cause of action, and the order of reference was then made a rule of court, and after this the defendant died, and the costs, which were to abide the event, were taxed; the court held, that the suit abated by the death of the defendant, that they could not enforce a rule made in the cause which was gone, and that therefore his administratrix could not have an attachment against the plaintiff for non-payment of the costs, but must bring an action to recover them (*i*); and Parke, J., remarked that in the case of *Rogers* v. *Stanton* (*k*), relied on in argument, the point concerning the abatement of the suit was not fully considered. In that case, under a reference by a judge's order, to which a stranger to the cause had become a party, the executor of the defendant, who had died after the award was made, was held entitled to an attachment against the stranger for the amount which the arbitrator directed the latter to pay to the defendant (*l*).

Attachment on reference of indictment.

On proceedings of a criminal character an attachment equally lies. Thus, if an indictment for a nuisance have been referred and a verdict taken subject to the reference, the defendant may be compelled by attachment to abate the nuisance as directed by the award (*m*).

(*e*) Ansell *v.* Evans, 7 T. R. 1; —— *v.* Mills, 17 Ves. 419.
(*f*) 52 & 53 Vict. c. 49, s. 1.
(*g*) Clarke *v.* Baker, 1 H. & W. 215.
(*h*) Owen *v.* Hurd, 2 T. R. 643.
(*i*) Maffey *v.* Godwyn, 1 N. & M. 101, S. C., R. *v.* Maffey, 1 Dowl. 538.
(*k*) 7 Taunt. 575.
(*l*) Rogers *v.* Stanton, 7 Taunt. 575.
(*m*) R. *v.* Gore, 8 Dowl. 102.

II. *For whom and for what an attachment will be granted.*]— An attachment would be granted on the application of a party to the submission, or if he were dead, of his personal representative, if the rule of court were not avoided by the death (*n*). A stranger to the submission cannot have an attachment to enforce payment of a sum which the award directs to be paid to him, though the direction itself, under the circumstances, be perfectly valid (*o*).

Attachment lay for party or representative.

Not for a stranger.

On one occasion it was said that an arbitrator might have an attachment to enforce payment of the costs of the award (*p*), but the soundness of that opinion was denied in a subsequent case (*q*). There does not seem to be an instance of such an application having been granted; and the courts have said, that an arbitrator cannot have a rule ordering a party to pay him his costs (*r*).

Whether for the arbitrator.

Whether the award order a party to pay money or to do any collateral act, an attachment lies if he fail to comply, since disobedience in either case is equally a contempt (*s*).

Attachment lies if award not performed.

The costs of the reference and award (and when there is a cause referred the costs of the cause also, even though no separate damages be awarded) might be taxed pursuant to the award on the rule of court embodying the submission, and if not paid might be recovered, together with the amount specified in the award, as the debt or damages (*t*).

For costs as well as damages.

Where the award orders each party to pay a moiety of the costs of the award, the party who, in order to get the award from the arbitrator, pays the whole, is entitled to an attachment against his opponent for the moiety for which under the award he is liable (*u*).

For money paid on taking up award.

No attachment can be granted to recover interest on a sum of money awarded to be paid by a certain day, though interest from that time may be recovered by action (*x*).

Not for interest on sum awarded.

(*n*) R. *v.* Maffey, 1 Dowl. 538; Rogers *v.* Stanton, 7 Taunt. 575.

(*o*) Skeete, In re, 7 Dowl. 618.

(*p*) Hicks *v.* Richardson, 1 B. & P. 93.

(*q*) Burroughes *v.* Clarke, 1 Dowl. 48.

(*r*) Laing *v.* Todd, 13 C. B. 276.

(*s*) Doddington *v.* Bailward, 7 Dowl. 640.

(*t*) Grundy *v.* Wilson, 7 Taunt. 699; Little *v.* Newton, 1 M. & G. 976; Taylor *v.* Shuttleworth, 2 M. & G. 55, S. C. 6 Bing. N. C. 277; Thorpe *v.* Cole, 4 Dowl. 457.

(*u*) Hicks *v.* Richardson, 1 B. & P. 93; Burroughes *v.* Clarke, 1 Dowl. 48; Stokes *v.* Lewis, 2 Smith, 12. See Butler *v.* Masters, 13 Q. B. 341.

(*x*) Churcher *v.* Stringer, 1 Dowl. 323, S. C. 2 B. & Ad. 777.

Second motion for attachment.

Where an attachment was refused because the applicant had not paid, in the first instance, certain costs which he sought to recover from his opponent, he was allowed to renew his application on affidavits, showing the new fact that he had subsequently paid the amount (*y*).

No attachment against peers.

Members of the House of Commons.

III. *Who not liable to be attached.*]—No attachment lies against a peer (*z*), or a member of the House of Commons (*a*), for disobedience to an award.

Whether attachment against executors.

It will not issue against the executor of a party who dies after the award is made without having performed it, for the contempt is personal, and the liability to punishment for a contempt dies with the person (*b*). So, though there be a clause preventing the death of a party revoking the arbitrator's authority, and the party die pending the reference, his executors cannot be compelled by attachment (though they may by action) to perform the award on the part of their testator (*c*).

Assignees and trustees.

As, by submitting to a reference without guarding against being personally responsible, executors and trustees, and assignees of bankrupts and insolvents, are taken impliedly to admit that they have sufficient funds or assets to answer the award, they are liable to an attachment if the arbitrator order them to pay, and will not be allowed to allege, in excuse for non-performance, that they have no assets (*d*).

Executor.

An executor personally liable for the costs of an action referred may be compelled to pay them by the like process (*e*). If the arbitrator order an executor to pay out of the assets which may be in his hands, or which may come to him, an attachment will not issue if he have no assets in hand, but will be subsequently granted on proof of assets having come in (*f*).

(*y*) Butler *v.* Masters, 13 Q. B. 341.

(*z*) Walker *v.* Earl of Grosvenor, 7 T. R. 171.

(*a*) Catmur *v.* Knatchbull, 7 T. R. 448.

(*b*) Webster *v.* Bishop, Prec. in Chanc. 223, S. C. 2 Vern. 444; Newton *v.* Walker, Willes, 315; Doe d. Pain *v.* Grundy, 1 B. & C. 284; Houlditch *v.* Houlditch, 1 Swanst. 58.

(*c*) Tyler *v.* Jones, 3 B. & C. 144; Lewin *v.* Holbrook, 11 M. & W. 110.

(*d*) Wansborough and Dyer, In re, 2 Chitt. 40; Worthington *v.* Barlow, 7 T. R. 453; Robson *v.* ——, 2 Rose, 50. See P. I. ch. 2, s. 2, d. 4, p. 29.

(*e*) Spivey *v.* Webster, 2 Dowl. 46.

(*f*) Joseph and Webster, In re, 1 Russ. & M. 496.

Where a woman, whom the arbitrator directed to deliver up two notes, and to pay a sum of money, failed to comply, and afterwards married, and her husband refused to pay the amount, it was doubted whether the court could grant an attachment against both or either of them (*g*). Husband and wife.

If a public company be by statute authorised to sue and be sued in the name of their treasurer, but he is not to be liable in person or goods by reason of being a defendant, the reference of actions, in which he is so made the nominal plaintiff or defendant, does not impose upon him any personal liability to an attachment for not paying the amount awarded against him. A mandamus against the treasurer and directors is the only remedy (*h*). Public officer.

An attachment does not lie against a corporation for non-performance of an award (*i*). If any process of contempt can issue, when a corporation is in default, it must be against the individual members of the corporation (*k*). Corporation.

Though the party be beyond the jurisdiction of the court at the time of his neglect to perform the award, and remain out of the jurisdiction, the court will nevertheless issue the process, as an attachment to enforce an award is not in the nature of criminal, but merely civil process, and the court will not inquire whether it can be made available (*l*). Party beyond the jurisdiction.

IV. *On what awards attachment refused.*]—It was very doubtful whether an award on a compulsory reference under s. 3 of the Common Law Procedure Act, 1854, now repealed, was enforceable by attachment (*m*). The cases cited should be considered with respect to compulsory references under the present law. Compulsory reference.

The award itself, though valid, may be so framed as to preclude a remedy by attachment.

An attachment will not be granted unless the whole and entire duty with which it is sought to charge the party is distinctly ascertained by the award. Therefore, where an No attachment, award not ascertaining amount to be paid.

(*g*) Anon., 1 Cromp. 265, 3rd ed., cited 2 Tidd, Pract. 835, 9th ed.; Bac. Ab. Abr. H.

(*h*) Corpe *v.* Glyn, 3 B. & Ad. 801.

(*i*) Guildford *v.* Mills, 2 Keb. 1; Anon. T. Raym. 152.

(*k*) London *v.* Lynn, 1 H. Bl. 206.

(*l*) Hopcraft *v.* Fermor, 8 Moore, 424, S. C. 1 Bing. 378.

(*m*) Talbot *v.* Fisher, 2 C. B. N. S. 471; Newbold *v.* Metropolitan Rail. Co, 14 C. B. N. S. 405.

award ordered the plaintiff to repay to the defendant any sum he should be made to pay on a bill of exchange, and the defendant, on affidavit that he had been forced to pay the amount of the bill, sought an attachment against the plaintiff for not recouping him, the application was refused; for where an unliquidated sum is to be paid, the court will not ascertain the amount upon affidavits (*n*).

Not ordering payment.

If the award find a certain sum to be due, but do not order the party indebted to pay the sum, no attachment can be granted; for there is no contempt of court when there is no express order to pay the amount awarded (*o*); but the remedy by action on the award, or by obtaining a rule to pay (*p*), or by execution under the Arbitration Act, 1889 (*q*), remains. An unauthorised direction of a verdict to be entered for a certain sum, does not amount to an order to pay that sum, so as to warrant an attachment (*r*).

Directing A. or B. to do an act.

If an award direct that A. or B. shall do an act, it seems doubtful whether an attachment can issue against either (*s*).

Discretionary to grant attachment.

Though the remedy by action on the award be of right, it is perfectly discretionary with the court, whether they will grant an attachment or not (*t*).

Unreasonable award.

It is reported as having been decided, that when an award appears unreasonable the court will not grant an attachment, but leave the party to his action on the award (*u*).

Parol award.

In one instance the Court of Common Pleas refused to grant an attachment for enforcing a parol award (*v*); but on a subsequent occasion they considered the objection to the award being by parol to be futile, and made the rule for the attachment absolute (*x*). There is also another recorded instance of an attachment issuing under similar circum-

(*n*) Graham *v.* Darcey, 6 C. B. 537.

(*o*) Seaward *v.* Howey, 7 Dowl. 318; Edgell *v.* Dallimore, 3 Bing. 634, S. C. 11 Moore, 541; Scott *v.* Williams, 5 Tyrw. 506, S. C. 3 Dowl. 508, S. C. sub nom. Hopkins *v.* Davies, 1 C. M. & R. 846.

(*p*) Baker *v.* Cotterill, 7 D. & L. 20, S. C. 18 L. J. Q. B. 345; Bowen *v.* Bowen, 31 L. J. Q. B. 193.

(*q*) 52 & 53 Vict. c. 49, s. 12.

(*r*) Donlan *v.* Brett, 2 A. & E. 344.

(*s*) Lawrence *v.* Hodgson, 1 Y. & J. 16.

(*t*) Stock *v.* De Smith, Cas. temp. Hardw. 106.

(*u*) Wilmot *v.* Allen, cited in Stock *v.* De Smith, Cas. temp. Hardw. 106.

(*v*) Dickman *v.* Hutherd, Pract. Reg. C. B. 44, S. C. Vin. Ab. Arb. Suppl. H. a. 1.

(*x*) Cookson *v.* Monkhouse, Pract. Reg. C. B. 44.

stances (*y*). But it is apprehended that at the present day the courts would be very slow to grant an attachment on a parol award (*z*).

Mistake in award.

Where the arbitrator made a mistake in his award in the Christian name of the defendant, the court refused to enforce it against the defendant by attachment (*a*). On a reference by a judge's order where the award set forth a supposed submission by order of Nisi Prius, it was said in one case the court would not enforce the award by attachment (*b*).

Validity of award doubtful.

If there be any reasonable doubt as to whether the award be sufficient in law, or if the question turn on a disputed matter of fact, and the affidavits be contradictory, the courts would refuse the application and leave the party to his action; for if an attachment issued the award had to be obeyed, and there was no means of appealing against the decision of the court, and solemnly trying the validity of the award (*c*). Thus, where the parties agreed to abide by the award made by the "two arbitrators and their umpire," and the award was made by the two arbitrators only, the objection being taken that all three ought to have executed it, the court considered the point too doubtful to grant an attachment (*d*). The power of the master to tax the costs of a cause and reference separately for each of the two joint defendants in the cause referred is too questionable to warrant the granting an attachment against the plaintiff, at the instance of one of the defendants, for non-payment of his share of the costs awarded to the defendants (*e*).

Delay in applying to the court.

After a long delay, for four years from the time when the award was made, Patteson, J., said he required an affidavit explaining the delay before an attachment could be allowed (*f*). But in a later instance, though the above was

(*y*) Rawling *v.* Wood, Barnes, 54.

(*z*) Bennett *v.* Watson, 29 L. J. Ex. 357, S. C. 5 H. & N. 831.

(*a*) Lees *v.* Hartley, 8 Dowl. 883; Davies *v.* Pratt, 16 C. B. 586.

(*b*) Christie *v.* Hamlet, 2 M. & P. 316, S. C. 5 Bing. 185.

(*c*) Dickenson *v.* Allsop, 13 M. & W. 722, S. C. 2 D. & L. 657; Cargey *v.* Aitcheson, 2 D. & R. 222; Thornton *v.* Hornby, 1 M. & Sc. 48, S. C. 8 Bing. 13; Stalworth *v.* Inns, 2 D. & L. 428; Hales *v*, Taylor, 1 Stra. 695; Spooner *v.* Payne, 11 Jur. 242; Lord *v.* Lord, 5 E. & B. 404, S. C. 26 L. J. Q. B. 34.

(*d*) Heatherington *v.* Robinson, 7 Dowl. 192.

(*e*) Dickins *v.* Jarvis, 5 B. & C. 528.

(*f*) Storey *v.* Garry, 8 Dowl. 299.

PART III. CH. VI. S. 1.

cited, Erle, J., held that a delay of two years and three months unexplained was no objection to proceeding by attachment (*g*).

No attachment together with action on award.

v. *No proceeding by attachment and action at the same time.*] —As it is considered vexatious to bring two separate proceedings for the same ground of complaint, the courts will not permit a party to enforce the award by action and attachment at the same time (*h*).

Old rule, attachment after action.

Formerly a different rule prevailed. Though judgment had been first obtained in an action on the arbitration bond, the court, in one instance, granted an attachment, on the ground that an attachment might possibly be a more quick and effectual process than suing out execution on the judgment (*i*). And in other cases, where attachments had been granted, and the party taken into custody, the courts refused to stay proceedings in actions on the arbitration bonds, subsequently commenced, alleging that the plaintiff had had no satisfaction upon the attachment (*k*).

In a cross action by the defendant, though the plaintiff had given notice of set-off of the sum awarded in his favour, the court nevertheless made absolute the plaintiff's rule for an attachment, but ordered it to stay a month in the officer's hands (*l*). Where a question as to the regularity of the judgment for the plaintiff, in an action on the award, was referred to the master, an attachment was granted pending the inquiry, but was subsequently stayed on the judgment being reported regular (*m*).

Electing by which mode to proceed.

In more modern times, in some instances, the courts have refused to grant an attachment while an action is pending (*n*), even where the plaintiff was willing to waive the action, on the ground that the party had made his election as to which of the two remedies he would adopt, and must abide by it (*o*).

(*g*) Bailey *v.* Curling, 20 L. J. Q. B. 235.

(*h*) Stock *v.* De Smith, Cas. temp. Hardw. 106.

(*i*) Clarke *v.* Elwick, 10 Mod. 332.

(*k*) Anon. 1 Salk. 73; Paterson *v.* Gross, 2 Barnard, 227.

(*l*) Harrison *v.* Oliver, Barnes, 56.

(*m*) Richardson *v.* Chancey, cited in Stock *v.* De Smith, Cas. temp. Hardw. 106, S. C. 1 Barnard, 386.

(*n*) Stock *v.* De Smith, Cas. temp. Hardw. 106.

(*o*) Badley *v.* Loveday, 1 B. & P. 81.

Attachment on discontinuing action.

But in others the attachment has been allowed to issue on the plaintiff's undertaking to discontinue his action (*p*). The more regular course is to discontinue the action, and pay the costs of it first, and after that to apply to the court for the process of contempt (*q*). The fact of an action having been commenced is no bar to the motion, provided it be not pending when the demand of performance is made, and it lies on the party resisting the application to show that it is pending (*r*).

Filing affidavit of debt.

Filing an affidavit of debt in the Court of Bankruptcy in respect of the amount awarded, with a view to make the defendant a bankrupt (which view the defendant had defeated by entering into a bond with sureties, under the statute 1 & 2 Vict. c. 110), did not preclude a motion for an attachment, no action having been commenced (*s*).

Action after attachment.

If an action be brought on the award after the defendant has been taken into custody on an attachment, the plaintiff will be put to his election, and if he prefer proceeding with the action, the attachment will be set aside, and the defendant discharged out of custody on his entering into a bond with sureties, to the plaintiff, in the nature of a bail-bond (*t*).

In one case, Wilde, C.J., stated his opinion that where a party, who having wilfully refused to perform an award, which he had the means of obeying if he chose, had been taken on attachment, and sentenced to a term of imprisonment for the contempt, he was not, after suffering the punishment, entitled to his discharge, or relieved thereby from an action on the award (*u*).

SECTION II.

STEPS NECESSARY TO BRING THE PARTY INTO CONTEMPT.

Making submission a rule of court.

1. *Demanding performance of the award.*]—The first step to be taken with a view to proceeding by attachment, is to make the submission a rule of court, unless it has the effect

(*p*) Paull *v.* Paull, 2 Dowl. 340, S. C. 2 C. & M. 235; Anon. Andr. 299.
(*q*) Paull *v.* Paull, 2 Dowl. 340.
(*r*) Higgins *v.* Willes, 3 M. & R. 382.
(*s*) Mendell *v.* Tyrrell, 1 Dowl. N. S. 453.
(*t*) Earl of Lonsdale *v.* Whinnay, 3 Dowl. 263.
(*u*) R. *v.* Hemsworth, 3 C. B. 745.

of having been made an order of court. For until there exists, or there is deemed to exist, a rule of court to be obeyed, non-performance of the award cannot be a contempt of court. The rule has no relation back for the purpose of rendering a party liable to this summary process (*x*).

Taxing costs.

If any costs be awarded and sought to be obtained, the amount, unless found by the arbitrator, must generally be settled by the master on taxation.

Costs of award.

When costs of the award alone are sought to be recovered, and there is no imputation made that they are excessive, it was decided by Coleridge, J., that it was not necessary to have them taxed before applying for an attachment (*y*); but more recently Blackburn, J., doubted that authority, and declined to act upon it (*z*).

Demand of performance necessary.

The party or parties entitled under the award must make a demand upon the party or parties liable under it to obey the directions of the arbitrator, whether they be for the payment of money or the performance of any other act. It was doubted in one case by Eyre, C.J., whether a demand need be made, when the time and place for the payment of money are specified in the award, and there has been a failure in the performance; but that learned judge yielded his opinion to what he found was the imperative practice, and decided that a demand was necessary even in such a case (*a*). This decision was confirmed on consideration (*b*). But Parke, B., is reported (*c*) to have said that a demand in such a case is not necessary. His observation, however, was merely an obiter dictum, and made in affirmance of a statement of counsel to that effect, and supposed, but erroneously, to be supported by the case cited (*d*), and without reference to the authorities mentioned above.

Not valid pending motion to set aside award.

A demand to comply with the award, so as to bring the party into contempt, cannot be made while a rule for setting

(*x*) Mayor of Bath *v.* Pinch, 4 Scott, 299; Chilton *v.* Ellis, 2 Dowl. 338; Hilton *v.* Hopwood, 1 Marsh, 66. See P. III. ch. 5, s. 1, making submission a rule of court.

(*y*) Threlfall *v.* Fanshawe, 19 L. J. Q. B. 334. See P. II. ch. 7, s. 1, d. 3.

(*z*) Parkinson *v.* Smith, 30 L. J. Q. B. 178.

(*a*) Brandon *v.* Brandon, 1 B. & P. 394.

(*b*) Dodington *v.* Hudson, 1 Bing. 410.

(*c*) Doe d. Williams *v.* Howell, 5 Ex. 299.

(*d*) Re Craike, 7 Dowl. 603.

aside the award is pending; for while the validity of the award is under the consideration of the court on a motion to set it aside, non-performance of its directions is no contempt (*e*).

Demand by all parties.

Where the arbitrator ordered the defendant to *deliver a bond* to the three plaintiffs, and one only demanded it, the court refused an attachment, holding that the demand ought to have been made by all three, or under a power of attorney executed by them all, so that the defendant might have known that it was by their joint authority (*f*).

Demand of money by one.

But where *money* is payable to two co-plaintiffs, a demand of the sum by one only is sufficient (*g*).

Demand by party or agent with power of attorney.

The demand may be made either by the party himself, or by a third party, authorised by power of attorney (*h*). A demand by the clerk of the party entitled is not enough (*i*). In one instance, a demand by an agent under a written authority, indorsed on the award, and unstamped, was, after hesitation, considered sufficient to warrant a rule nisi for an attachment (*k*); but at the present day the courts would assuredly refuse their process, unless the agent who demanded a sum of money awarded acted under a power of attorney from his principal (*l*).

Agent demanding execution of a deed.

A distinction is taken between demanding money awarded, and calling upon the party to perform other acts directed to be done. Thus, if an award direct the execution of certain deeds, the agent who tenders the deeds for execution need not be empowered by deed or power of attorney to make the demand (*m*).

Demand by attorney.

Whether a valid demand of the damages or of the costs awarded in a cause referred can be made by the attorney or his agent, without a power of attorney, does not seem to have been decided with respect to awards generally, though it is

(*e*) Dalling *v.* Matchett, Willes, 215; Morris *v.* Reynolds, 1 Salk. 73.

(*f*) Sykes *v.* Haigh, 4 Dowl. 114.

(*g*) Bailey *v.* Curling, 2 L. M. & P. 161, S. C. 20 L. J. Q. B. 235; Drew *v.* Woolcock, 24 L. J. Q. B. 22.

(*h*) Tidd, Pr. 836, 9th ed.; Mason *v.* Whitehouse, 6 Dowl. 602.

(*i*) Hartley *v.* Barlow, 1 Chitt. 229.

(*k*) Langman *v.* Holmes, 2 W. Bl. 990.

(*l*) Laugher *v.* Laugher, 1 Dowl. 284, S. C. 1 C. & J. 398.

(*m*) Tebbutt *v.* Ambler, 2 Dowl. N. S. 677; Kenyon *v.* Grayson, 2 Smith, 61; Lodge *v.* Porthouse, Lofft. 388.

apprehended that in many cases it would be sufficient; for it is clear that when costs are payable to a party by a rule of court, his attorney may often demand payment by virtue of his character (*n*).

If the award order the defendant to pay the plaintiff or his attorney, naming him, the attorney can make a valid demand without any power of attorney (*o*).

If the attorney have a lien on the amount awarded, and give the party notice of his lien at the time of the demand and before the money has been paid, an attachment will, it seems, issue if payment be refused (*p*).

Party not attending to receive sum awarded.

Though the award direct payment of money at a particular time and place, and the party to whom it is awarded do not attend to receive it, a proper demand any time subsequent will be sufficient for an attachment, as the duty to pay the sum awarded is a continuing liability, unless indeed the award expressly order that it is to be payable on the particular day, and not after (*q*).

Performing condition precedent.

There is no contempt if any condition precedent to the attaching of the duty remain unperformed.

Hence, when a defendant is ordered to execute a conveyance, if the plaintiff be bound to prepare and tender the conveyance, the refusal of the defendant to convey the land is no ground for attachment, unless the proper deeds have been tendered to him for execution (*r*).

Allowing appointed day to pass by.

And if the defendant is, "on or before a certain day," to execute a conveyance to be prepared by the plaintiff, the latter must tender the conveyance for execution on or before the day. If he allow the day to slip by, but demand execution afterwards, no attachment will be granted, and, it seems he will be wholly without remedy (*s*).

Demand only of what is well awarded.

If the arbitrator award on a matter not within his authority, the demand should be only in respect of what is well

(*n*) Inman *v.* Hill, 4 M. & W. 7; Dennett *v.* Pass, 1 Bing. N. C. 638; Fortescue, Ex parte, 2 Dowl. 448; Mason *v.* Whitehouse, 6 Dowl. 602, contrà, S. C. 4 Bing. N. C. 692, acc.; 2 Archb. Pract. 1257, 7th ed.

(*o*) Hare *v.* Fleay, 11 C. B. 472.

(*p*) Ormerod *v.* Tate, 1 East, 462.

(*q*) Craike, In re, 7 Dowl. 603.

(*r*) Standley *v.* Hemmington, 6 Taunt. 561; Doe d. Clarke *v.* Stillwell, 8 A. & E. 645. See Performance, ante, ch. 2 of this part, p. 530.

(*s*) Doe d. Williams *v.* Howell, 5 Exch. 299.

awarded, or it may be held bad as to the whole (*t*). Thus, where an arbitrator, without authority, awarded on the costs of the reference, and the demand was of one sum, including the costs, the rule for an attachment was discharged (*u*). Where there had been a proper demand for costs awarded, but the amount was subsequently reduced pursuant to a judge's order, a fresh demand of the reduced amount was held necessary to ground an attachment (*x*). But if the award be of two distinct sums, one within the submission, and the other not, and a demand be made of both, a clear refusal to pay anything will be a contempt, and an attachment will issue in respect of the sum really due (*y*). Generally speaking, the demand of performance of an act beyond the power of the arbitrator to order will not vitiate the demand as to other matters properly awarded (*z*).

Demand of precise thing awarded.

The precise thing awarded should be demanded. Where, on an award to pay money, and to deliver a wine warrant, for a certain hogshead of wine lying in the docks, a demand of the money and of the hogshead of wine was made, the court let an attachment issue for all excepting the wine, and refused it for that, since a demand of the wine is not equivalent to demanding the wine warrant, for the delivering the wine would impose upon the party the payment of the dock dues, which the delivery of the warrant would not (*a*).

Personal service of copy of award and rule.

II. *Service of the rule, award, and other documents.*]—In general, besides the demand, in order to ground an attachment, there must be personally served on the party sought to be charged, at the time of making the demand, a copy of the award. It used also to be necessary, and still is, in some cases, to serve a copy of the rule of court, founded on the submission (*b*); for a party could not be held to be in contempt until he had been made acquainted with the rule of court, for the disobedience to which it was sought to put him in con-

(*t*) See Whitehead *v.* Firth, 12 East, 166.

(*u*) Strutt *v.* Rogers, 7 Taunt. 214.

(*x*) Spivy *v.* Webster, 1 Dowl. 696.

(*y*) Poyner *v.* Hatton, 7 M. & W. 211; The Earl of Cardigan *v.* Henderson, 22 L. J. Q. B. 83.

(*z*) Smith and Reeves, In re, 5 Dowl. 513.

(*a*) Hemsworth *v.* Brian, 1 C. B. 131.

(*b*) See post as to the practice on rules to pay money pursuant to an award, p. 623.

tempt. Leaving a copy of the rule at the party's office was insufficient, though the original were shown him (*c*). If there be a demand of costs which have been taxed, a copy of the master's allocatur for them must also be given at the same time. And if an agent make the demand, there must be personally left with the party a copy of the power of attorney, or other authority under which the agent acts. The originals of all these several instruments must be produced and shown at the time of serving the copies (*d*), even though the party do not require to see them (*e*); serving a copy of the award one day and showing the original two days afterwards, when the demand was made, was insufficient (*f*).

Of the master's allocatur.

Of the agent's power of attorney.

Showing originals.

Giving notice of enlargement of time.

If the award have not been made within the period limited by the submission, but the time has been enlarged, notice of the enlargement, and that the award has been made within the extended time, must be given, in order to fix the party with a contempt (*g*).

What sufficient notice.

Mere verbal notice is sufficient. Though the submission require that the enlargement be made in writing, it is not necessary to produce the original to the party, or to serve him with a copy. It is enough to bring the knowledge of the enlargement home to the party in any manner (*h*). A recital in the award that the arbitrator has enlarged the time to a certain day does not, it seems, amount to a good notice, although the award purports to be made within the extended period (*i*).

Serving submission not requisite.

Serving the original submission was not necessary, for it was the disobedience to the rule of court that was the foundation of the contempt (*k*).

(*c*) Parker *v.* Burgess, 3 N. & M. 36.

(*d*) Tidd, Pr. 837, 9th ed.; Mayor of Bath *v.* Pinch, 4 Scott, 299; Boyes *v.* Hewetson, 2 Scott, 837; Gifford *v.* Gifford, Forr. 80; Doe d. Hickman *v.* Hickman, 1 Scott, N. R. 398; Bass *v.* Maitland, 8 Moore, 44, contrà; Wadsworth *v.* Marshall, 1 C. & M. 87; Anon. 12 Mod. 257; R. *v.* Tooley, 12 Mod. 312; Chanler *v.* Driver, 12 Mod. 317; King *v.* Packwood, 2 Dowl. 570; Laugher *v.* Laugher, 1 Dowl. 284, S. C. 1 C. & J. 398.

(*e*) Jackson *v.* Clarke, M'Lel. 72, S. C. 13 Price, 208; Reid *v.* Deer, 7 D. & R. 612; R. *v.* Sloman, 1 Dowl. 618.

(*f*) Lloyd *v.* Harris, 8 C. B. 63.

(*g*) Hilton *v.* Hopwood, 1 Marsh. 66; Wohlenberg *v.* Lageman, 6 Taunt. 250.

(*h*) Doddington *v.* Bailward, 7 Dowl. 640.

(*i*) Davis *v.* Vass, 15 East, 96; Doddington *v.* Bailward, 7 Dowl. 640.

(*k*) Greenwood *v.* Dyer, 5 Dowl. 255.

What good service.

Tendering the copies of the proper documents to the party, and leaving them by him, is sufficient service, though he refuse to take them up (*l*).

The originals need not be delivered into the hands of the party when produced to him. If they be shown so that he can read them it is sufficient (*m*).

Personal service necessary.

No attachment can be granted if a personal service and personal demand cannot be effected, even when a party keeps out of the way purposely to avoid service (*n*).

Though on a very strong case a relaxation of the general rule applicable to all attachments may be allowed, where an attachment is the only remedy for a debt, yet in the case of an award, where there is another remedy by action, the rule will be strictly adhered to (*o*), except according to some cases, where there is an equivalent to personal service, such as an acknowledgment by the party that the award and rule have come to his hands, or where they have been seen in his possession (*p*). Thus, where it was proved that one of two unsuccessful parties had served the other with the rule and award in regular form, the court, on an application against them both for non-performance, held personal service unnecessary, since personal knowledge of the award and rule had been brought home to both (*q*).

Unless award, &c., already in party's possession.

Error in copy served.

Care must be taken that the copies served are correct. Where the master's name signed to the allocatur was written Day instead of Dax in the copy served, no attachment was allowed to issue (*r*).

(*l*) Ellis *v.* Giles, 5 Dowl. 255.

(*m*) Calvert *v.* Redfearn, 2 Dowl. 505.

(*n*) Pyne, In re, 1 D. & L. 703; Stunnell *v.* Tower, 1 C. M. & R. 88; Doe d. Steer *v.* Bradley, 1 Dowl. N. S. 259; Winwood *v.* Holt, 3 D. & L. 85; Read *v.* Fore, 1 Chitt. 170.

(*o*) Green *v.* Prosser, 2 Dowl. 99; Anon. 12 Mod. 257; Richmond *v.* Parkinson, 3 Dowl. 703; Whalley, In re, 3 D. & L. 291.

(*p*) Brander *v.* Penleaze, 5 Taunt. 812; Dicas *v.* Warne, 1 Scott, 537; Anon. 1 D. & R. 529.

(*q*) Bower, In re, 1 B. & C. 264.

(*r*) R. *v.* Calvert, 2 C. & M. 189. See Smith and Reeves, In re, 5 Dowl. 513.

SECTION III.

THE COURSE OF THE MOTION FOR AN ATTACHMENT.

PART III. CH. VI. S. 3.

Entitling affidavits on the motion.

1. *Affidavits on the motion for an attachment.*]—All affidavits must be entitled in the High Court of Justice and in the Divisional Court in which they are to be used. When the reference is of a cause by rule of court, judge's order or order of Nisi Prius, the affidavits on which the motion for an attachment is made (*t*), including the affidavit verifying the power of attorney, if any, for the demand of payment (*u*) must be entitled in the cause also.

But when the reference is by agreement out of court, and there is no cause in court, the affidavits needed only to be entitled in the court, though they are often entitled "In the matter" of the parties to the submission, as seems now to be necessary (Order XXXVIII. r. 2 (1883)).

Where cross actions in the Common Pleas and all matters in difference were referred by an agreement out of court, that court granted an attachment on affidavits entitled "In the matter of arbitration between A. and B., A. *v.* B.," not mentioning the cross action B. *v.* A. (*x*).

Affidavits on showing cause.

On some occasions it was held that after the rule nisi for an attachment had been granted, the affidavits on showing cause ought to be entitled "The Queen against [the party sought to be brought into contempt]," on the ground that there was a proceeding in court between the Crown and the individual as soon as the rule nisi has been granted (*y*); but later decisions showed that, whether the reference were in a cause or under the statute, they ought to be entitled in the same manner as the affidavits on which the motion has been grounded should be entitled, for that the Crown was no party until the rule for the attachment had been made absolute (*z*).

(*t*) Whitehead *v.* Firth, 12 East, 166; Wood *v.* Webb, 3 T. R. 253.

(*u*) Doe d. Clarke *v.* Stillwell, 6 Dowl. 305; Bevan *v.* Bevan, 3 T. R. 601; Bainbrigge *v.* Houlton, 5 East, 20; Houghton and Fallowes, In re, 2 M. & P. 452.

(*x*) Pike *v.* Newman, 14 C. B. 425.

(*y*) Bevan *v.* Bevan, 3 T. R. 601; R. *v.* Sheriff of Middlesex, 3 T. R. 133; R. *v.* Jones, 1 Stra. 704.

(*z*) Whitehead *v.* Firth, 12 East, 166; R. *v.* Harrison, 6 T. R. 60; Wood *v.* Webb, 3 T. R. 253; Houghton and Fallowes, In re, 2 M. & P. 452.

The rule nisi for the attachment used to be headed in the manner prescribed for the affidavits on which the motion was made.

Entitling rule nisi.

After the attachment has once been granted, even although it have not issued, every affidavit on a motion to set it aside or in any matter concerning it, must be headed, "The Queen against [the party attached]" (*a*).

Affidavits after attachment granted.

An objection to the want of a title to the affidavits, when it was necessary, could not, it seems, be waived by consent, and the court would not look at them when deficient in this respect (*b*).

The affidavit on which the application is made must verify the award. Formerly, if there were an attesting witness to it, he was obliged, according to the rules then applicable to written instruments generally, to be the party to attest its due execution. The affidavit should state the date of the execution, or at least should show that the award was made within the authorised time (*c*). Credit, however, is sometimes given to the award itself as being made on the day it purports to be made; and it has been said, that when there is nothing to induce suspicion, the affidavit of the execution of the award need not state when it was executed (*d*). Where the award annexed to the affidavit bore a date within the time limited by the submission it was held sufficient (*e*). On one occasion, an objection to the want of a statement that the award of an umpire was made within the proper period, was held to be cured, when it appeared by the jurat of the affidavit to the execution of the award that the affidavit itself was sworn before the expiration of the time limited for making the award (*f*).

Affidavit verifying award.

Whether it must show award made in time.

When the time had been enlarged, the old practice required that the enlargement should be made part of the rule of court with the submission (*g*). If this had not been done, there

Verifying enlargement.

(*a*) R. *v.* Sheriff of Middlesex, 7 T. R. 439; Whitehead *v.* Firth, 12 East, 166.

(*b*) Owen *v.* Hurd, 2 T. R. 643.

(*c*) Wohlenberg *v.* Lageman, 6 Taunt. 251; Trew *v.* Burton, 1 C. & M. 533.

(*d*) Doe d. Clarke *v.* Stillwell, 8 A. & E. 645; Stephenson *v.* Browning, Barnes, 56; Wohlenberg *v.* Lageman, 6 Taunt. 251.

(*e*) Higgins *v.* Street, 25 L. J. Ex. 285.

(*f*) Trew *v.* Burton, 1 C. & M. 533.

(*g*) Welsh, In re, 1 Dowl. N. S.

must at least have been an affidavit stating that it had been so enlarged, and that the award was made within the enlarged time, and that the defendant had notice of the enlargements before the demand made. But it is questionable whether even this would have been sufficient (*h*). A recital of the enlargements in the award does not dispense with the necessity of proof (*i*). But if the enlargements appeared as part of the rule of court, there need not have been any affidavit to prove them, for the rule itself was evidence that they had been sufficiently verified; for credit was given to the court that they would not have made them a rule without a proper affidavit according to the practice (*k*).

Where, however, the submission required that the enlargements should be made by the arbitrator's indorsements and a judge's order, though the submission with the indorsements was made a rule, the court refused to presume that judges' orders were obtained so as to render the enlargements valid; as if there were orders produced that would have appeared on the face of the rule, which would have been drawn up on reading those orders as well as the indorsements (*l*).

Affidavit must show demand and service.

It must be stated in the affidavits that all the steps previously shown to be necessary to bring the party into contempt have been taken. They must, therefore, be careful to show a proper demand of performance, and to allege personal service, at the time of or prior to the demand, of copies of the rule and award; also of a copy of the master's allocatur, when there is one, and the taxed costs are demanded; and where an agent makes the demand under a power of attorney, of a copy of that document. They must also aver that at the time of such service the originals of these several instruments were produced and shown. There must be an

331; Bottomley *v.* Buckley, 4 D. & L. 157; Davis *v.* Vass, 15 East, 96; R. *v.* Hardey, 19 L. J. Q. B. 196. See ante, P. III. ch. 5, s. 1, p. 581.

(*h*) Wohlenberg *v.* Lageman, 6 Taunt. 251; George *v.* Lousley, 8 East, 13; Halden *v.* Glasscock, 5 B. & C. 390.

(*i*) Wohlenberg *v.* Lageman, 6 Taunt. 251; George *v.* Lousley, 8 East, 13; Halden *v.* Glasscock, 5 B. & C. 390; Davis *v.* Vass, 15 East, 96.

(*k*) Dickins *v.* Jarvis, 5 B. & C. 528; Smith and Reeves, In re, 5 Dowl. 513; Barton *v.* Ransom, 6 Dowl. 384; Doe *v.* Amey, 8 M. & W. 565; Peebles *v.* Hay, 8 Jur. 338.

(*l*) Mason *v.* Wallis, 10 B. & C. 107.

affidavit of the due execution of the agent's power of attorney, and till modern times it must have been made by the attesting witness, for there must be the proper legal evidence of the delegation of the authority (*m*).

Non-performance of award.

It should likewise be sworn that the award has not been performed, and if money be awarded, that it has not been paid. If the demand for the sum awarded be made under a power of attorney, the affidavit in which it is sworn that the money is still unpaid may be made by the attorney; there is no necessity, in such case, that the party entitled should himself make the affidavit (*n*).

Performance of condition precedent.

The affidavits must specifically aver the performance of every act necessary as a condition precedent to entitle the party under the award, and readiness and willingness to perform every concurrent act. Hence, where an award directed that either party who paid the whole of a certain sum might recover back a moiety from his opponent, it was held not enough to swear that the latter had had notice of the payment of the whole sum by the party seeking the attachment, and an attachment was refused as to that portion of the money demanded, for want of a positive affidavit that it had in fact been paid (*o*).

Presumption as to payment of costs of award.

Where the award directed A. to pay the arbitrator's costs, and B. to repay him, though the costs were taxed by the master, the Court of Queen's Bench would not attach B. for non-payment of them, it not being sworn by A. that he had paid them (*p*); but it seems that the Court of Common Pleas would presume the payment to have been made on the credit of their allowance by the master (*q*).

Misnomer in the affidavit.

Where a true copy of the award had been served on the defendant, and the original duly shown him, a misnomer of the umpire's name in the affidavit of service was held immaterial (*r*).

Affidavit of award lost.

Though the original award is usually produced and sworn

(*m*) Laugher *v.* Laugher, 1 C. & J. 398, S. C. 1 Dowl. 284.
(*n*) R. *v.* Paget, 9 Dowl. 946.
(*o*) Smith and Reeves, In re, 5 Dowl. 513. See Lindsay *v.* The Direct London and Portsmouth Rail. Co., 19 L. J. Q. B. 417.
(*p*) Butler *v.* Masters, 13 Q. B. 341.
(*q*) Smith *v.* Troup, 7 C. B. 757.
(*r*) Smith and Reeves, In re, 5 Dowl. 513.

to, yet if it be lost, on an affidavit stating that fact, a motion for an attachment may be made on a copy (*s*).

Affirmation of Quaker or Moravian.

The statement verified by the affirmation of a Quaker or Moravian, is as valid a ground of motion as the affidavit of another person (*t*). Even before the recent statutes, where an affirmation was admissible only in civil cases, an attachment for non-performance of an award, though criminal in form being a civil process in substance, might be obtained on the affirmation of a Quaker (*u*).

Motion or summons: Arbitration Act, 1889.

11. *The motion for an attachment.*]—Till modern times, every application for an attachment to enforce an award had to be made in open court. But now it has been held by the Queen's Bench Division (Day, J., dissentiente) that an application for an attachment may be made by a motion in court or by summons to a judge at chambers (*x*); but the summons cannot be heard by a registrar in the Probate Division, nor by a master in the Queen's Bench Division (Order LIV. r. 12 (1883)); nor does Order LIV. r. 12 (a) (1889), enabling a master to exercise all the powers conferred upon the court or a judge by the Arbitration Act, 1889, seem to empower him to grant an attachment.

Chancery Division.

In the Chancery Division, per Cotton, L.J., the motion ought to be made by motion in open court (*y*), but if a summons be taken out, the order, per North, J., must be made by a judge, not by the chief clerk, though the latter, it is said, has power to refuse it or to refer it to the court. The judge in chambers will, if desirable, himself adjourn the application to open court (*z*).

In the case of attachment for awards, it would seem to be advisable that there should be a motion in open court.

No motion on last day of term.

An attachment could not be moved for on the last day of

(*s*) Robinson *v.* Davis, 1 Stra. 526.

(*t*) 9 G. IV. c. 32; 7 & 8 W. IV. c. 34; 1 & 2 Vict. c. 77.

(*u*) Powell *v.* Ward, cited in R. *v.* Bell, Andr. 200; Taylor *v.* Scott, cited in Atcheson *v.* Everitt, Cowp. 394; Gellibrand, In re, 1 D. & R. 121; 2 Tidd, Pract. 838, 9th ed.

(*x*) Salm Kyrburg *v.* Posnanski, 13 Q. B. D. 218.

(*y*) Davis *v.* Galmoye, 39 Ch. D. 322.

(*z*) Davis *v.* Galmoye, 40 Ch. D. 355.

the term, nor could cause be shown against the rule nisi for it on that day (*a*).

An attachment may issue against one alone of several defendants (*b*).

Separate attachments.

If an award directs costs to be paid in equal proportions by three different persons, there must be separate attachments against each (*c*).

On reading, what rule drawn up.

The rule nisi which used to be granted was drawn up on reading the rule embodying the submission, the award, the affidavit of the execution of the award, and the other affidavits stating the facts necessary to bring the party into contempt. Though a rule to set aside an award would have been drawn up on reading a verified copy of the award, or an affidavit verifying the award (*d*), according to the practice in the Queen's Bench, it was necessary, when the intention was to enforce the award, to draw up the rule nisi on the original award.

Drawing up rule on unstamped award.

When the award is handed in to the officer of the court to draw up the rule for the attachment, it is competent for him to object to the want of a stamp on the award, and the court will sanction his refusal to draw up the rule (*e*).

Rule nisi only formerly.

The rule for the attachment used not to be absolute in the first instance, only a rule to show cause (*f*). Though, according to the practice of the courts, when a rule of court directed the payment of costs and nothing else, and they were not paid, a rule absolute for an attachment would be granted in the first instance, yet when under an award nothing but costs were claimed, the court would still only grant a rule nisi (*g*).

Personal service of rule nisi.

The rule nisi for an attachment had in general to be served personally. On one occasion the court refused to engraft on the rule nisi, that service of the rule at the dwelling-house should be deemed good service, upon an affidavit that the

(*a*) Watkins *v.* Phillpots, M'Lel. & Y. 393; Anon. 3 Smith, 118; Kerr *v.* Jeston, 1 Dowl. N. S. 340.

(*b*) Richmond *v.* Parkinson, 3 Dowl. 703.

(*c*) Gulliver *v.* Summerfield, 5 Dowl. 401.

(*d*) See P. III. ch. 9, s. 5, d. 1.

(*e*) Hill *v.* Slocombe, 9 Dowl. 339.

(*f*) Gifford *v.* Gifford, Forr. 80; Rex *v.* ——, 2 Chitt. 57; Chanler *v.* Driver, 12 Mod. 317. See Darbyshire *v.* Cannon, 1 Mod. 21.

(*g*) Daniell *v.* Beadle, 1 M. & G. 960, S. C. Daniels *v.* Wealds, Dowl. 44. Semble, misreported.

defendants were shy and difficult to be met with, and that the deponent had to try for two months before he could serve the defendants with the award (*h*). However, on a very strong case being made out that the party kept out of the way to avoid being served, the court would sometimes dispense with personal service (*i*).

Order XLIV. r. 2, 1883, R. S. C., provides that "no writ of attachment shall be issued without the leave of the court or judge, to be applied for on notice to the party against whom the attachment is to be issued."

Motion on notice.

And by R. S. C. Order LII. r. 2 (1883), no motion or application for a rule nisi, or order to show cause, shall hereafter be made to enforce an award or for attachment. And by Order LII. r. 4 (1883), every notice of motion to enforce an award, or for attachment, shall state in general terms the grounds of the application; and, where any such motion is

Affidavits.

founded on evidence by affidavit, a copy of any affidavit intended to be used shall be served with the notice of motion. If not so served it is irregular, and the court may refuse the attachment, or, if it has been granted, may set it aside. But the court if it pleases may condone the irregularity (*k*).

A notice of motion must be given in every case (*l*).

Service of notice of motion under Judicature Acts.

Under the Rules of Court, Order XLIV. r. 2, notice of motion for an attachment for disobeying an order of the Chancery Division for payment of money need not be served personally; it is sufficient if it is served on the solicitor (*m*).

Waiving want of service.

If the party appeared to the rule nisi for an attachment, he waived the necessity of personal service of that rule, even if, when he appeared to show cause, he took the objection that there had been no personal service of that rule (*n*). So, also, if he consented to its enlargement, he could not afterwards rely on the want of such service (*o*), since the service of the

(*h*) Garland *v.* Goulden, 2 Y. & J. 89.

(*i*) Barwick, In re, 3 Dowl. 703; Fennell, In re, 3 Dowl. 703, note.

(*k*) Petty *v.* Daniel, 34 Ch. D. 172; Hampden *v.* Wallis, 26 Ch. D. 746; Wyggeston Hospital, In re, 33 W. R. 551.

(*l*) Eynde *v.* Gould, 51 L. J. Q. B. D. 425. See Jupp *v.* Cooper, 5 C. P. D. 26, where there was an order nisi; Baigent *v.* Baigent, 1 P. D. 421.

(*m*) Browning *v.* Sabine, 5 Ch. D. 511; Richards *v.* Kitchen, 25 W. R. 602; Morris *v.* Fowler, 59 L. T. 407; Joy *v.* Hadley, 22 Ch. D. 571.

(*n*) Levi *v.* Duncombe, 1 C. M. & R. 737.

(*o*) Cartwright *v.* Blackworth, 1 Dowl. 489.

rule nisi was merely to bring the party into court to explain his disobedience for the contempt already incurred in disobeying the rule embodying the submission.

III. *What may be shown for cause against the motion.*]—Any deficiency or irregularity in the demand, or any want of proper personal service of the rule, or award, or other necessary documents, as directed in a previous section, may be shown to the court as a ground of resisting the motion (*p*).

Showing as cause irregularity in demand or service.

Any material defect in the affidavits on which the motion is made may also be relied on.

Defect in the affidavits.

In some cases reliance may be made on the framing of the award, which, as we have before seen, may be such as not to warrant an attachment, though a good ground of action, or for a rule to pay; as where there is no direction in the award to pay the amount found due (*q*).

No contempt on face of award.

Objections to the validity of the award apparent on its face may be taken advantage of in answer to the motion for an attachment (*r*), even although the time limited for moving to set aside the award has expired, for the party sought to be charged would be without remedy if the attachment were granted notwithstanding the illegality of the award; whereas, if the other party were left to his remedy by action on the award, it would be competent to the defendant to take advantage of the defects apparent on its face (*s*).

Defects on face of the award.

The court, it is laid down in many cases, will not allow any extrinsic objections to be alleged (*t*). The partiality or misconduct of the arbitrator (*u*), his omission to decide on some of the matters referred, though good grounds for a motion to set aside the award, could not be alleged in bar of an attachment. Reference cannot even be made to the pleadings in the cause referred, even though brought before

Not misconduct of arbitrator or matter omitted.

(*p*) Ante, p. 595.

(*q*) Seaward *v.* Howey, 7 Dowl. 318; ante, p. 592.

(*r*) Randall *v.* Randall, 7 East, 80.

(*s*) Pedley *v.* Goddard, 7 T. R. 73; Macarthur *v.* Campbell, 2 A. & E. 52; Dubois *v.* Medlycott, Barnes, 55; Stephenson *v.* Browning, Barnes, 56; Lucas *v.* Wilson, 2 Burr. 701; Holland *v.* Brooks, 6 T. R. 161.

(*t*) Butler *v.* Masters, 13 Q. B. 341; Macarthur *v.* Campbell, 2 A. & E. 52; Paull *v.* Paull, 2 C. & M. 235.

(*u*) Brazier *v.* Bryant, 10 Moore, 587; Anon. Andr. 299; Manley *v.* Bray, 11 Jur. 521.

the court by an affidavit identifying them, so as to show the award defective on its face (*x*).

Award made after time expired or submission revoked.

On one occasion the courts refused to allow a party to prove that the award was made beyond the limited period, or that the submission had been revoked (*y*); in two subsequent instances, however, proof that the award was a nullity by reason of a revocation of the arbitrator's authority was held admissible and conclusive against the right to an attachment (*z*).

The refusal of the courts in other instances to set aside awards merely because the arbitrator's authority had been revoked, proceeding on the ground that the award is a nullity and cannot be enforced, and that therefore the interference of the court is unnecessary, shows clearly their opinion, that the revocation would be a good answer to an application for an attachment, for where the party has any means of putting a bad award into execution, they show no hesitation in setting it aside (*a*).

Appointment of umpire by arbitrators separately.

The above-mentioned cases were commented on and affirmed in principle in a later case where the court allowed a defendant, sought to be attached for not obeying the award of an umpire, to show for cause, that the appointment of the umpire had been signed by the arbitrators apart from each other, and that consequently the award was probably a nullity (*b*).

Validity of award only doubtful.

Defects apparent on the face of the award, though not sufficiently clear to induce the courts to set it aside, may often be urged successfully in answer to a motion for an attachment for non-performance, since, if the award be of doubtful validity, the court will neither set it aside nor grant an attachment (*c*).

Party not liable to attachment.

If the party sought to be attached fall under the class of

(*x*) Davies *v.* Pratt, 25 L. J. C. P. 71, S. C. 16 C. B. 586; Rowe *v.* Sawyer, 7 Dowl. 691. See Wright *v.* Graham, 3 Ex. 131.

(*y*) Holland *v.* Brooks, 6 T. R. 161.

(*z*) Milne *v.* Gratrix, 7 East, 601; King *v.* Joseph, 5 Taunt. 452. See Kerr *v.* Jeston, 1 Dowl. N. S. 340.

(*a*) Doe d. Turnbull *v.* Brown, 5 B. & C. 384; Hobbs *v.* Ferrars, 8 Dowl. 779; Worrall *v.* Deane, 2 Dowl. 263.

(*b*) Lord *v.* Lord, 26 L. J. Q. B. 34, S. C. 5 E. & B. 404.

(*c*) Hutchins *v.* Hutchins, Andr. 297. See Wrightson *v.* Bywater, 3 M. & W. 199; Lord *v.* Lord, 26 L. J. Q. B. 34, S. C. 5 E. & B. 404.

persons above enumerated, against whom an attachment cannot be issued, he may prove the fact by affidavits, and the rule will be dismissed (*d*).

Award performed as far as possible.

He may prove, in answer to the application, that he has fully performed all the directions in the award (*e*), or at least all that are in their nature possible (*f*), or all that can be complied with without subjecting himself to an action for interfering with the rights of others existing previous to the submission (*g*).

If, however, the inability to perform the award, or the liability to an action for non-performance, accrue from the party's own conduct subsequent to the submission, such inability or liability will be no excuse: as, for instance, if pending the reference he sell the property in dispute, and thus cannot deliver it up pursuant to the award (*h*). A party ordered to deliver up certain goods cannot discharge himself from an attachment by showing that, subsequent to the submission, but before the award, he had become a bankrupt, but had not obtained his certificate, and that the property directed to be given up had been taken possession of by the messenger of the Court of Bankruptcy (*i*). In one instance, however, it is said that where the defendant was a bankrupt and incapable of paying the sum awarded, the court refused to grant an attachment against him for non-payment of it (*j*).

When bankruptcy an answer.

Unless the certificate bar the claim under the award, bankruptcy is in no case a defence. But where the party ordered by the award to pay a sum of money or costs is discharged by his certificate from liability, no attachment can issue (*k*).

The following case, inserted here as connected with the effect of bankruptcy, must not be relied upon as law without reference to later decisions on the subject. A defendant against whom in an action for damages for a tort a verdict was

(*d*) See ante, p. 590.

(*e*) See P. III. ch. 2, s. 1, p. 530; Russell *v.* Yorke, 4 Scott, 422.

(*f*) Hanson *v.* Boothman, 13 East, 21.

(*g*) Doddington *v.* Bailward, 7 Dowl. 640; Smith and Reeves, In re, 5 Dowl. 513. See, however, Butler *v.* Masters, 13 Q. B. 341.

(*h*) Tyler *v.* Campbell, 5 Bing. N. C. 192.

(*i*) Hemsworth *v.* Brian, 1 C. B. 131.

(*j*) Anon. K. B., 1 Cromp. 3rd ed. 265, cited 2 Tidd. Pract. 835, 9th ed.

(*k*) Baker's case, 2 Stra. 1152; R. *v.* Davis, 9 East, 318. See P. III. ch. 1, d. 7, p. 526, effect of award on bankrupt.

taken subject to a reference, became bankrupt before the award was made. The plaintiff, pursuant to the award in his favour, entered up judgment for the amount of the damages and costs as of a term preceding the bankruptcy. The court held that the plaintiff's claim both for damages and costs was barred by the certificate on the ground that they might have been proved under the commission (*l*).

Where the arbitrator ordered the plaintiff to pay the defendant a certain sum and the costs of the reference (the event of the award entitling the defendant to the costs of the cause), and the plaintiff became bankrupt between the date of the reference and the making the award, and the costs were afterwards taxed, and judgment of nonsuit signed, it was held that the claim to the costs was not barred by the certificate, but might be enforced by the attachment (*m*).

Inability to pay no answer.

Mere inability from want of means to pay a sum awarded cannot be urged in excuse (*n*).

Matter not brought forward no defence.

A cross demand, which might have been brought before the arbitrator as one of the matters in difference, but which was not so brought, cannot be set up as a defence or used to reduce the amount awarded (*o*).

Set-off by matter subsequent.

If, after an award directing payment of money to the plaintiff, matter arises which gives the defendant a counter-claim by way of set-off for an equal amount, the court will not grant an attachment to the plaintiff to enforce payment to him of the amount awarded (*p*).

Foreign attachment no answer.

It was held no answer to an attachment for not paying a sum of money awarded that the money awarded had been attached in the hands of the party ordered to pay by process of foreign attachment out of the Mayor's Court of the City of London, at the suit of a creditor of the successful party. Even where it had been paid over to the creditor under such foreign attachment, it was decided that payment must nevertheless be made to the party entitled under the award (*q*), on

(*l*) Beeston *v.* White, 7 Price, 209. See, however, Ex parte Charles, 14 East, 197.

(*m*) Haswell *v.* Thorogood, 7 B. & C. 705; Jacobs *v.* Phillips, 1 C. M. & R. 195.

(*n*) Bac. Ab. Arb. E. 4.

(*o*) Smith *v.* Johnson, 15 East, 213.

(*p*) Lambe *v.* Jones, 9 C. B. N. S. 478; Rees *v.* Rees, 25 L. J. Q. B. 352; Swayne *v.* White, 31 L. J. Q. B. 260.

(*q*) Coppell *v.* Smith, 4 T. R. 312; Grant *v.* Hawding, 4 T. R. 313, note.

the ground that the award of the arbitrator, which was made under an order of Nisi Prius, was as much to be obeyed as the judgment of the court, which could not be defeated by any intermediate step of that kind, and that payment in pursuance of the award under the attachment for contempt would be an answer to any proceedings in the Mayor's Court (*r*).

Cases on rules to pay money awarded applicable.

These cases proceeded on the principle that an attachment by the custom of London did not extend to affect sums while being dealt with by the superior courts. When the arbitration was not in court, payment under the foreign attachment was a good answer to an action of debt on the award (*s*).

The cases in the following chapter should be referred to on this head, for whatever is an answer to an application for a rule to pay money awarded would also bar an attachment (*t*).

Cross motion.

IV. *Granting or refusing the motion.*]—Cross motions for an attachment, and for setting aside the award, are often heard together (*u*).

Moulding the rule.

The rule would sometimes be moulded to suit the facts. Thus, when the applicant failed as to one sum for not showing the fulfilment of a condition precedent to his right to demand it, the court allowed the attachment to issue in respect of other sums not open to the same objection (*x*).

Rule when discharged with costs.

If the rule was discharged on a preliminary point, as on a technical objection to the affidavits, it would, it seems, be discharged without costs, but the party taking the objection would be allowed, without waiving his advantage, to go into the merits, so as, if successful on them, to have the rule discharged with costs (*y*).

Making rule absolute, no cause shown.

If the party did not appear to show cause against the rule nisi, the rule might have been made absolute on an affidavit of personal service of the rule nisi (*z*).

(*r*) Caila *v.* Elgood, 2 D. & R. 193.

(*s*) Ingram *v.* Bernard, 1 Lord Raym. 636; Dresser *v.* Johns, 28 L. J. C. P. 281.

(*t*) See P. III. ch. 7, s. 2, d. 1.

(*u*) R. *v.* Bingham, 2 Tyrw. 46, note, p. 47; 2 Tidd. Pr. 845, 9th ed.; Lodge *v.* Porthouse, Lofft. 388. See Creswick *v.* Harrison, 20 L. J. C. P. 56.

(*x*) The Earl of Cardigan *v.* Henderson, 22 L. J. Q. B. 83.

(*y*) Chamberlain, In re, 8 Dowl. 686.

(*z*) Houghton and Fallowes, In re, 2 M. & P. 452.

Making rule absolute, on terms.

When there was any fair ground for giving indulgence to a party in contempt, though it be not sufficient to induce the court to refuse or set aside the attachment, the court would often direct it to be stayed for a certain period in the office, or would impose such terms as seem equitable (*a*).

Drawing up rule, producing original award.

In order to the drawing up the rule absolute, the original award must have been produced and deposited with the master. A copy was insufficient. The award was not to be filed in court, but was to be returned after the rule had been complied with. If a party had a lien on the award, but was willing to allow the award to be enforced, provided he did not lose his lien, the master would receive the award from him and return it to him (*b*).

The attachment.

v. *Proceedings on the attachment.*]—When the rule for an attachment is made absolute, the rule must be drawn up by the master, after which the solicitor must make out the attachment on parchment, and get it signed at the master's office, and sealed according to the practice of the court.

Costs are in the discretion of the court, and should be asked for when the writ is applied for (*c*).

Arresting the party.

The attachment is to be taken to the sheriff's office, and a warrant obtained on it. On this warrant the sheriff's officer will arrest the party (*d*). At one time, when it was considered that all attachments were criminal process, it was held that the arrest might be made on a Sunday; but that is not law now, since it has long been settled that an attachment for non-performance of an award is only in the nature of a civil execution (*e*).

Attachment on award civil process.

Setting aside attachment.

If an attachment have been irregularly obtained, it will be set aside; but when an attachment has been granted on the usual affidavit of service, the court will not set it aside on the mere affidavit of the party that he has never been served, un-

(*a*) Caila *v.* Elgood, 2 D. & R. 193; Smith and Reeves, In re, 5 Dowl. 513; Tyler *v.* Campbell, 5 Bing. N. C. 192; Palmer's case, 12 Mod. 234. See P. III. ch. 6, s. 1, d. 5, p. 594.

(*b*) Davis *v.* Potter, 21 L. J. Q. B. 134.

(*c*) Dallas *v.* Glyn, 46 L. J. N. S. Chanc. 51; Abud *v.* Riches, 2 Ch. D. 528.

(*d*) 2 Arch. Pract. 952, 14th ed. See also the Crown Office Rules, 1886, rr. 261—276, affecting the practice on the Crown side of the Court of Queen's Bench.

(*e*) R. *v.* Myers, 1 T. R. 265.

less he can show some mistake in the service, as that another person has been served for him; since, as process is usually served without a witness, it would lead to great inconvenience if a different rule should prevail (*f*).

Practice on the attachment.

By Order XLIV. r. 1, 1883, R. S. C., "A writ of attachment shall have the same effect as a writ of attachment issued out of the Chancery Division has heretofore had." Though the common law practice may, therefore, be varied, the cases on the old practice may still be useful.

Tendering amount to sheriff's officer.

Where a party was arrested under an attachment for contempt of court in not paying money, he was not entitled to be discharged on tendering the amount to the officer (*g*).

Party not always imprisoned until performance.

As an attachment for non-performance of an award is in the nature of a civil execution, it is laid down in an old edition of a book of practice that interrogatories are never filed, but that the party is detained in custody, until he pay the money ordered, or otherwise perform the award (*h*).

When the contempt was only non-payment of money awarded, probably the doctrine above laid down might have been good. But it certainly did not hold as a general rule in all cases, or in all the courts.

Examined on interrogatories.

In some cases in the Queen's Bench, the usual course pursued in the case of attachments of a criminal character was adopted, and interrogatories were filed, and the master of the Crown Office had to report whether the party was in contempt or not.

Reported in contempt, fine imposed.

His report that the party was guilty of a contempt was conclusive, and, though affidavits in mitigation were admissible, none would be received in denial of the contempt. The court then sometimes imposed a fine, and committed the party until it were paid (*i*).

Reported not in contempt, discharged.

If the master reported that no contempt had been committed, the party was discharged. An award ordered the defendant to sign a written authority to certain auctioneers to sell an estate in which he was interested. On his refusal, an attachment issued against him out of the King's Bench, and he put in bail to answer to interrogatories before the master. In answer to the interrogatories, the defendant set

(*f*) Hopley *v.* Granger, 1 B. & P. N. R. 256.

(*g*) Pitt *v.* Coombs, 3 N. & M. 212.

(*h*) 2 Archb. Pract. p. 1273, 7th ed.; see also p. 1394, 13th ed.

(*i*) Coulson *v.* Graham, 2 Chitt. 57.

out a clause in the award, on which he contended that he was not bound to execute the authority to sell until it appeared that certain parties could make a good title to the estate, which had not been done. Upon this the master reported him not to be in contempt, and the attachment was discharged (*k*).

Discharged on bail to appear and be examined.

When a party in custody for not performing an award, directing her to convey an estate, had ruled the prosecutor to file interrogatories, and they had been filed, but she had not been ruled to appear before the examiner according to the usual practice in attachments, the court discharged her on bail, to appear before the examiner when the prosecutor chose to call her, although the objection was taken that she was in custody on what was treated as a civil process, and that the court had no power to interfere (*l*).

Practice in Common Pleas.

In the Common Pleas an attachment was granted against a party then bankrupt, who, by an award made before the fiat, was ordered to pay a sum of money, and to deliver some wine warrants, and wine in bottles, to his opponent, but had not done so. Wilde, C.J., in passing sentence, said, "The non-performance of the award is not a single act of contempt which will be purged by a definite period of imprisonment; but the prisoner may, at the expiration of the term for which the court upon this occasion sentences him, if the award shall then remain unperformed, be again brought up to answer for his continuing contempt. Nor will he thereby, as I conceive, be relieved from an action on the award. It is evident from the statements contained in the several affidavits, that the prisoner can, if he pleases, perform the award, and his not doing so is a wilful and pertinacious contempt of the authority of the court" (*m*).

Continuing disobedience not purged by imprisonment for a term.

Discharging bankrupt.

Where, after being taken into custody on an attachment for not performing an award to pay a sum of money, the prisoner became bankrupt, and obtained his certificate, it was decided in an old case that he was entitled to be discharged out of custody (*n*).

A bankrupt defendant, who, after obtaining his certificate,

(*k*) Wood *v.* Griffith, 1 Wils. C. C. 34, S. C. 1 Swanst. 43.

(*l*) Doe d. Clarke *v.* Stillwell, 2 Dowl. N. S. 18.

(*m*) R. *v.* Hemsworth, 3 C. B. 745.

(*n*) Baker's case, 2 Stra. 1152.

was arrested on an attachment for not performing an award, applied for his discharge under the following circumstances. The award, made on the 30th of April, ascertained the amount of a partnership account, the subject of a suit in Chancery, due from the defendant, and ordered him to pay it to the plaintiff on the 30th of May. On the 14th of May the defendant became a bankrupt. It was held that the ascertained debt was provable under the commission, but not the costs in Chancery, which had not been taxed before the bankruptcy, and that the certificate was no discharge as to the costs, to which the plaintiff had only an inchoate right before taxation. The court ultimately directed that on payment of the costs of the Chancery suit the defendant should be discharged from the attachment (*o*).

Discharging insolvent.

By the 33 G. III. c. 5, s. 4, a party in custody on an attachment for non-payment of money or costs, pursuant to an award, was put upon the same footing as a common debtor, and as such was entitled to the benefit and subjected to the provisions of the Lords' Act (32 G. II. c. 28) (*p*), now repealed.

Costs of attachment.

If the defendant is to be discharged from an attachment on certain terms, and on paying the costs of the attachment, the costs of an inquiry before the master, rendered necessary by the defendant's conduct, in order to enable him to obtain his discharge, will be considered as costs of the attachment (*q*).

(*o*) R. *v.* Davis, 9 East, 317.
(*p*) R. *v.* Curwen, 1 Moore, 494.
(*q*) Tyler *v.* Campbell, 5 Bing. N. C. 193.

CHAPTER VII.

ENFORCING THE AWARD BY PROCEEDINGS UNDER THE STATUTES.

PART III. CH. VII.

Contents of the seventh chapter.

How advantage may be taken, in the case of awards within the cognisance of the courts of law, of the provisions of the statute 1 & 2 Vict. c. 110, which gives to rules of court for the payment of money the effect of judgments, and of the Arbitration Act, 1889, which render awards by leave of the court or a judge enforceable as judgments, is considered in the first section of this chapter.

The second section investigates the practice of obtaining such rules to enforce payment of a sum awarded.

SECTION I.

RULE TO PAY THE AMOUNT AWARDED.

PART III. CH. VII. S. 1.

No summary process to levy sum awarded before statute of Victoria.

In old times, when there was no cause in court, though the submission were made a rule of court, there was no summary method of enforcing payment of a sum of money awarded by levying it out of the debtor's property. It is true the amount might have been recovered by action on the award, and then execution might have issued against his goods and lands, but the process was slow and expensive: the penal process by attachment was also open, but if the party were out of the jurisdiction of the courts, he could not be attached, or if, after being arrested, he chose to lie in prison, in neither case, however ample the property, could satisfaction of the debt be obtained. Now, however, the statute 1 & 2 Vict. c. 110, s. 18, which gives to a rule of court for the payment of money the effect of a judgment,

affords a simple and summary method of obtaining execution as on a judgment for the amount awarded, whenever the submission can be made a rule of court.

Statute 1 & 2 Vict. c. 110, s. 18.

That section provides, "That all decrees and orders of courts of equity, and all rules of courts of common law, and all orders of the Lord Chancellor and of the Court of Review in matters of bankruptcy, and all orders of the Lord Chancellor in matters of lunacy, whereby any sum of money, or any costs, charges, or expenses, shall be payable to any person, shall have the effect of judgments in the superior courts of common law, and the persons to whom any such moneys or costs, charges, or expenses, shall be payable, shall be deemed judgment creditors within the meaning of this act; and all powers hereby given to the judges of the superior courts of common law, with respect to matters depending in the same courts, shall and may be exercised by courts of equity with respect to matters therein depending, and by the Lord Chancellor and the Court of Review in matters of bankruptcy, and by the Lord Chancellor in matters of lunacy; and all remedies hereby given to judgment creditors are in like manner given to persons to whom any moneys or costs, charges, or expenses, are by such orders or rules respectively directed to be paid."

How to proceed under the act.

In one of the first cases after the passing of the act, in which its provisions were attempted to be taken advantage of to enforce an award, the party, after an award in his favour, without applying to the court, made the submission a rule of court, taxed his costs, and issued a fieri facias for the amount awarded and the costs. But the court set the execution aside as not warranted by the statute, on the ground that the rule embodying the submission could not be considered a rule *by which money was payable* (*a*).

Proper course to move for rule to pay sum awarded.

And Lord Denman, C.J., in giving judgment, said, "There is no difficulty in giving effect to the act of parliament as to awards, if a proper case is made out: and that is by calling on the delinquent party to show cause why he should not pay a certain sum of money pursuant to the award. If that rule be made absolute, an execution may

(*a*) Jones *v.* Williams, 11 A. & E. 175.

issue for the sum distinctly specified in the rule so to be obtained" (*b*).

The principles thus laid down have been sanctioned by all the courts (*c*); and it has grown to be the settled practice when it is wished to obtain the benefit of the statute, to apply to the court for a rule calling upon the party against whom the award is made, to show cause why he should not pay the amount awarded.

Rule granted by common law power of the courts.

The *power* to grant such a rule is not given by the statute of Victoria. The rule is granted by virtue of the inherent authority of the courts existing previous to the statute, and only not exercised previously because before the act such a rule was useless; for the rule founded on the submission in effect ordering the party to obey the award was sufficient for an attachment, and as a rule directing a party to pay the money awarded could have been enforced by no other penalty, the application for such a rule could have only delayed by one superfluous step the obtaining the process of attachment, to which the party was entitled without it. Now, however, since this statute makes a distinction between rules for obeying an award, and rules for the payment of money, giving the effect of judgments to the latter only, it is highly beneficial that the courts should thus exercise their general jurisdiction in making such rules (*d*).

Statute gives it effect of a judgment.

Discretionary to grant rule.

It has been argued at times that the rule in question is due to the subject ex debito justitiæ (*e*); but the whole class of cases on the point shows that it is as discretionary with the court to grant such a rule, as it is to grant an attachment, and that in the exercise of their discretion, the courts will be guided by much the same principles as influence them in allowing or refusing the penal process of contempt (*f*). But the courts will grant a rule to pay, though not an attachment,

Award containing no direction to pay.

(*b*) Jones *v.* Williams, 11 A. & E. 175. See Rickards *v.* Patterson, 8 M. & W. 313; Jones *v.* Williams, 8 M. & W. 349.

(*c*) Wilson *v.* Foster, 6 M. & G. 149; Doe *v.* Amey, 8 M. & W. 565.

(*d*) Doe *v.* Amey, 8 M. & W. 565; Neale *v.* Postlethwaite, 1 Q. B. 243; Lloyd *v.* Harris, 8 C. B. 63; Harrison *v.* Creswick, 10 C. B. 441; Hare *v.* Fleay, 11 C. B. 472.

(*e*) Spence *v.* Clarkson, 1 Dowl. N. S. 837; Rule *v.* Bryde, 1 Ex. R. 151.

(*f*) Creswick *v.* Harrison, 20 L. J. C. P. 56; Laing *v.* Todd, 13 C. B. 276.

where the award contains no order to pay the amount which it finds due (*g*).

Party charged with perjury.

The court will not refuse this rule merely because the successful party has, since the award, been sent to take his trial on a charge of perjury alleged to have been committed by him before the arbitrator, no application having been made to set aside the award on the ground of the alleged perjury (*h*).

Rule refused when right doubtful.

The rule will be refused when the right is doubtful, as when an attorney who claims a lien on the amount awarded seeks in this way to enforce it (*i*); or where the validity of the award seems questionable; for example, where the arbitrator has awarded joint damages to the plaintiff and a stranger to the action made a party to the reference, instead of separate damages to each (*k*); since the same reason applied here, as was of force with respect to attachments, that in each case, if the rule were granted, the judgment was before the Judicature Acts final; whereas the parties ought to have an opportunity of raising their objections to the award for deliberate decision (*l*).

When the plaintiff was ordered to repay to defendant any sum he might be made to pay on a bill of exchange, the court refused a rule to compel the plaintiff to pay the amount which the defendant swore he had been obliged to pay on the bill (*m*).

When party pursues other remedy.

If the party be proceeding to obtain the benefit of the award by any other legal proceeding at the time of applying for the rule, it will be refused, as an attachment would have been, had he moved for one; but where the party had merely filed an affidavit of debt with a view of making the defendant a bankrupt, and the latter had entered into a bond conditioned to pay what might be found due in an action, the court, as no action had been commenced, granted the

(*g*) Baker *v.* Cotterill, 7 D. & L. 20, S. C. 18 L. J. Q. B. N. S. 345; Bowen *v.* Bowen, 31 L. J. Q. B. N. S. 193.

(*h*) Woollen *v.* Bradford, 33 L. J. Q. B. 129.

(*i*) Holcroft *v.* Manby, 2 D. & L. 319. See P. III. ch. 1, d. 8, p. 527.

(*k*) Hawkins *v.* Benton, 2 D. & L. 465.

(*l*) Dickenson *v.* Allsop, 2 D. & L. 657, S. C. 13 M. & W. 722; Spooner *v.* Payne, 11 Jur. 242.

(*m*) Graham *v.* Darcey, 6 C. B. 537.

rule, on the party undertaking not to bring an action on the award (*n*).

Attorney cannot have rule to enforce his lien for costs.

The attorney of a successful party who claims a lien on the sum awarded, cannot have a rule in his own name under the statute, to make the other side pay him the amount awarded, except perhaps in the case of collusion between the parties to defraud him of his lien for costs (*o*). He should proceed in his client's name (*p*).

Award under Lands Clauses Acts.

When an arbitrator has awarded compensation on a reference under the Lands Clauses Consolidation Act, 1845, the claimant cannot enforce payment by means of a rule to pay, if it appear on the face of the award or by affidavit that there is a substantial question as to the claimant's right to recover, but the party will be put to his action for the amount (*q*).

Public Health Act.

The same course will be followed on a reference under the Public Health Act, 1875 (*r*). With regard to costs also, if the arbitrator has by a separate subsequent instrument settled the amount of the party's costs, the latter cannot in any case, it seems, have a rule calling on the promoters to pay them, but his remedy is by action (*s*).

Under late Common Law Procedure Act.

It was doubtful whether an award on a compulsory reference under section 3 of the Common Law Procedure Act, 1854, could be enforced by a rule to pay (*t*).

Under Arbitration Act, 1889.

Now by the Arbitration Act, 1889, s. 12, "An award on a submission may, by leave of the court or a judge, be enforced in the same manner as a judgment or order to the same effect." And by section 16 the court or judge are to have, as to references under order of court, all the powers as are by the act conferred as to references out of court.

The award may be enforced by leave, though the term for setting aside has not elapsed (*u*).

(*n*) Mendell *v.* Tyrrell, 9 M. & W. 217, S. C. 1 Dowl. N. S. 453.

(*o*) Dunn *v.* West, 10 C. B. 420; Lloyd *v.* Mansell, 22 L. J. Q. B. 110; Holcroft *v.* Manby, 7 M. & G. 843.

(*p*) Breary *v.* Kemp, 24 L. J. Q. B. 310.

(*q*) Newbold *v.* The Metropolitan Rail. Co., 14 C. B. N. S. 405.

(*r*) Walker *v.* Beckenham L. B., 48 J. P. 264.

(*s*) London and N. W. Rail. Co. *v.* Quick, 5 D. & L. 685; Gould *v.* Staffordshire Potteries Waterworks Co., 5 Ex. 214, S. C. 19 L. J. Ex. 281.

(*t*) Talbot *v.* Fisher, 2 C. B. N. S. 471; Kendil *v.* Merrett, 18 C. B. 173, S. C. 25 L. J. C. P. 251.

(*u*) Order XLII. r. 31 (a), Dec. 1889.

SECTION II.

PRACTICE AS TO OBTAINING THE RULE.

What demand and service sufficient.

1. *Practice under the statute of Victoria.*]—In applications for the rule to pay the money awarded, the same formalities in the demand of the sum found due, and in the service of the rule embodying the submission, and of the award and allocatur, and other instruments, as are requisite in the case of an attachment (*v*), are generally necessary; but under special circumstances, a less strict mode of proceeding will be permitted (*x*). Where the allocatur was lost, but a document purporting to be a copy served, and the party was told it was a true copy, Crompton, J., in the Bail Court, held it insufficient, and refused to grant a rule nisi to pay the taxed costs. He suggested that if the affidavit had been made that the allocatur had been lost, and that the copy served was a true copy, and a copy of that affidavit had been served on the party, possibly a rule might have been granted (*y*). Service of a copy of the award one day, and showing the original two days afterwards, is insufficient (*z*).

Lost allocatur.

Demand by attorney.

An award made on an order of reference of a cause directed the defendant to "pay to the plaintiff, or to S. his attorney," a certain sum at the office of the attorney on a specified day and hour. A demand by S. the attorney to pay him was held quite sufficient, though he was not authorised by any power of attorney (*a*).

On one occasion, however, Wightman, J., said, "I think enough is done in obtaining this rule without going through the forms necessary in cases of attachments." What kind of service or notice had been attempted in the particular case does not appear in the report (*b*). In another instance, where

Whether per-

(*v*) See as to practice on attachments, ante, p. 595.

(*x*) Hawkins *v.* Benton, 2 D. & L. 465; Rickards *v.* Patterson, 8 M. & W. 313; Pearson *v.* Archbold, 2 Dowl. N. S. 769; Tattersall *v.* Parkinson, 17 L. J. Ex. 208, S. C. 2 Ex. 342.

(*y*) Bliss *v.* Falkner, B. C., Jan. 30, 1865.

(*z*) Lloyd *v.* Harris, 8 C. B. 63.

(*a*) Hare *v.* Fleay, 11 C. B. 472.

(*b*) Doe d. Moody *v.* Squire, 2 Dowl. N. S. 327.

Personal service necessary.

the defendant, in answer to a letter stating the effect of the award, and demanding the amount, and telling him that the submission had been made a rule of court with a view to issuing execution, wrote that he would send a friend to settle the business; and when afterwards his agent had applied for a copy of the award, and copies of the award and rule, and of the master's allocatur, had been left with his clerk, Patteson, J., granted a rule, though no personal service had been effected (*c*).

And where a defendant, after having been served with a copy of the award and rule of reference and allocatur, and with a written demand of payment of the sum due under the award, kept out of the way to avoid a personal demand by the party authorised to receive the money, the court thought the strict rule might be dispensed with (*d*).

Party resident abroad.

The fact that the party sought to be affected was resident abroad, and, as appeared by a letter from him, was aware of the contents of the award, though it had not been served upon him, was not considered by the Court of Common Pleas a sufficient ground for granting a rule nisi, calling upon him to pay the money, and ordering that sticking up a copy in the master's office should be deemed good service (*e*).

Moving on last day of term.

In the Court of Queen's Bench the rule might have been obtained on the last day of term, though the rule for an attachment could not (*f*).

When rule rule nisi.

The rule was only a rule nisi in the first instance in all cases, not a rule absolute; for if it were otherwise, execution might have been issued without any opportunity whatever being given to the party to be affected by it to impugn the validity of the award (*g*).

Since Arbitration Act.

By Order LII. rr. 2 and 3 (1883), it would seem that the motion for leave to enforce the award as a judgment or for a rule to pay, should be made on notice of motion to the other party (*h*). And by rule 4 of the same order, the notice of

(*c*) Hawkins *v.* Benton, 2 D. & L. 465.

(*d*) Smith *v.* Troup, 7 C. B. 757.

(*e*) Wilson *v.* Foster, 6 M. & G. 149.

(*f*) Leblé *v.* Carroll, 24 L. J. Q. B. 96. See, however, Watkins *v.* Philpotts, M'Lel. & Y. 393.

(*g*) Winwood *v.* Holt, 3 D. & L. 85; Jones *v.* Williams, 11 A. & E. 175; Rickards *v.* Patterson, 8 M. & W. 313.

(*h*) See Phillips *v.* Gill, 1 Q. B. D. 78.

motion should state in general terms the grounds of the application.

On a motion to enforce an order to pay a specific sum at a specific time, it is sufficient to state as the ground of the motion "for default in obeying the order" (*i*).

Form of rule.

The rule simply ordered the payment of the amount awarded. It was not necessary that the rule nisi should contain an undertaking that the applicant abandoned his right to move for an attachment, though such a clause was sometimes inserted (*j*). Nor need it state that the party is at liberty to issue execution; for the permission to issue execution on the rule is not given by the court, which derives no new powers of ordering execution in this case from the act, but the right to execution is the effect which follows on the rule by the force of the statutes (*k*).

Abandoning right to attachment.

Reserving liberty to issue execution.

How drawn up.

On one occasion, where the enlargements of time had been made part of the rule of court and duly verified by affidavit, Patteson, J., though he did not think it necessary, yet recommended as a more prudent course to draw up the rule on reading the affidavits filed when the order of reference was made a rule of court, as well as the affidavits on which the application for the rule was made (*l*).

Rule six-day rule.

The rule to pay was a six-day rule, and the time would not be shortened without special circumstances. Where an application for a rule was made within four days of the end of the term, and the master had drawn it up to show cause the next term, the Court of Exchequer refused to allow it to be amended by having it drawn up to show cause on the last day of term, or before a judge at chambers (*m*). The practice of the Court of Queen's Bench seems to have been to permit the rules, under particular circumstances, to be made returnable before a judge at chambers (*n*).

Whether cause can be shown at chambers.

Service of rule nisi.

The rule nisi had generally to be served personally, and where there was reason to believe it could be so served,

(*i*) Treherne *v.* Dale, 27 Ch. D. 66.

(*j*) Burton *v.* Mendizabel, 1 Dowl. N. S. 336; Neale *v.* Postlethwaite, 1 Q. B. 243.

(*k*) Burton *v.* Mendizabel, 1 Dowl. N. S. 336; Doe *v.* Amey, 8 M. & W. 565.

(*l*) Peebles *v.* Hay, 8 Jur. 338.

(*m*) Arthur *v.* Marshall, 2 D. & L. 376.

(*n*) Hawkins *v.* Benton, 2 D. & L. 465, note, 471; Drew *v.* Woolcock, 24 L. J. Q. B. 22; Morris *v.* Morris, 6 E. & B. 383, S. C. 25 L. J. Q. B. 261.

nothing less would suffice; but if personal service could not be effected, on a special statement of facts such service would be allowed as should seem proper (*o*). Thus, on an affidavit showing that personal service could not possibly be effected, the party never leaving his house or opening his door, and that a copy of the rule had been left at his house, Patteson, J., made the rule absolute (*p*).

Consent of attorney to rule absolute.

When the party was absent from home, and could not be served, but not keeping out of the way to avoid service, the court would not make absolute the rule, though his attorney accepted service of the rule and indorsed on it his consent that the rule might be made absolute (*q*). In one instance, where a defendant had said that he would not pay the sum awarded, the rule was made absolute on proof that it had been served by leaving it at his house in the hands of his sister-in-law, who said that he had gone to America, and that his wife was upstairs in bed (*r*).

Showing cause last day of term.

Cause could not be shown against the rule on the last day of term (*s*).

Official manager of company.

The official manager of a company appointed under the Joint Stock Companies Winding-up Act, 1848 (11 & 12 Vict. c. 45), might appear and show cause against a rule calling on a company to pay a sum awarded, though he was not named in the rule (*t*).

Same objections as to an attachment.

On showing cause against it, the same objections might have been urged against the validity of the award as were available in answer to an application for an attachment (*u*); therefore, the conduct of the arbitrator could not be gone into by the court (*x*); nor in general any objection not open on the face of the award (*y*).

Rule refused in case of set-off.

But where there was a bonâ fide claim of a set-off to a larger amount than the sum sought to be recovered, the

(*o*) Jordan *v.* Berwick, 1 Dowl. N. S. 271; Winwood *v.* Holt, 3 D. & L. 85; Ansell *v.* Thomas, H. T. 1845, Ex., cited in Hawkins *v.* Benton, 2 D. & L. 464, note, 471.

(*p*) Doe d. Steer *v.* Bradley, 1 Dowl. N. S. 259.

(*q*) Evans *v.* Prosser, 34 L. J. Q. B. 356.

(*r*) Styring *v.* Lloyd, 12 W. R. 384.

(*s*) Kerr *v.* Jeston, 1 Dowl. N. S. 340; Laing *v.* Todd, 13 C. B. 276.

(*t*) Mackenzie *v.* The Sligo and Shannon Rail. Co., 19 L. J. C. P. 142.

(*u*) Kerr *v.* Jeston, 1 Dowl. N. S. 340; Harrison *v.* Creswick, 10 C. B. 441.

(*x*) Manley *v.* Bray, 11 Jur. 521.

(*y*) Davies *v.* Pratt, 25 L. J. C. P. 71.

court would refuse the rule, unless the lien of the plaintiff's attorney for the costs in the action referred were affected (*z*). So where by the award the plaintiff was to pay the costs of a Chancery suit between him and the defendant, which costs had not yet been ascertained, the Court of Common Pleas refused to grant the plaintiff a rule to compel the defendant to pay other sums due under the award (*a*).

Time to set aside not expired.

It is no answer that the time for moving to set aside the award has not expired (*b*).

Deeds without stamps to be evidence.

It was no objection that the award recited a clause in the submission, that all deeds and documents should be admitted in evidence without a stamp, it not being shown that any unstamped deeds were so admitted (*c*).

Misnomer.

The court would not grant a rule to enforce the award, if the defendant in the cause referred were described in the award by a wrong Christian name, but would refer the award back to be amended (*d*).

After reference back no rule granted on old allocatur.

A rule to pay the costs of a reference pursuant to an award, and the master's allocatur, would not be granted if it appeared that after the taxation there was a reference back to the arbitrator as to a special matter, and that a new award had been made, even though the new award re-enacted the old direction as to costs. To entitle the party to the rule, there must have been a fresh taxation of the costs (*e*).

Right doubtful.

The rule will be refused as in the case of an attachment unless it be clear that the party is entitled to it (*f*).

Rule against company being wound up refused.

An award ordered a railway company to pay a sum by instalments, a short time prior to an order in equity for winding up the company. A demand for payment was subsequently made on the secretary, and on a director, but the court, considering the liability to pay not clear, refused the rule (*g*).

So the court refused a rule to make B. pay on an award

(*z*) Breary *v.* Kemp, 24 L. J. Q. B. 310; Swayne *v.* White, 31 L. J. Q. B. 260; Rees *v.* Rees, 25 L. J. Q. B. 352.

(*a*) Lambe *v.* Jones, 9 C. B. N. S. 478.

(*b*) Hare *v.* Fleay, 11 C. B. 472. See now O. XLII. r. 31 (a), Dec. 1889.

(*c*) Phillips *v.* Higgins, 20 L. J. Q. B. 357.

(*d*) Davies *v.* Pratt, 16 C. B. 586, S. C. 25 L. J. C. P. 71.

(*e*) Johnson *v.* Latham, 20 L. J. Q. B. 236; McRae *v.* McLean, 2 E. & B. 946.

(*f*) Wright *v.* Graham, 3 Ex. 131.

(*g*) Mackinnon *v.* Sligo and Shannon Rail. Co., 9 C. B. 250.

against A. and B., the action being brought in the names of A. and B., and the cause and all matters being referred, B. swearing that he had long ago retired from the partnership with A., had never given A. any authority to sue in his name, and had had no notice of the action, or reference, or award, until the money was demanded (*h*).

Presumption condition precedent performed.

The court will presume that the arbitrator has performed a condition precedent necessary to give him power to make an award, though it be not stated in the award, or sworn to by affidavit (*i*). On such a motion it will not allow an award good on the face to be invalidated by reference to the pleadings, though brought before it by affidavit (*k*).

Presumptive payment of costs of award.

Where the award directed the plaintiff to pay one moiety of the costs of the award, and the defendant the other moiety, the plaintiff took up the award (which was in his favour), and the master allowed him on taxation half the costs of the award: it was held by the Court of Common Pleas no objection to a rule calling on the defendant to pay the sum awarded, and the costs found by the master, that the plaintiff had not sworn that he had paid the whole expense of the award, for it was reasonable to suppose that the plaintiff had paid all the arbitrator's fees on taking up the award, and the objection, if any, was an objection to the master's taxation (*l*). The Court of Queen's Bench, however, it would seem, would require a positive affidavit that the plaintiff had paid the amount (*m*).

Swearing money due.

But where the award ordered A. to repay B. if B. paid the arbitrator's costs, an affidavit by B. that A. had not paid him the amount of those costs, and that the amount was due and unpaid by A. to him, was held sufficient to ground a presumption that B. had paid the arbitrator, there being no affidavit to the contrary (*n*).

Award ordering payment to a stranger.

The court will not grant a rule for B. to pay A., on an award between A. and B., directing that B. shall pay, for damage done to A., a certain sum to C., when the payment

(*h*) Robertson *v.* Hutton, 26 L. J. Ex. 293.
(*i*) Davies *v.* Pratt, 16 C. B. 586, S. C. 25 L. J. C. P. 71.
(*k*) Ibid.
(*l*) Smith *v.* Troup, 7 C. B. 597.
(*m*) Butler *v.* Masters, 13 Q. B. 341; Smith *v.* Reeves, 5 Dowl. 513.
(*n*) Parkinson *v.* Smith, 30 L. J. Q. B. 178.

to C. does not appear on the face of the award to be for A.'s benefit (*o*).

Attorney of corporation not appointed under seal.

Where the defendants, a railway company, had been served with the writ in the action, and their attorney had entered an appearance for them, and had ultimately referred the action, it was held they could not show, as cause against a motion for a rule to pay the plaintiff the amount awarded, that the attorney had not been appointed under their corporate seal (*p*).

Making rule absolute.

On making the rule absolute, the court would impose such terms as seemed equitable, as that a plaintiff should undertake not to bring an action on the award, the defendant having previously entered into a bond with sureties to abide the event of such an action (*q*).

Referring award back.

If the award were shown to be invalid on showing cause against the rule for an attachment, the court would often refer the award back to the arbitrator for amendment (*r*).

Producing award on drawing up rule.

As in case of an attachment, the rule would not be drawn up without producing and depositing with the master the original award (*s*).

Rule as to costs.

Though, to warrant execution under the statute of 1 & 2 Vict., the rule must state on its face the amount of the money which it directs to be paid, yet when a rule directs costs to be paid, it need not specify their amount in order to receive the benefit of the act; for costs stand on a different footing from other sums payable, and execution, it seems, may issue on the rule as soon as the officer of the court has ascertained how much is due for them (*t*). These observations respecting costs do not apply to the case of costs payable under an award, and already taxed by the master, and demanded by the party before the motion for the rule; for their amount must be stated in the rule.

Interest on sum awarded not recoverable.

When the award ordered money to be paid on a specified day with interest to that day, the rule would be granted for the payment of the amount and the interest up to the day,

(*o*) Laing *v.* Todd, 13 C. B. 276.

(*p*) Faviell *v.* Eastern Counties Rail. Co., 2 Ex. 344.

(*q*) Mendell *v.* Tyrrell, 1 Dowl. N. S. 453, S. C. 9 M. & W. 217.

(*r*) See P. II. ch. 10, s. 1, p. 481.

(*s*) Davis *v.* Potter, 21 L. J. Q. B. 134.

(*t*) Jones *v.* Williams, 8 M. & W. 349; Hodson *v.* Patterson, 4 M. & G. 333; Wright *v.* Burroughes, 2 D. & L. 94.

but not beyond; though, in an action on the award, a jury might have given further interest (*u*).

Scire facias unnecessary.

Though a year and a day have elapsed since the making of a rule ordering the payment of money or costs, no scire facias or special application to the court is necessary to authorise the issuing of execution (*x*).

Execution under Arbitration and Judicature Acts.

II. *Execution under the Arbitration and Judicature Acts.*]—Whenever the submission is or has been, or has the effect of having been, made a rule of court, the performance of the award may be enforced in the same manner as a judgment by virtue of the Arbitration Act, 1889, ss. 12 and 16, and of the orders made under the Judicature Acts, viz., Order XLII., rules 7, 9, and 24 (1883). The same preliminary steps must probably be taken as when execution is sought to be obtained under the stat. 1 & 2 Vict. c. 110, s. 18 (see p. 623).

The application under the Judicature Acts to enforce an award, except under very special circumstances, had to be made to a judge at chambers on summons, and this summons should generally have been personally served. The judge, on being satisfied that the right to execution existed, would order execution to issue; or, where the award was for payment of money, would order the money to be paid; and then execution might issue on the judge's order.

Summons.

By rule 20 of the Central Office Practice Rules, settled by the Practice Masters (1880—1888), an application for leave to enforce an award under sect. 12 of the Arbitration Act, 1889, should be made by summons before a master in chambers.

The applicant must produce before the master the original award (or a duplicate thereof) together with a copy, both to be verified by affidavit intituled "In the matter of an arbitration between A. B. and C. D."

The verified copy of the award must be subsequently filed in the writ, &c. department (without fee) on issuing execution.

On an application to enforce an award under the Judicature Acts it was held that a demand of payment by the solicitor's clerk was not sufficient unless he was authorised by

(*u*) Doe d. Moody *v.* Squire, 2 Dowl. N. S. 327.

(*x*) Spooner *v.* Payne, 12 Jur. 282.

power of attorney. It was also held that a demand in writing of performance of the award was not necessary (*y*), though stated in Archbold's Practice to be required (*z*).

Railway Companies Arbitration Act.

III. *Enforcing award under the Railway Companies Arbitration Act*, 1859.]—By this act (the 22 & 23 Vict. c. 59), s. 26, it is enacted, that "full effect shall be given by all the superior courts of law and equity in the United Kingdom, according to their respective jurisdiction, and by the companies respectively, and otherwise, to all agreements, references, arbitrations, and awards, in accordance with this act: and the performance or observance thereof may, when the courts think fit, be compelled by distress infinite on the property of the companies respectively, or by any other process against the companies respectively, or their respective property, that the courts, or any judge thereof, shall direct, and, where requisite, frame for that purpose."

Distress infinite.

Under the Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), s. 24, and under the Allotments and Cottage Gardens Compensation for Crops Act, 1887 (50 & 51 Vict. c. 26), s. 17, where any money awarded is not paid within fourteen days, it is recoverable upon order made by the county court judge of the district, as money ordered to be paid under the court's ordinary jurisdiction is recoverable.

(*y*) Salter *v.* Roberts, Q. B. D. 14th June, 1882, S. C. per Cave, J., at Chambers, 2nd June, 1882.

(*z*) 13th ed., p. 1367; 14th ed., p. 1652.

CHAPTER VIII.

ENFORCING THE AWARD BY PROCEEDINGS IN THE CAUSE REFERRED.

PART III. CH. VIII.

Contents of the eighth chapter.

IT is often convenient for a party in whose favour the arbitrator has determined the cause referred to enforce the award by issuing execution in the cause for the money or costs awarded, instead of applying for an attachment, or a rule under the statute of Victoria on the award itself; as these latter courses would frequently be more dilatory, and cannot be obtained without a personal demand of payment of the money due, a thing sometimes difficult to effect, and not necessary when proceeding in the cause.

This chapter, therefore, is confined to investigating, in its separate sections, under what circumstances, and in what manner, a verdict may be entered, costs taxed, judgment signed, and execution issued in the cause, according to the effect of the award.

SECTION I.

ENTERING THE VERDICT PURSUANT TO THE AWARD.

PART III. CH. VIII. S. 1.

Award in the cause as a verdict.

When a cause was referred at Nisi Prius before the Judicature Acts, and a verdict taken subject to the reference, the award of the arbitrator respecting the cause stood in the place of the finding of the jury, and was followed with similar consequences. The verdict might be entered, the costs might be taxed, judgment might be signed, and execution might be issued, for the amount found due in the cause,

and for that portion of the costs of the cause to which, under the submission and award, the party was entitled (*a*).

Enforcing payment by judgment contrary to submission.

In one instance the arbitrator was to make two awards, in the first of which he was to state a case for the court, and assess contingent damages; in the second he was to dispose of the remaining matters, but payment under the first award was not to be enforced until the final award was made. The first award was made, the case stated and decided by the court, and damages found for the plaintiff on such decision. No second award was ever made, and the time had elapsed for making it. The court set aside the judgment entered by the plaintiff in the action subsequently to get his costs, on the ground that it was an enforcing payment contrary to the terms of the reference (*b*).

Where no verdict was taken on the reference, and the arbitrator was not empowered to order a verdict to be entered, or, being empowered, had not thought fit to direct the entry of a verdict, judgment could not be signed either for the amount awarded or the costs (*c*).

Pro formâ verdict how far available.

The plaintiff could take no advantage from the pro formâ verdict taken at Nisi Prius, except what the award gave him. Where, after directing a verdict to be entered for the plaintiff on the several issues, the arbitrator awarded to him a gross sum by way of damages in respect of the cause and of other matters in difference, the court held, that although the pro formâ verdict was not vacated, the plaintiff could not avail himself of it in any way, for there were no means of ascertaining how much of the damages was due in respect of the cause (*d*). It was also said there would be a difficulty about taxing the costs of the cause, as no distinct damages were given in the cause; but though they could not be taxed on the verdict, and enforced by execution, they might, it seems, be taxed on the rule of court founded on the order of reference, and be recovered by attachment, or by execution, under the 1 & 2 Vict. c. 110 (*e*).

(*a*) Borrowdale *v.* Hitchener, 3 B. & P. 244; Lee *v.* Lingard, 1 East, 400; Cromer *v.* Churt, 15 M. & W. 310, S. C. 15 L. J. Ex. 263.

(*b*) Wood *v.* The Copper Miners' Co., 24 L. J. C. P. 34.

(*c*) Grundy *v.* Wilson, 7 Taunt. 699.

(*d*) Taylor *v.* Shuttleworth, 6 Bing. N. C. 277; Tayler *v.* Marling, 2 M. & G. 55.

(*e*) Ibid.

Practice as to entering verdict.

Before the Judicature Acts, on a reference at Nisi Prius, the officer made a minute on the panel of the verdict given by the jury for the specified amount of the damages subject to the award, and he took a full note of the terms of the reference in his minute book, if there were any special terms. He detained in his own hands the Nisi Prius record until the award was made. In order to proceed to judgment and execution, the party entitled to the verdict must have made the order of Nisi Prius or other submission a rule of court. On his producing the certificate or award in his favour, the clerk of assize or associate would then deliver to him the Nisi Prius record, having first, in causes tried at the assizes, entered the postea on it for the amount of the sum awarded (*g*).

In strictness, it was the duty of the associate to enter the postea in all cases, but in causes in the Queen's Bench or Exchequer, tried at the sittings in London or Middlesex, the record was frequently delivered out without the postea, which was in such case entered by the attorney of the successful party (*h*). In the Common Pleas, the practice was for the associate to enter the postea in all cases (*i*).

No application to court necessary.

No application to the court was necessary to entitle the successful party (*k*), or (when the submission provided that death should not revoke the arbitrator's authority) the personal representative of a successful party who died before the making of the award (*l*), to have the verdict entered pursuant to the award, or to have the postea delivered up (*m*).

Submission made rule before motion.

It seems the submission must have been made a rule of court before the court would entertain any motion respecting the entering of the verdict (*n*).

Award of verdict conditional on decision of court.

If there were a positive award of a verdict in favour of one party, and then on the facts stated an hypothetical and conditional award of a verdict in favour of the other, in case the court should determine for the latter the point of law raised

(*g*) 2 Archb. Pr., p. 1375, 13th ed.; Kenrick *v.* Phillips, 7 M. & W. 415.

(*h*) See the statement as to the practice in 1 Archb. Pr., p. 328, 7th ed.

(*i*) Ex relatione of the Associate's officer.

(*k*) Borrowdale *v.* Hitchener, 3 B. & P. 244.

(*l*) Lewis *v.* Winter, W. W. & D. 47.

(*m*) Grimes *v.* Naish, 1 B. & P. 410. See Platt *v.* Hall, 2 M. & W. 391.

(*n*) Kirkus *v.* Hodgson, 8 Taunt. 733, S. C. 3 Moore, 64.

on the facts, the one for whom the award positively determined the cause needed not to have made any application to the court, but might enter a verdict, sign judgment, and issue execution, as if there were no point of law raised (*o*). Whereas the other party could only take advantage of the possible provision in his favour by application to the court to enter the verdict for him; and this application must have been made within the time allowed for motions to set the award aside, since it was in effect a motion to set aside the positive determination of the arbitrator, and to substitute another (*p*).

Rule to enter a verdict or set aside award.

A rule might have been applied for in the alternative, either to set aside the award or to enter the verdict according to the opinion of the court on the facts found in the award (*q*).

Amending verdict by arbitrator's notes.

Where the arbitrator had awarded damages generally, the court on one occasion rejected an application to amend the entry of the verdict by entering it on such of the alleged breaches of contract as were proved according to the arbitrator's notes, holding that they could make no order respecting the notes of an arbitrator any more than of a judge (*r*).

SECTION II.

TAXING THE COSTS OF THE CAUSE.

When the submission was or had been made a rule of court, the practice was to get an appointment for taxation from the master marked on the foot of the rule. The usual one day's notice of taxation must have been given, and a copy of the rule and appointment must have been served on the opposite solicitor (*s*).

(*o*) Scott *v.* Van Sandau, 6 Q. B. 237; Anderson *v.* Fuller, 4 M. & W. 470.

(*p*) Anderson *v.* Fuller, 4 M. & W. 470; Paxton *v.* Great North of England Rail. Co., 8 Q. B. 938.

(*q*) Anderson *v.* Fuller, 4 M. & W. 470.

(*r*) Scougull *v.* Campbell, 1 Chitt. 283.

(*s*) 2 Archb. Pr., p. 1353, 13th ed., 1639, 14th ed.

When a verdict had been taken at the trial subject to an award or certificate, the solicitor should have obtained the award or certificate from the arbitrator, and taken it to the associate having the Nisi Prius record, who would give a certificate of the verdict found at the trial. The judgment might have been entered in the usual way, in accordance with the award or certificate. The successful party, it seems, might have entered up judgment without any motion for that purpose (*u*). The usual notice of taxation must have been given (*v*). The master would then tax the costs, and sign judgment.

Taxing the costs.

Of the cause.

The costs of the cause used to be taxed on the postea, as in the case of an ordinary verdict. We have before seen that the costs of the reference are costs of the cause when the arbitrator has only to certify (*x*). The costs of the reference, which are ordinarily costs as between party and party (*y*), should strictly have been taxed on the rule embodying the submission; but by consent of parties, to save expense, the costs both of the cause and of the reference were frequently included in one allocatur, and marked on the postea. No affidavit was required to verify the award. But if only a copy of the award were produced, and the adverse party objected to the taxation, the master would probably decline to proceed except under the direction of the court or a judge (*z*).

Of the reference.

Costs of special case, costs of cause.

On the trial of an action a verdict was taken by consent, subject to a special case to be stated by A. B., who, in the event of the court deciding in favour of the plaintiffs, was thereby empowered to direct for what amount the verdict should be entered, and to whom the cause and all matters in difference between the parties were thereby referred, subject to the special case, the costs of the action to be taxed to abide the event of the award, and the costs of and incident to the reference and award to be in the discretion of the arbitrator. Many meetings were held before the special case

(*u*) Lloyd *v.* Lewis, 2 Ex. D. 7, S. C. 46 L. J. Ex. 81.

(*v*) 2 Archb. Pr., p. 1375, 13th ed., 1660, 14th ed.

(*x*) Sim *v.* Edwards, 25 L. J. C. P. 174, S. C. 17 C. B. 527. Ante, P. II. ch. 7, s. 1, p. 374.

(*y*) Eccles *v.* Blackburn, 30 L. J. Ex. 358.

(*z*) Ex relatione of a master of the Court of Queen's Bench.

was settled. It divided the plaintiffs' claim into six parts, as to four of which the court decided for the plaintiffs, but as to the last two for the defendants. The case was thereupon sent to the arbitrator, who directed a verdict for the plaintiffs with damages, and ordered that "the costs of and incident to the reference and award should be paid and borne by the defendants." The master disallowed to the plaintiffs all costs incurred by them incident to that portion of their demand comprised in the 5th and 6th heads of claim up to the time of the judgment of the court upon the special case, and allowed to the defendants their costs of and incident to those two heads, on the ground that the costs up to the judgment on the special case were costs in the *action*, and that the reference did not commence until after the judgment. The Court of Common Pleas held that the master was right in his taxation (*a*).

Costs on distributive finding on double plea.

In an action for slander, to the second count for calling the plaintiff a thief the defendant pleaded a plea, alleging three separate instances of theft. The arbitrator found for the plaintiff with damages on the first count, and on the issue on the plea to the second count he found that so much of the plea as related to one of these instances of theft was proved, and that the rest of the plea was not proved.

It was held in the Court of Common Pleas, dissenting in some measure from the principle of *Biddulph* v. *Chamberlayne* (*b*), that on taxation the master ought to allow the plaintiff no costs of any part of the plea of justification, and the defendant's costs only of the part of the plea found to be true, including costs of evidence applicable to such part, though also applicable to the rest of the plea; but not costs of any evidence applicable only to that part of the plea which was found to be untrue (*c*). See the new cases referred to in Part II. Ch. VII. s. 2, on costs abiding the event.

Event.

Where a verdict was taken, subject to a reference to an arbitrator to find the facts and state a special case, the costs of the reference and arbitration and special cases to be costs in the cause, and to abide the event of the award, the arbitrator found the first issue for the defendant, and stated

(*a*) Edwards *v.* The Great Western Rail. Co., 12 C. B. 419.
(*b*) 17 Q. B. 351.
(*c*) Reynolds *v.* Harris, 28 L. J. C. P. 26, S. C. 3 C. B. N. S. 267.

the case. Judgment was given thereon for the plaintiff in the court below, but reversed in the Exchequer Chamber. The master allowed no general costs to either party; but having regard to s. 145 of the Common Law Procedure Act, 1852, allowed the plaintiff the costs of the trial of the issues of fact, that is, all the costs commencing at the drawing up of the issue until the direction of the court below to enter the verdict. He allowed to the plaintiff the costs of the reference, special case, and argument. He allowed neither party any costs in error, and no costs at all to the defendant. The court held that he had decided rightly (*d*).

Apportioning costs.

In an action to recover for three distinct heads of claim, the arbitrator awarded a sum in respect of one only, and an order was made that the plaintiff recover such costs as one of the masters may find that he has rightly incurred in recovering the above amount to be taxed, and that the defendants recover against the plaintiff such costs as they have rightly incurred in defending themselves on those points on which they have succeeded to be also taxed. It was held in the Court of Appeal, reversing the decision of the Common Pleas Division, that the plaintiff was entitled to the general costs of the cause, excluding only such costs as were applicable exclusively to the two heads on which he failed, and that the defendants were entitled to such costs only as were incurred exclusively with respect to the two heads on which the defence was successful (*e*).

Costs of witnesses.

When a witness was rejected by an arbitrator, it was said that the costs of his attendance, either at the assizes, when the cause was referred, or before the arbitrator, would not be allowed by the master in taxing the costs as between party and party (*f*).

It was held, without reference to the rules under the Judicature Act, that the costs of an accountant in examining the defendant's books at the request of the plaintiff could not be allowed the plaintiff as costs of the cause, even though the accountant was by consent appointed by the arbitrator, and time was saved on the reference by his labours, and the

(*d*) Whaley *v.* Laing, 5 H. & N. 490, S. C. 29 L. J. Ex. 313.

(*e*) Sparrow *v.* Hill, 50 L. J. Com. Law, 675; below, 50 L. J. Com. Law, 411.

(*f*) Galloway *v.* Keyworth, 15 C. B. 229.

accountant was called by this act as a witness, as such costs were in fact costs of preparing a witness (*g*).

But now the reasonable charges and expenses appearing to have been properly incurred in procuring evidence are allowed both in the Chancery and Common Law Divisions (*h*); and masters allow the costs of qualifying witnesses, to enable them to give evidence; as, for instance, the expenses of surveyors inspecting premises, on the condition of which they are afterwards examined as witnesses (*h*).

Witnesses qualifying.

Though the matters referred were of very great importance, and two counsel attended the arbitrator for each party, the costs of one counsel only generally used to be allowed in the Common Pleas, though the rule was not inflexible (*i*). It does not seem that there was any such rigid rule in the other courts of law (*k*).

Of counsel attending reference.

In a case of complexity a court of the Queen's Bench Division recently directed the master to allow the costs of two counsel (*l*), but the fees of the second counsel are often struck out by the master as between party and party (*m*).

In one case before the master, the plaintiffs claimed to be allowed, as against the defendants, the other party to the reference, 71*l.* 15*s.* 6*d.*, which they had paid, on taking up the award, to the attorneys who had been employed by the arbitrator to draw it up. This sum consisted of 52*l.* 10*s.*, the arbitrator's charges for four meetings, and 19*l.* 5*s.* 6*d.* for the attorney's bill (the arbitrator being a layman). The master disallowed all of the attorney's bill, except 1*l.* 15*s.* for the stamp duty on the award. The court refused to call on the master to review his taxation, as without laying down any rule whether a lay arbitrator be entitled to charge for professional assistance in framing his award, they held that the charge of fifty guineas for four meetings was amply sufficient

Costs of attorney to draw award.

(*g*) Nolan *v.* Copeman, L. R. 8 Q. B. 84.

(*h*) Mackley *v.* Chillingworth, 46 L. J. N. S. C. P. 484.

(*i*) Sinclair *v.* Great Eastern Rail. Co., 21 L. T. C. P. 752, S. C. L. R. 5 C. P. 135.

(*k*) Hawkins *v.* Rigby, 29 L. J. C. P. 228, S. C. 8 C. B. N. S. 271. See Kirkwood *v.* Webster, 9 Ch. D. 239.

(*l*) Orient Steam Nav. Co. *v.* Ocean Marine Ins. Co., 35 W. R. 771.

(*m*) Benton *v.* Ellis, Lever & Co., 1 Times L. R. 499; Drew *v.* Josolyne, 4 Times L. R. 717.

to cover all the expenses which he might fairly have incurred in obtaining the aid of professional advice (*l*).

Legal assessor.

A reasonable amount may often be allowed to a lay arbitrator for the assistance of a legal assessor (*m*).

Shorthand notes.

The cost of employing a shorthand writer, the cost of the transcript of his notes, or the cost of brief copies for the use of counsel, cannot be allowed against the party liable to costs, on taxation of costs, without consent, or an order of a judge, or the court (*n*); costs of shorthand notes not being generally allowed (*o*).

Type-writer reproduction not chargeable as copies.

Where shorthand notes had been agreed to be taken, copies simultaneously taken off by a type-writer were not allowed to be charged at 4*d*. a folio, the usual price of a copy (*p*).

Costs of cause, reference, and award.

What are costs of the cause, reference, and award, have been discussed at p. 373.

How soon costs may be taxed.

A difference of practice in the old courts as to the time of taxing costs (*q*) was settled by a rule of court in 1853, which has been renewed, and now is R. S. C. Ord. LXV. r. 15, 1883, "Costs may be taxed on an award, notwithstanding the time for setting aside the award has not elapsed."

On a reference under the Common Law Procedure Act, judgment must have been signed before execution could issue (*r*). As the cause was not removed out of the court by the reference, the costs must have been taxed on the scale applicable to proceedings in the superior court (*s*).

On what scale costs to be taxed.

If the award in an action on contract (other than cases wherein, by reason of the nature of the action, no writ of trial could at law be issued) found that the plaintiff was entitled to recover in the action an amount that did not exceed 20*l*., and there were no certificate that the cause was proper to be tried before a judge of the superior courts, the master would tax the costs of the action on the reduced scale, and if he taxed them on the higher scale the court would order a

(*l*) Galloway *v.* Keyworth, 15 C. B. 229.

(*m*) Westwood & Co. *v.* Cape of Good Hope, 2 Times, L. R. 667.

(*n*) Croom *v.* Gore, 1 H. & N. 14, S. C. 25 L. J. Ex. 267; Wells *v.* Mitcham Gas Co., 4 Ex. D. 1; Kirkwood *v.* Webster, 9 Ch. D. 239.

(*o*) Autothreptic Co., In re, 59 L. T. 632.

(*p*) P. II. ch. 7, s. 1, p. 373.

(*q*) Hobdell *v.* Miller, 2 Scott, N. R. 163; Ives *v.* Jones, 10 C. B. 439; Hare *v.* Fleay, 11 C. B. 472; Cromer *v.* Churt, 15 M. & W. 310; Little *v.* Newton, 1 M. & G. 976.

(*r*) Kendil *v.* Merrett, 25 L. J. C. P. 251, S. C. 18 C. B. 173. See the next section.

(*s*) Edwards *v.* Edwards, 5 C. B. N. S. 536, S. C. 28 L. J. C. P. 25.

reviewal of his taxation (*t*). Whether the reference took place before or after issue joined, the amount awarded was a sum "recovered" in the action within the meaning of the rule; for the term "recovered" was not limited to a recovery by verdict, but was used in a popular and not strictly legal sense, and meant that if a party did not obtain more than 20*l.* as the fruits of his process, he was to be allowed costs of the cause according to the lower scale only (*u*).

Costs of reference.

But this rule does not apply to costs of the *reference*, for though less than 20*l.* is recovered by the award, no reduction is made in their taxation on that account (*x*).

Costs of reference to county court judge.

When a cause was referred to arbitration under section 3 of the Common Law Procedure Act, 1854, to a county court judge, the costs were to be taxed, not according to the county court scale, but according to the scale of the superior court, since the reference did not remove the proceedings out of the superior court (*y*).

Taxing costs of cause when no damages awarded.

Though no damages were awarded separately in the cause referred, but the arbitrator found the issues for the plaintiff, and awarded him a gross sum in respect of the cause and all other matters together, it seems that the costs of the cause could not be taxed on the verdict taken at Nisi Prius, but that they might be taxed for the plaintiff on the rule of court embodying the submission (*z*).

Taxing costs according to award.

The master must tax the costs according to the language of the award. If the arbitrator ordered costs to be taxed as between attorney and client, and the master taxed them on that scale, the court would not review the master's taxation, on the ground that the arbitrator had no authority to give such costs. The proper application was to move to set aside the award for the excess (*a*). Since the Arbitration Act,

(*t*) Lund *v.* Hudson, 1 D. & L. 236; Elleman *v.* Williams, 2 D. & L. 46. See directions to the masters of the superior courts, H. T. 1853, 13 C. B. 96; Walther *v.* Mess, 7 Q. B. 189; 8 Q. B. 629.

(*u*) Elleman *v.* Williams, 2 D. & L. 46; Wallen *v.* Smith, 6 Dowl. 103.

(*x*) Holland *v.* Vincent, 9 Ex. 274; Nicholson *v.* Sykes, 9 Ex. 357.

(*y*) Edwards *v.* Edwards, 28 L. J. C. P. 25.

(*z*) Taylor *v.* Shuttleworth, 8 Dowl. 281; Tayler *v.* Marling, 2 M. & G. 55.

(*a*) Bartle *v.* Musgrave, 1 Dowl. N. S. 325. See P. II. ch. 7, s. 1, d. 3, p. 373, duty of arbitrator in awarding costs.

1889, the arbitrator usually may order costs as between solicitor and client (*b*).

Court directing how costs to be taxed.

The court on application would sometimes direct the master how the costs were to be taxed, when there was difficulty in construing the award as to its legal effect (*c*).

Where the costs of the cause and reference were left to the arbitrator's discretion, and were to be recovered as costs in the cause, and the fourth issue in the cause was withdrawn by consent, but the arbitrator was to decide on the costs of the cause as if it had remained, and the award ordered the verdict to be entered on the first and second issues for the plaintiff with nominal damages, and for the defendant on the third, and did not notice the fourth; the court directed the master to tax the costs of the first and second issues for the plaintiff, and of the third for the defendant, and to disallow to either party the costs of the fourth issue (*d*).

On the reference of an action on the case after issue joined, where the declaration contained three counts, to each of which the defendant had pleaded several pleas, going to the whole cause of action in each, the arbitrator awarded that the plaintiff had good cause of action in respect of the second count, and was entitled to certain damages on it, but that he had no cause of action in respect of the first and third counts. The master feeling a difficulty in taxing the costs, the issues raised on the pleas not being determined by the award, the court, on the application of the plaintiff, who contended that the finding on the second count in the plaintiff's favour was a substantial decision for him of the issues raised on the pleas to that count, and who expressed his willingness to allow the defendant the costs of the issues on the pleas to the other two counts, which the award had not determined, ordered the master to tax the plaintiff his costs in the cause upon his allowing the costs of the first and third counts, and of the issues relating to them, to be taxed for the defendant (*e*).

Award ambiguous, taxation not reviewed.

An award in assumpsit on a special count, and also on a general count, ordered the defendant to pay to the plaintiff a

(*b*) 52 & 53 Vict. c. 49, Sch. 1 (i). See P. II. ch. 7, s. 1, p. 378.

(*c*) See Reynolds *v.* Harris, 28 L. J. C. P. 26, S. C. 3 C. B. N. S. 267.

(*d*) Allenby *v.* Proudlock, 4 A. & E. 326.

(*e*) Williamson *v.* Locke, 2 D. & L. 782.

certain sum. The master having taxed the costs on all the issues for the plaintiff, the court, on a motion to order a review of the taxation, discharged the rule; as on such an application the burthen lay on the applicant to show that the master was wrong, and it was merely ambiguous whether the finding of the arbitrator applied to the special count as well as the general count, and there had been no application to set aside the award for the objection (*f*).

Where submission made or has effect of rule of court, master has power to tax.

When a submission by consent might have been made a rule of court, it was one of the consequences, that the master of the court had authority to tax the costs of the reference and award (*g*). The master would now apparently have the same power under a submission which by virtue of the Arbitration Act, 1889 (*h*), has the same effect as if it had been made an order of court.

Taxing costs, submission rule of another court.

A cause in the Exchequer was referred, and the submission provided for its being made a rule of the Court of King's Bench, and the arbitrator awarded costs to be taxed by the master in the Exchequer; the Court of Exchequer, though there was a suggestion of collusion between the attorneys to allow excessive costs, refused to review the master's taxation, saying that they had no jurisdiction over him, as the reference not being made by that court, he did not act as their officer in taxing the costs; but they intimated it might probably form a ground for setting aside the award in the Court of King's Bench (*i*).

Taxing costs for each of the defendants separately.

Where there were two defendants in a cause referred, and the costs of the cause were to abide the event, it seems very doubtful whether there could have been a separate taxation of costs for each defendant (*k*).

Costs of cause and reference separately.

When the award is in the plaintiff's favour, and the defendant has to pay the costs of the cause, and of the reference and award, the master should make out two allocaturs, one for the costs of the cause, and the other for the costs of the reference and award; for if the judgment were entered up for a less amount of costs than that specified in the allocatur,

(*f*) Rennie *v.* Mills, 5 Bing. N. C. 249.
(*g*) Bhear *v.* Harradine, 7 Ex. 269, S. C. 21 L. J. Ex. 127.
(*h*) 52 & 53 Vict. c. 49, s. 1.
(*i*) Chapman *v.* Lansdown, 1 Anst. 273.
(*k*) Dickins *v.* Jarvis, 5 B. & C. 528.

Judgment only for costs of cause.

it might have been set aside; and judgment could not properly be entered up for the costs of the reference and award, but only for the costs in the cause; though if the costs of the cause and reference and award were taxed together in one allocatur, and judgment were entered up for the whole amount, it was only an irregularity, which would be cured, unless the application to set aside the judgment were made in reasonable time, or if the defendant's attorney had consented to the taxing of all the costs together (*l*).

When sum paid into court satisfies plaintiff's claim.

In an action for work, &c., the plaintiff claimed a balance of 373*l*. The defendant paid 200*l*. into court under Order XXX. r. 1 (1875), and gave notice in Form 5, Appendix B, that that sum was sufficient to satisfy the plaintiff's claim. The plaintiff took it out under Order XXX. r. 3, but did not give the notice under Order XXX. r. 4, nor any other notice. The cause was afterwards referred under the Common Law Procedure Act, 1854, to the certificate of an arbitrator, "the costs of the cause to abide the event," and pleadings were delivered on either side. The arbitrator certified that the 200*l*. paid into court was sufficient to satisfy the plaintiff's claim. It was held that as the 200*l*. was paid in generally, and as the plaintiff recovered nothing beyond that sum, the plaintiff was not entitled even to the costs of action up to the time of taking the money out of court; but that the defendant was entitled to the costs of the action from the commencement (*m*).

Fresh taxation after reference back.

After a reference back, the taxation of costs of the reference made on the original award becomes inoperative. There must be a second taxation after the new award is made (*n*).

Reference back, costs of abortive award.

If an award, being defective, was referred back, and a new award made, giving the plaintiff the costs of the reference, he was not, according to a decision in the Exchequer, entitled to all the costs of the abortive award, such as the stamp and expense of execution; but these, being wholly thrown away, ought to be borne equally by each party (*o*).

(*l*) Bignall *v.* Gale, 3 M. & G. 859.

(*m*) Langridge *v.* Campbell, 2 Ex. D. 281.

(*n*) Johnson *v.* Latham, 20 L. J. Q. B. 236.

(*o*) Blair *v.* Jones, 6 Ex. 701.

SECTION III.

SIGNING JUDGMENT PURSUANT TO THE AWARD.

Rule for judgment.

In old times, it was sometimes held to be necessary, and sometimes not, to obtain a rule to sign judgment, before judgment could be signed or execution issued on the verdict entered pursuant to the award (*p*), but a later order of court (1853) decided that no rule for judgment was necessary.

Judicature Acts.

In general, by the Judicature Acts, judgment cannot be entered except on the direction of the court or a judge (*q*); but it is not clear that these provisions apply where an action has been referred by order of Nisi Prius on the usual terms, and it would seem that judgment may still, in such a case, be entered on the verdict found by the award, although neither the order of reference nor the award contain any provision as to the judgment (*r*).

An arbitrator or referee to whom a cause has been referred can now direct judgment to be entered (*s*).

Motion for judgment.

"Where at the trial the judge or referee [or arbitrator (*t*)], abstains from directing any judgment to be entered, the plaintiff may set down a motion for judgment. If he does not set down such a motion and give notice thereof to the other parties within ten days of the trial, any defendant may set down a motion for judgment and give notice thereof to the other parties" (*u*).

Requirements for signing judgment.

The official requirements for signing judgments are, on a report after a trial by a referee, an office copy of the report directing judgment to be entered (the report being previously filed at the filing department), and a copy of the pleadings to be filed; and for signing judgment on an award, production of the award or duplicate thereof (not to be filed unless desired

(*p*) Haywards *v.* Ribbans, 4 East, 309; Lee *v.* Lingard, 1 East, 400; Higginson *v.* Nesbitt, 1 B. & P. 97; Borrowdale *v.* Hitchener, 3 B. & P. 244; Kettle *v.* Grove, Barnes, 57; Read *v.* Garnett, Barnes, 59; Hall *v.* Mister, 1 Salk. 84.

(*q*) Order XXXVI. r. 39, and Order XL. r. 1, 1883.

(*r*) Lloyd *v.* Lewis, L. R. 2 Ex. D. 7, S. C. 46 L. J. Ex. 81.

(*s*) Order XXXVI. rr. 50 and 55 (c). See p. 371.

(*t*) Order XL. r. 6a.

(*u*) Order XL. r. 2.

by the parties), and the order of reference or other order authorising judgment, and a copy of the pleadings to be filed.

Where the order of reference directs judgments within a certain time after service of the award, an affidavit of service of the award is required (*x*).

When judgment may be signed.

According to the old practice of the Common Pleas, when a verdict was taken subject to a reference, and an award was made in vacation, whether before or after the return day of the habeas corpora juratorum, final judgment could not be entered up until after the time for setting the award aside had expired (*y*).

But it was held in the Exchequer, that when a verdict was taken subject to a reference at Nisi Prius, and the award, or certificate, was not made till the four days after the return day of the distringas had expired, the party in whose favour the arbitrator directed the verdict to be entered might at once proceed to sign final judgment and issue execution, though in vacation, and needed not to wait until the losing party had had four days of term to move in to set aside the award (*z*). In deciding this point the court remarked that there was a judge always sitting who would interfere and stay execution if necessary, to prevent any injustice being done.

Where a verdict was taken subject to a reference of a cause and all matters in difference, and the award made in vacation directed the verdict to stand for the plaintiff for 548*l.*, but also awarded that 202*l.* was due from the plaintiff to the defendant in respect of the other matters in difference, the Court of Queen's Bench held that the plaintiff was entitled to sign judgment for the sum awarded in the action at the expiration of fourteen days after the making of the award (*a*).

Sum payable at a future day

A sum being awarded due, but payment directed to be made at a future day, it seems to have been doubtful whether a plaintiff could sign judgment before the day on

(*x*) See official requirements, Annual Practice, 1107.

(*y*) Wilkinson *v.* Stewart, 59 Geo. III., cited by counsel in Thompson *v.* Jennings, 10 Moore, 110; 2 Tidd, Pr. 839, 9th ed.; Jones *v.* Ives, 10 C. B. 429; Hare *v.* Fleay, 11 C. B. 472. See the previous section as to taxing costs.

(*z*) Cromer *v.* Churt, 15 M. & W. 210. See Ross *v.* Ross, 16 L. J. Q. B. 138.

(*a*) O'Toole *v.* Pott, 26 L. J. Q. B. 88, S. C. 7 E. & B. 102.

which the amount was payable. It is clear that he was not justified in issuing execution (*b*).

Signing judgment on compulsory reference.

Execution could not issue on an award made under a compulsory reference under the Common Law Procedure Act, 1854, without first signing judgment. And the form for fi. fa., No. 10 of the forms issued by the judges in Mich. Vac., 1854, and which omits the statement that the money has been recovered by judgment, was held to be wrong (*c*). But judgment on such an award could not, according to the practice of the Court of Exchequer, be signed without leave of a judge, before the time for moving to set aside the award had expired.

Entering up judgment nunc pro tunc after death of plaintiff; of defendant.

Where the order of Nisi Prius contained the usual clause providing against the death of a party defeating the reference, and the plaintiff died before the making of the award, which directed that a verdict should be entered for the plaintiff with damages, and that the plaintiff's executors should assign an annuity to the defendant: the court made absolute a rule obtained by the plaintiff's executors to enter up judgment on the verdict, as of the term when the distringas was returnable, upon their undertaking to assign the annuity (*d*). Under a similar submission, the defendant, in an action of trespass quare clausum fregit, having died before the making of the award, which directed a verdict for the defendant, and prescribed how a disputed boundary should in future run, though it was objected that the heir might be affected by an award concerning the boundary of the land, the court permitted the personal representative of the defendant to enter up judgment, nunc pro tunc, as of a previous term (*e*).

Award made on last day of term.

A verdict was taken subject to a reference at the Spring Assizes, 1854. The plaintiff died in April after the reference. The award was made on the last day of Michaelmas Term, 1854. It was held that the verdict was not complete until the award, and that the two months for entering judgment did not begin to run till the award was made; that as the award was made on the last day of term, too late for

(*b*) Callard *v.* Paterson, 4 Taunt. 318.

(*c*) Kendil *v.* Merrett, 25 L. J. C. P. 251, S. C. 18 Q. B. 173.

(*d*) Tyler *v.* Jones, 3 B. & C. 144.

(*e*) Lewis *v.* Winter, W. W. & D. 47.

entering judgment, the statute of Charles II. c. 86, s. 1, gave the executor the two following terms in which to enter it, so that applying in Easter Term, 1855, to enter judgment nunc pro tunc as of the previous Easter Term, was in time (*f*).

Though many terms often elapse after the reference before the award is made, it was not a matter of course to enter up judgment as of the term next after the assizes at which the verdict was found; but a special application for that purpose must have been made to the court, and if the special ground alleged as the reason of the motion were answered by the affidavits on the other side, the rule would be discharged (*g*).

Judgment on lost award.

If the award were lost, the court would nevertheless permit judgment to be entered up pursuant to it on an affidavit of its contents (*h*).

What form of judgment when no verdict.

When no verdict was taken subject to the reference, and the arbitrator had no power to direct one to be entered, and the submission provided that final judgment was to be entered up for the plaintiff or defendant according to the award; if the arbitrator awarded that the plaintiff had no cause of action, it seems that judgment ought to have been entered up as on a judgment by confession (*i*).

Clause to sign judgment for amount awarded.

Where the order of reference provided that the successful party should be at liberty to sign final judgment for the *amount* which should be payable under the award, and tax his costs, and issue execution thereon for such amount, together with such costs so to be taxed; the award being in the defendant's favour, the plaintiff disputed his right under this clause to sign judgment and issue execution for his costs, for strictly speaking there was no amount payable to him under the award; but the court, looking to the intention of the parties, and putting a liberal construction on the terms, held that the clause gave the defendant the right to sign judgment for his costs (*k*).

Judgment in ejectment as on a trial.

A judge's order, referring an action of ejectment, directed that the costs of the suit, reference, and award, should abide

(*f*) Heathcote *v.* Wing, 25 L. J. Ex. 23.

(*g*) Brook *v.* Fearns, 2 Dowl. 144. See Beeston *v.* White, 7 Price, 209.

(*h*) Hill *v.* Townsend, 3 Taunt. 45.

(*i*) Harding *v.* Forshaw, 1 M. & W. 415, per Parke, B., 416.

(*k*) Maggs *v.* Yorston, 6 Dowl. 481.

the event of the award, that the party in whose favour the award should be made might sign judgment in the same manner as if the cause had been tried at Nisi Prius, and that if in the plaintiff's favour, he might issue a writ of possession thereon, and proceed in the usual way for costs on such judgment; it was said by the court that if the plaintiff recovered on one only out of two demises, the defendant would be entitled to costs on the other; and though the arbitrator awarded no damages, Coleridge, J., was of opinion that in signing judgment, the plaintiff might enter it for a shilling damages, so as to warrant the judgment for costs (*l*).

Entering nominal damages to warrant judgment for costs.

On the reference at Nisi Prius of an indictment for a nuisance, if a verdict be taken for the Crown, subject to the award, and the arbitrator leave the verdict untouched, and direct that the nuisance shall be discontinued, the verdict remains to secure performance of the award, and the prosecutor, in case the defendant neglects to obey the arbitrator's directions, has the choice either of proceeding by attachment, or of moving for judgment on the verdict. In case the course is adopted of calling up the defendant for judgment, the motion should be made on affidavits, stating the award and the fact of the defendant's non-performance. The defendant should have notice of the motion, and should be furnished with copies of the affidavits on which the motion is to be made (*m*).

Moving for judgment on an indictment referred.

On a reference of any matter of appeal to a Court of General or Quarter Sessions, which may be referred under statute 12 & 13 Vict. c. 45, when the submission is effected before the appeal is entered, the award, by section 12, is to be as binding and effectual as a regular judgment of the Court of General or Quarter Sessions, and may be enrolled among the records of the court. When the submission is by order of the Court of Sessions, the award, on application made in due time, may be entered as the judgment of the Court of Sessions in the appeal, and shall be as binding and effectual to all intents as if given by the court (*n*).

Award on reference of matter of appeal to Quarter Sessions may be entered as judgment of the Court of Sessions.

(*l*) Doe d. Madkins *v.* Horner, 8 A. & E. 235.

(*m*) R. *v.* Gore, 8 Dowl. 102.

(*n*) See the Appendix of Statutes. See ante, p. 97. See also R. *v.* West Riding Justices, 34 L. J. N. S. M. C. 142; R. *v.* Middlesex Justices, L. R. 6 Q. B. 220.

SECTION IV.

ISSUING EXECUTION FOR THE AMOUNT AWARDED.

PART III. CH. VIII. S. 4.

No demand requisite before execution.

Though, to warrant the quasi criminal process of attachment, personal service of the award on the party is necessary, no such step needed to have been taken before issuing execution on the verdict for the amount awarded, as this was only civil process (*o*).

Interest on sum awarded.

Execution could issue only for the sum awarded. There could have been no additional charge for interest recoverable under this method of proceeding (*p*). If the party sought interest, he had to bring an action on the award, and then he could obtain both principal and interest (*q*). But now by R. S. C. (1883) Order XLII. r. 16, the writ of execution for the recovery of money may be indorsed with a direction to the sheriff to levy the amount due and four per cent. interest from the entry of the judgment.

Obtaining payment out of sum deposited in court.

Where an arbitrator awarded to the plaintiff one sum in respect of the matters in the action referred, and another sum in respect of matters not in the action, the court made absolute a rule entitling the plaintiff to have paid out of court to him the amount awarded in the action, out of a larger sum deposited by the defendant in court in lieu of bail; but they refused to engraft on the rule a direction to pay over the residue to the defendant, saying that there ought for that purpose to be a separate application by the defendant, which the plaintiff should have the opportunity of answering by affidavit (*r*).

Execution against a company by mandamus.

If an award order a public officer of a company, in whose name the company by statute are to sue and be sued, but who is exempted from personal liability, to pay money or costs in respect of an action referred, if the act give no

(*o*) Borrowdale *v.* Hitchener, 3 B. & P. 244, overruling Read *v.* Garnett, Barnes, 58. See R. S. C. 1883, Ord. XLII. rr. 1 *et seq.*

(*p*) Lee *v.* Lingard, 1 East, 400.

(*q*) Churcher *v.* Stringer, 2 B. & Ad. 777.

(*r*) Fowle *v.* Steinkeller, 9 Dowl. 1037.

power of taking out execution against the goods of the company, and no other mode exist of enforcing payment, a mandamus will lie to the treasurer and directors, commanding them to pay the sum awarded (*s*).

Against a local board of health.

A mandamus would lie to a local board of health to pay the compensation awarded by an arbitrator under the Public Health Act, 1848 (*t*).

Distress infinite against railway companies.

We have previously seen that by the stat. 22 & 23 Vict. c. 59, s. 26, it is provided that an award between railway companies under this act may be enforced by distress infinite and other process (*u*).

(*s*) R. *v.* St. Katherine's Dock Co., 4 B. & Ad. 360.

(*t*) Ringland *v.* Lowndes, 15 C. B. N. S. 173.

(*u*) See ante, P. III. ch. 7, s. 2, d. 3, p. 631.

CHAPTER IX.

SETTING ASIDE AN AWARD ON MOTION.

PART III. CH. IX.

Scope and contents of the ninth chapter.

HAVING discussed the various modes of enforcing valid awards, we have now to see how a party may obtain relief at law against one that is void or defective. This, if his objections be well founded, he may in general effect by the summary method pointed out in this chapter—of making a motion in court to set aside the award.

On what references the courts of law have jurisdiction to entertain the motion,—within what period after the award has been published the motion must be made,—and for what causes the courts will set the award aside,—are respectively set forth in the first three sections.

The other succeeding sections treat of,—the practical steps to be taken on making the application,—the motion to set aside,—the answer that may be given by the party supporting the award,—and the result of the motion.

SECTION I.

THE JURISDICTION OF THE COURTS TO SET AN AWARD ASIDE ON MOTION.

PART III. CH. IX. S. 1.

When submission by rule of court.

It is only when the submission is by rule of court, or can be made a rule of court, or has the effect of a rule of court (*a*), that the courts have any jurisdiction to set aside an award on motion (*b*). When the submission was by agreement out of court, the courts of common law had no authority

(*a*) Bennett *v.* Watson, 29 L. J. Ex. 357, S. C. 5 H. & N. 831; stat. 52 & 53 Vict. c. 49, s. 1.

(*b*) Mitchell *v.* Staveley, 16 East, 58.

to set aside an award until the statute 9 & 10 W. III. c. 15, which is now repealed (*c*).

For misbehaviour of the arbitrator, the only remedy was by bill in equity, since it could not be pleaded as a defence to an action on the award (*d*).

Stat. 9 & 10 W. III. c. 15.

The statute of William III. provided in effect, that in all cases where the submission contained an agreement for making it a rule of any of the superior courts of record, the award, if procured by corruption or undue means, should be set aside on complaint to the court of which the submission was agreed to be made a rule (*e*).

Setting aside: Arbitration Act, 1889.

Now by the Arbitration Act, 1889, s. 11 (2), "where an arbitrator or umpire has misconducted himself, or an arbitration or award has been improperly procured, the court may set the award aside." The words of this section seem large enough to apply to parol references, though probably not intended to do so.

Motion in court.

The jurisdiction to set aside an award, in old times, whether at common law or under the statute of William III., could alone be exercised on motion made for that purpose openly in the court of which the submission had been made a rule; for a judge at chambers had no power to set aside an award, though in vacation he could stay all proceedings under the award till the next term, in order to allow time for an application to avoid it to be made to the court (*f*). And it would seem that under the above-quoted section, the power of setting aside awards is still confined to the court alone.

Not before a judge at chambers.

Motion in divisional court of which submission is made rule.

Where the submission allowed the making it a rule of any divisional court of the High Court of Justice, and it was made a rule of the Queen's Bench Division, the Chancery Division refused to entertain a motion to set aside the award (*g*).

Court of Common Pleas at Lancaster.

It was held that an award made pursuant to an order of reference on the trial at the Lancaster assizes of a cause in the Common Pleas at Lancaster, could not be impeached on motion in the courts at Westminster, for they did not acquire

(*c*) 52 & 53 Vict. c. 49, s. 26.
(*d*) Veale *v.* Warner, 1 Saund. 327 *c*, notes.
(*e*) Dawson *v.* Sadler, 1 S. & S. 537.
(*f*) Cromer *v.* Churt, 15 M. & W. 310.
(*g*) Lomax Arbitration, 42 L. T. N. S. 391.

PART III. CH. IX. S. 1.

any jurisdiction for that purpose under the 4 & 5 W. IV. c. 62, s. 26, which empowered the superior courts at Westminster, after *trials* of actions in the Common Pleas at Lancaster, to grant new trials or enter verdicts or non-suits.

But in that particular case the application might have been made to any judge at chambers, all of the judges being appointed judges of the Common Pleas of Lancaster, under section 24 of the act (*h*).

Award in a county court.

The superior courts cannot set aside an award on a reference by a county court order. The county court judge alone has the power, on application made to him at the first court held more than a week after the entry of the award as the judgment (*i*).

SECTION II.

WITHIN WHAT PERIOD THE MOTION TO SET ASIDE AN AWARD MUST BE MADE.

PART III. CH. IX. S. 2.

Time for setting aside award under the statute.

1. *Time for moving to set aside.*]—It was enacted by the 9 & 10 W. III. c. 15, s. 2, that awards procured by corruption or undue means should be adjudged to be void, and be set aside, provided "complaint of such corruption or undue practice be made in the court where the rule is made for submission to such arbitration or umpirage, before the last day of the next term after such arbitration or umpirage made and published to the parties."

Time under Arbitration Act, 1889.

This Act has been repealed by the Arbitration Act, and now, by Order LXIV. r. 14 (1883), "An application to set aside an award may be made at any time before the last day of the sittings next after such award has been made and published to the parties." It was held that, under the Rules of 1875, which did not contain this provision, though the Judicature Act, 1873, abolished the old law terms generally with reference to the administration of justice, it still preserved them as the measure for determining the time within

(*h*) Byrne *v.* Fitzhugh, 5 Tyrw. 221.

(*i*) Mayer *v.* Farmer, L. R. 3 Ex. D. 235; stat. 9 & 10 Vict. c. 95, s. 77, re-enacted 51 & 52 Vict. c. 43, s. 104.

which motions must have been made under the statute (9 & 10 W. III. c. 15) for setting aside awards (*k*).

Old law terms.

The old law terms, under 11 G. IV. & 1 W. IV. c. 70, s. 6, and the 1 W. IV. c. 3, s. 3, were the following:— Hilary Term, which began on the 11th and ended on the 31st of January; Easter Term, which began on the 15th of April and ended on the 8th of May; Trinity Term, which began on the 22nd of May and ended on the 12th of June; and Michaelmas Term, which began on the 2nd and ended on the 25th of November. But if the whole or any number of the days intervening between the Thursday before and the Wednesday next after Easter day fell within Easter Term, though the days were part of the term, there were to be no sittings in banc on any of them, but the term was in such case to be prolonged and continued for such number of days of business as should be equal to the number of intervening days before mentioned, exclusive of Easter day; and the commencement of the ensuing Trinity Term was in such case to be postponed, and its continuance prolonged for an equal number of days of business. In case the last day of any term would have fallen on a Sunday, the Monday following was to be taken as the last day (*l*).

Limit applies whatever the ground of motion.

The courts laid it down that the limitation given by the statute of William III. applied to all objections, and that an award, however defective on its face, could not be set aside after the time allotted by the act (*m*). If, however, any attempt were made to enforce an award by attachment, the application might be resisted at any time, however late, for defects appearing on the face of the award (*n*).

Publication to the parties, notice of award made.

The old statute of William III. (*o*) provided that the time for setting aside an award should begin to run after the award was made "*and published to the parties.*" The new rule, Order LXIV. r. 14, also makes the time commence from publication of the award to the parties.

The limited period, therefore, is not necessarily to be

(*k*) Christ's Hospital, Brecknock *v.* Martin, 3 Q. B. D. 16.

(*l*) Burt, In re, 5 B. C. 668; Price *v.* Hughes, 1 Dowl. 448.

(*m*) Freame *v.* Pinnegar, 1 Cowp. 23.

(*n*) Pedley *v.* Goddard, 7 T. R. 73; Lowndes *v.* Lowndes, 1 East, 276; Auriol *v.* Smith, 1 Turn. & R. 121; Dubois *v.* Medlycott, Barnes, 55; Stephenson *v.* Browning, Barnes, 56; Zachary *v.* Shepherd, 2 T. R. 781.

(*o*) 9 & 10 W. III. c. 15.

computed from the making of the award, but from the publication of it to the parties.

An award is ordinarily said to be published as soon as it has been executed by the arbitrator and announced as his final determination, so that he no longer retains any power of alteration, and the instrument is complete as an award (*p*). But the publishing in this sense is not the publishing required by the statute, which demands a publishing *to the parties*. There is no publishing to the parties until they have notice that the award has been made (*q*). This notice is sufficient; and the time will run from the date of such notice, although it be not until long after that the party has intimation of the contents of the award, or is served with a copy of it (*r*).

Notice of award to be had on payment of excessive fee.

As in cases of references not under the statute the courts commenced the computation of the period allowed for setting aside the award from the publication to the parties by analogy to the statute (*s*), the following points decided on this head on submissions by common law may conveniently be noticed here. In a case in the Common Pleas it was laid down that an award was to be considered as published to the parties, when the parties had notice that it was ready for delivery on payment of the reasonable charges; and that when the arbitrator gave notice that the award was ready, but refused to deliver it except on payment of an alleged excessive charge, the court held that the award was not published until the arbitrator's charge had been taxed by the officer of the court (*t*).

But, in a subsequent case, the Court of Queen's Bench expressed their dissent from the above decision, and held that an award was published when the arbitrator gave notice that the award was ready to be delivered on payment of his charges, whether those charges were reasonable or not (*u*).

And in this view the Court of Exchequer concurred, on the ground that it led to less dispute afterwards; whereas the

(*p*) Brooke *v.* Mitchell, 6 M. & W. 473.

(*q*) Brooke *v.* Mitchell, 6 M. & W. 473; Potter *v.* Newman, 4 Dowl. 504.

(*r*) Hemsworth *v.* Brian, 7 M. & G. 1009.

(*s*) Potter *v.* Newman, 4 Dowl. 504.

(*t*) Musselbrook *v.* Dunkin, 9 Bing. 605.

(*u*) Macarthur *v.* Campbell, 5 B. & Ad. 518.

rule in *Musselbrook* v. *Dunkin* (*x*) would make the time for moving to set aside the award depend upon the variable time when the master might make his report as to the reasonableness of the charges (*y*).

In a more recent case the Court of Common Pleas seem to have held that an award was published by a notice that it was ready for delivery on payment of a specified sum for the arbitrator's charges, although it was suggested that that sum was excessive; for when the plaintiff moved to set aside the award which had been taken up by the defendant, and alleged as an excuse for not applying within the proper time after this notice of the award being ready for delivery, that the fee demanded by the arbitrator was extortionate, and that therefore he had not taken up the award, the court expressed a very decided opinion against the validity of the excuse, the party not having applied to the court to have the arbitrator's charges taxed by the master (*z*).

Whether the courts had a discretionary power of allowing further time than the statute of Will. III. prescribed for the application may be doubted.

Whether court can give further time for moving.

But now Order LXIV. r. 7, which enables the court or a judge to enlarge the time "appointed by these rules" for doing any act or taking any proceeding, even though the application is not made until after the expiration of the time appointed, has been held to allow the judge to give further time for moving to set aside an award after the prescribed time has elapsed (*a*).

In a case under the old law where one of the parties improperly kept the submission, and thus it was contended, prevented it being made a rule of court within the term following the making of the award, and rendered it impossible for the other party to apply to set aside the award within the old statutable time, Williams, J., on a motion for an enlargement on these grounds, made on the last day but one of the term, granted the party permission to move to set aside the award in the following term, and directed that, if a rule

(*x*) 9 Bing. 605.
(*y*) Brooke *v.* Mitchell, 6 M. & W. 473.
(*z*) Moore *v.* Darley, 1 C. B. 445.
(*a*) Oliver and Scott, In re, 43 Ch. D. 310, S. C. 59 L. J. Ch. 148.

nisi should then be granted, it should be dated as of the preceding term (*b*).

But the propriety of the above decision was questioned by Coleridge, J., on several occasions. That learned judge, remarking that the application in *Perring and Keymer, In re* (*c*), was ex parte, under a somewhat similar state of facts, came to a contrary decision, expressing strong doubts of the power of the courts to antedate the rule, and saying that he had no idea that the courts could dispense with the provisions of an Act of Parliament, though they might dispense with their own rules (*d*).

On a more recent occasion, where a party, on the last day but one of the term next after the award was made, asked leave to be allowed to move on the last day of term to set aside the award, on the ground that the affidavit on which the motion was intended to be grounded had not arrived from the country, Maule, J., refused the motion, saying that to allow it would be to repeal the act (*e*).

Drawing up rule embodying submission nunc pro tunc.

A subsequent decision in the Queen's Bench is apparently confirmatory of the above ruling. A rule nisi was obtained on the last day but one of term to set aside an award under the statute made in the previous vacation. The submission was not made a rule till after the term had expired. On an application in the following term to allow the rule embodying the submission to be drawn up as of the day on which the motion was made, and to enlarge the rule nisi then obtained, and to allow it to be drawn up on reading the rule founded on the submission so drawn up as prayed for, Erle, J., refused the motion, saying that the statute was precise in its terms, and that as the motion before the submission was made a rule could not be attended to by the court, and the time limited by the statute had expired, the party was precluded from moving for another rule to set the award aside. It appeared that the party moving had no copy of the submission, which was in the hands of the opposite party, who refused to make it a rule of court in time; but no application had been made

(*b*) Perring and Keymer, In re, 3 Dowl. 98.
(*c*) 3 Dowl. 98.
(*d*) Smith and Blake, In re, 8 Dowl. 133, S. C. 2 Jur. 1015; Reynolds *v.* Askew, 5 Dowl. 682.
(*e*) Evans *v.* Howell, In re, 4 M. & G. 767.

to the court to compel the latter to produce it for the purpose of having it made a rule (*f*).

Party applying before time expired.

More recently, however, the same learned judge drew an important distinction. On the last day but one of the term next after the making of the award, a party obtained a rule nisi for the other party to file the submission with the master, in order to its being made a rule of court as of the day on which the motion to set aside the award was made; and that the rule to set aside the award should be drawn up on reading such rule. The party applying had good ground for supposing that the other side, in whose hands the submission was, intended to make it a rule of court, and it was only by an accident that that result did not take place. Erle, J., making the latter rule absolute, observed, "The party has, within the time limited by the statute, applied to set aside the award, and also to make the submission a rule of court as of the same day on which the motion was to be made. The distinction between the present case and those which have been cited I take to be this: that here the party applying to set aside the award did take the initiative within the time limited by the statute, and that he was not able to make the submission a rule of court by reason of its being in the hands of the other party; whereas in the cases which have been referred to, the motion itself was made after the time limited by the statute. If there had been no reason for supposing that the submission would have been made a rule of court, so as to enable the party to move to set it aside within the limited time, I think a different answer must have been given to this motion" (*g*).

Notice of motion is application.

Since the Judicature Acts service of notice of motion to set aside the award was held a sufficient "complaint in the court" within the statute, and where it was made before the last day of the term following the publication of the award the court allowed the motion to be heard later (*h*). So, too, since the Arbitration Act, 1889, a notice of motion set down before the

(*f*) Ross *v.* Ross, 16 L. J. Q. B. 138, S. C. 4 D. & L. 648.

(*g*) Midland Rail. Co. *v.* Heming, 4 D. & L. 788, S. C. 11 Jur. 658.

(*h*) Huddersfield *v.* Jacomb, L. R. 17 Eq. 476; on appeal, L. R. 10 Ch. App. 92; Smith *v.* Parkside Mining Co., 6 Q. B. D. 67.

last day of the prescribed sittings is an application to set aside an award under Order LXIV. r. 14, and the motion is in time, though it does not come on for hearing till after the sittings (*i*).

Parties cannot extend the time by consent.

Where two terms had elapsed after the making of the award, the Court of Common Pleas refused to hear the motion, though both parties had agreed to the motion being then made (*k*).

Equity.

The rule was equally strict in the Chancery Division. If the complaint were made on the last day of the next term it was too late. The case of *Harvey* v. *Shelton* (*l*), where the motion was allowed to be made on the last day of term, was in a later case treated as if the proceeding had been by mistake (*m*).

The reference of a cause by agreement out of court was a reference under the statute of Will. III., and not at common law; and therefore the motion to set aside the award must have been made within the time given by the statute (*n*).

Limitation of time for moving at common law.

II. *When award in a cause at common law.*]—The reference of a cause by an order of a judge, or an order of Nisi Prius, or by a rule of court, was not a reference under the statute of Will. III., but by the common law power of the court, and the statutable limitation of time by that act did not necessarily apply (*o*): and the same limit did not attach in all cases (*p*). But R. S. C. 1883, Order LXIV. r. 14, seems to apply to these references as well as to those out of court, and makes the practice uniform.

Time for moving to enter verdict

When the award directed the verdict for the plaintiff to stand, subject to the opinion of the court, a motion to enter a

(*i*) Gallop *v.* Central Queensland Meat, &c. Co., 25 Q. B. D. 230, S. C. 59 L. J. Q. B. 460.

(*k*) North British Rail. Co. *v.* Trowsdale, 35 L. J. N. S. C. P. 262; S. C. L. R. 1 C. P. 401.

(*l*) 7 Beav. 455.

(*m*) Huddersfield *v.* Jacomb, L. R. 17 Eq. 476; on appeal, L. R. 10 Chanc. 92.

(*n*) Rushworth *v.* Barron, 3 Dowl. 317; Reynolds *v.* Askew, 5 Dowl. 682.

(*o*) Anderson *v.* Coxeter, 1 Stra. 301; Potter *v.* Newman, 4 Dowl. 504.

(*p*) Riccard *v.* Kingdon, 3 D. & L. 773; Thompson *v.* Jennings, 10 Moore, 119; Borrowdale *v.* Hitchener, 3 B. & P. 244; Allenby *v.* Proudlock, 4 Dowl. 54; Martin *v.* Burge, 6 N. & M. 201, S. C. 4 A. & E. 973; Hayward *v.* Phillips, 6 A. & E. 119; Rawsthorn *v.* Arnold, 6 B. & C. 629; Lyng *v.* Sutton, 5 Dowl. 39; Sell *v.* Carter, 2 Dowl. 245; Moore *v.* Butlin, 7 A. & E. 595.

verdict for the defendant pursuant to a point raised on the award (whether the arbitrator were or were not specially empowered to raise questions) must have been made within the same time as a motion to set aside the award; for the arbitrator having expressly decided for the plaintiff, the application was in fact an application to set aside his award; and both terms might have been included in one rule, either to set aside the award, or to enter the verdict, according to the opinion of the court on the facts found (*q*).

Pursuant to point stated in award.

III. *When further time allowed.*]—In all cases of references by common law, whether the prescribed limit was that adopted from analogy to a verdict, or that founded on analogy to the statute of William III., the courts in the exercise of their discretion would, on sufficient grounds being shown to them, allow a further period for making the application to set aside the award (*r*). And now R. S. C. 1883, Order LXIV. r. 7, seems to extend the discretion of the court to all awards (*s*). Where an award was made on reference of a cause at Nisi Prius, the court, on a statement of facts showing that it was impossible for the attorney to prepare a case and get counsel's opinion on the validity of the award within the first four days of term, on application for that purpose made on the second day of term, enlarged the time for making the motion to a day later than the fourth day of term (*t*).

Discretionary to allow further time to move.

When no time to get counsel's opinion.

In a later case, on a reference by judge's order of a cause and all matters in difference, where the defendant, in whose favour the award was, improperly kept the order of reference from the plaintiff and prevented its being made a rule of court till too late, Patteson, J., granted a rule giving the plaintiff an additional term to move to set aside the award, and directed that the rule to set aside the award, if granted, should bear date on the day of the application for the enlargement. The motion for leave to move (being made in

Party keeping back order of reference.

(*q*) Paxton *v.* Great North of England Rail. Co., reported in Riccard *v.* Kingdon, notes, 3 D. & L. 773; Anderson *v.* Fuller, 4 M. & W. 470.

(*r*) Allenby *v.* Proudlock, 4 Dowl. 54; Rogers *v.* Dallimore, 6 Taunt. 111; Synge *v.* Jervoise, 8 East, 465; Worrall *v.* Deane, 2 Dowl. 261; Hemsworth *v.* Brian, 7 M. & G. 1009.

(*s*) Oliver *v.* Scott, 43 Ch. D. 310, S. C. 59 L. J. Ch. 148.

(*t*) Bennett *v.* Skardon, 5 M. & R. 10.

Easter Term) asked leave to move in Trinity Term, but the argument on that rule not coming on until Michaelmas Term, it having been enlarged by consent, it was urged that the court would not make absolute a rule which could have no effect when granted, as Trinity Term had elapsed; but the court intimated that they thought they had power to mould the rule accordingly, as it had stood over by consent; and the rule was ultimately drawn up allowing the party to make his motion to set aside the award in the Michaelmas Term then instant (*u*).

Counsel failing to move in time.

Where a whole term had elapsed after an award made on a submission by a judge's order, the court entertained the motion in the second term, and set aside the award, the merits being clear, and the counsel having been instructed to move earlier, but having for some cause failed to do so (*x*).

First rule discharged on technical grounds.

Where the rule to set aside the award was enlarged by consent to beyond the limited period, and then ultimately discharged on a preliminary technical objection, Patteson, J., being of opinion that had the rule not been so enlarged, but disposed of on the same ground within the first term, the party might within that term have moved again, thought this a sufficient reason for allowing a second application as soon as the first rule was discharged (*y*).

Stating excuse for the delay.

But a party who would take the case out of the ordinary rule must show clearly to the court why the application is made too late. Hence, if after the usual period information be obtained of facts which afford grounds for impeaching the award, the rule will be refused, unless the party positively allege that he did not know of the circumstances on which he relies in time (*z*). It is no sufficient reason for delay on the part of the plaintiff, that he failed to move in time, as the defendant had misled him, by stating that he, the defendant, intended to move to set the award aside; for the plaintiff ought not to have relied on the defendant, but to have proceeded himself (*a*).

Party misled by opponent.

Bad health.

In a more recent case the Court of Exchequer considered that an affidavit that the applicant was in bad health, and

(*u*) Bottomley *v.* Buckley, 4 D. & L. 157.

(*x*) Rogers *v.* Dallimore, 6 Taunt. 111.

(*y*) Sherry *v.* Oke, 3 Dowl. 349.

(*z*) Reynolds *v.* Askew, 5 Dowl. 682.

(*a*) Emet *v.* Ogden, 7 Bing. 258.

unfit on that account to attend to business, did not excuse a delay; and Pollock, C. B., stated the rule could not be relaxed, except a case of fraud was made out (*b*).

Arbitrator demanding excessive fee.

The cases which have been previously cited as showing that an award is to be considered as published to the parties, although it can only be had on payment to the arbitrator of an extortionate fee, prove also that the fact of the party having on that ground delayed to take up the award, and so remaining ignorant of its contents, is an insufficient excuse for not applying to set aside the award in time. If, however, the party had had the arbitrator's charges taxed, and had demanded the award, tendering the sum found reasonable by the master, the court perhaps would have granted some indulgence if the arbitrator's continued refusal to deliver the award had obstructed the party's moving in due course (*c*).

Recent appointment of assignee.

Where an arbitrator made an award after one of the parties became insolvent, and the assignee was not appointed until two terms had expired, the court, it seems, would not hear him, although he moved to set aside the award immediately on his appointment (*d*).

Bankruptcy.

So the circumstance that a fiat in bankruptcy had issued against the plaintiff was no reason for extending the time (*e*).

Time under the Lands Clauses Act.

IV. *When award under the Lands Clauses Act.*]—When an award is made under the Lands Clauses Consolidation Act, 1845, it was held before the R. S. C. 1883, that the motion to set it aside must be made within the period limited by the statute 9 & 10 W. III. c. 15, for setting aside awards under that act (*f*). Now there seems no reason why the time for setting aside the award should not be the same as in other cases, Order LXIV. r. 14, being general in its language, and sect. 24 of the Arbitration Act, 1889, does not apply in terms to this point.

(*b*) Guadiano *v.* Brown, 2 Jur. N. S. 358.

(*c*) Macarthur *v.* Campbell, 5 B. & Ad. 518; Moore *v.* Darley, 1 C. B. 445; Musselbrook *v.* Dunkin, 9 Bing. 605.

(*d*. Hobbs *v.* Ferrars, 8 Dowl. 779.

(*e*) Hemsworth *v.* Brian, 7 M. & G. 1009.

(*f*) Harper *v.* Great Eastern Rail. Co., L. R. 20 Eq. 39. See Huddersfield *v.* Jacomb, L. R. 17 Eq. 476; on appeal, L. R. 10 Chanc. 92.

SECTION III.

FOR WHAT CAUSES AN AWARD MAY BE SET ASIDE ON MOTION.

PART III. CH. IX. S. 3.

1. *Where the conduct of the arbitrator is corrupt or irregular.*] —By the Arbitration Act, 1889, s. 11 (2), where an arbitrator or umpire has misconducted himself, or an arbitration or award has been improperly procured, the court may set the award aside. We may remark as a general rule that every ground of relief in equity against an award has always been held to be equally open in the courts of common law on motion in a summary way to set the award aside (*g*).

All equitable grounds available.

References by compulsion.

An award on a compulsory reference under the Common Law Procedure Act, 1854, could be set aside only on the same grounds as awards on references by agreement (*h*).

Error in law or fact.

In neither class of arbitrations could an award be impeached on the ground that it was an erroneous decision in law or fact when the alleged error did not appear on the face of the award (*i*). But by Order LIX. r. 3, "where a compulsory reference to arbitration has been ordered, any party to such reference may appeal from the award or certificate of the arbitrator or referee upon any question of law; and on the application of any party the court may set aside the award on any ground on which the court might set aside the verdict of a jury. Such appeal shall be to a Divisional Court who shall have power to set aside the award or certificate, or to remit all or any part of the matter in dispute to the arbitrator or referee, or to make any order with respect to the award or certificate, or all or any of the matters in dispute that may be just."

Compulsory references under Arbitration Act, 1889.

The decision by the Divisional Court will be final unless special leave be given to appeal (*k*).

Corruption or partiality of arbitrator.

In every court of law or equity the award will be set aside

(*g*) R. *v.* Wheeler, 3 Burr. 1257; Lingood *v.* Eade, 2 Atk. 501.

(*h*) Hogg *v.* Burgess, 27 L. J. Ex. 318, S. C. 3 H. & N. 293; Holgate *v.* Killick, 31 L. J. Ex. 7; Mundy *v.* Bluck, 9 C. B. N. S. 557, S. C. 30 L. J. C. P. 193; Holloway *v.* Francis, 9 C. B. 559; Brown *v.* Hellaby, 26 L. J. Ex. 217, S. C. 1 H. & N. 729.

(*i*) Baggalay *v.* Borthwick, 10 C. B. N. S. 61, S. C. sub nom. Baguley *v.* Markwick, 30 L. J. C. P. 342.

(*k*) Judicature Act, 1884, 47 & 48 Vict. c. 61, s. 8.

on motion, if it be proved that the arbitrator is corrupt or partial (*l*), or that he is secretly interested in the subject referred (*m*). Oral evidence to show that the arbitrator after the award had admitted that he had been bribed, was held not sufficient to set aside the award, the arbitrator himself not being called (*n*).

Evidence of alleged admissions.

There may be ample misconduct in a legal sense to make the court set aside an award, even where there is no ground for imputing the slightest improper motive to the arbitrator (*o*). Thus, the award will be set aside if the arbitrator refuse to postpone a meeting for the purpose of allowing a party time to get counsel on his part, where the other side unexpectedly appears by counsel (*p*); so if he receives affidavits instead of vivâ voce evidence, when he is directed to examine the witnesses on oath (*q*); but not if he omit to swear the witnesses and the party at the meeting do not request him to administer the oath, or after objecting, subsequently acquiesce in the mode of examination (*r*).

Legal misconduct of arbitrator.

Refusing time to get counsel.

Omitting to swear witnesses.

The award may be impeached if the arbitrator make his award without having heard all the evidence (*s*), or having allowed the party reasonable opportunity of proving his whole case (*t*). So, also, if, contrary to the principles of natural justice, he examine a witness or a party privately or in the absence of his opponent; unless the irregularity be subsequently waived by the parties (*u*).

Not hearing case.

Examining witness, party absent.

If the arbitrator proceed ex parte without sufficient cause or without giving the party absenting himself clear notice of his intention so to proceed, the award will be avoided (*x*). So, likewise, if he refuse to hear evidence on a claim within scope of the reference, on a mistaken supposition that it is

Proceeding ex parte improperly.

Refusing to consider a matter in difference.

(*l*) Tittenson *v.* Peat, 3 Atk. 529; Morgan *v.* Mather, 2 Ves. Jr. 15.

(*m*) Earle *v.* Stocker, 2 Vern. 251.

(*n*) Whiteley *v.* Roberts, W. N. (1891) 3.

(*o*) Phipps *v.* Ingram, 3 Dowl. 669.

(*p*) Whatley *v.* Morland, 2 Dowl. 249. See P. II. ch. 4, s. 1, d. 2, p. 173.

(*q*) Banks *v.* Banks, 1 Gale, 46.

(*r*) Ridoat *v.* Pye, 1 B. & P. 91. See P. II. ch. 4, s. 1, d. 5, p. 182.

(*s*) Phipps *v.* Ingram, 3 Dowl. 669.

(*t*) Pepper *v.* Gorham, 4 Moore, 148; Maunder, In re, 49 L. T. 535. See P. II. ch. 4, s. 1, d. 6, p. 188.

(*u*) Dobson *v.* Groves, 6 Q. B. 637; Harvey *v.* Shelton, 7 Beav. 455. See P. II. ch. 4, s. 1, dd. 8, 9, pp. 191, 194.

(*x*) Gladwin *v.* Chilcote, 9 Dowl. 550. See P. II. ch. 4, s. 1, d. 10, p. 197.

not within it (*y*); but not if he erroneously reject admissible or receive inadmissible evidence (*z*). His refusing to hear additional evidence tendered, when the whole case is referred back to him by the court, is fatal (*a*), but not so when the award is sent back with a view to a particular amendment only being made (*b*).

One of several arbitrators using false case and opinion.

When there are several arbitrators, if one of them take counsel's opinion on an incorrect statement of the facts, and knowingly act upon it, the award will be set aside, but not if he take an opinion on a case truly drawn up (*c*).

Delegating authority to one another.

So if one delegate his authority of deciding a point of law to another absolutely (*d*), but not if he merely give up his own opinion to the other (*e*).

Two of three arbitrators acting alone.

So, also, if they execute the award separately (*f*). Even when the submission provides that an award made by any two out of the three arbitrators shall be valid, if two of them hold meetings alone, without notice to the third, the award may be impeached; but not if after notice the latter stay away (*g*); so it will be bad, if the two exclude the third from the meetings by force or fraud, or make an award without first taking his opinion (*h*).

Arbitrators appointing umpire by lot.

An umpirage, or award of an umpire, may be set aside, if the two arbitrators appoint the former by lot and not by choice (*i*), unless both nominees are acknowledged to be fit to be umpires (*k*), or the parties have consented to that mode of appointment (*l*).

Umpire hearing interested arbitrator.

Where an umpire sat with arbitrators, one of whom was secretly interested, the umpire's award was set aside (*m*).

Umpire not re-hearing case.

So also, if the umpire make his award, refusing to rehear the evidence, his decision will be set aside; but the

(*y*) Samuel *v.* Cooper, 2 A. & E. 752.

(*z*) Hagger *v.* Baker, 14 M. & W. 9. See P. II. ch. 4, s. 1, d. 11, p. 199.

(*a*) Nickalls *v.* Warren, 6 Q. B. 615.

(*b*) Howett *v.* Clements, 1 C. B. 128. See P. II. ch. 10, s. 2, p. 489.

(*c*) Hare, In re, 6 Bing. N. C. 158. See P. II. ch. 4, s. 2, d. 3, p. 211.

(*d*) Little *v.* Newton, 9 Dowl. 437.

(*e*) Eardley *v.* Steer, 4 Dowl. 423. See P. II. ch. 4, s. 3, d. 3, p. 217.

(*f*) Wade *v.* Dowling, 4 E. & B. 44.

(*g*) Dalling *v.* Matchett, Willes, 215.

(*h*) Templeman and Reed, In re, 9 Dowl. 962. See P. II. ch. 4, s. 3, d. 5, p. 219.

(*i*) Cassell, In re, 9 B. & C. 624.

(*k*) Pescod *v.* Pescod, W. N. (1888) 2.

(*l*) Tunno and Bird, In re, 5 B. & Ad. 488. See P. II. ch. 4, s. 4, d. 3, p. 237.

(*m*) Blanchard *v.* Sun Fire Office, 6 Times L. R. 365.

award will be sustained if the parties, by the submission, or by their conduct, have agreed to relieve him from the duty of re-examining the witnesses (*n*).

Erroneous judgment of arbitrator.

II. *When the award a mistaken decision in law or fact.*]—On a voluntary submission, an award, good on its face, cannot be set aside for an erroneous judgment of the arbitrator on a question of law; nor will the court review his decision as to the facts, or allow the merits of the case to be gone into (*o*); although in very early times the Court of Chancery took upon itself to examine the propriety of the arbitrator's decision as to the amount of damages, and set aside the award where the damages awarded were deemed excessive (*p*). We have seen above, p. 664, that on a compulsory reference the case is different.

Arbitrator deciding on legality of contract.

The court on a voluntary reference will not set aside an award on a suggestion that the arbitrator has allowed in account premiums of insurance on an illegal voyage to a hostile port, the legality of the ground of the insurance being for the consideration of the arbitrator (*q*).

Whether award set aside for mere mistake of arbitrator.

When the arbitrator has made a mere mistake in the computation of the amount awarded, intending to give a different sum than that set down in the award, the present inclination of the courts of law is to hold that the award cannot on that account be set aside. The question how far an award is impeachable for a mistake, either apparent on the face of the instrument or not, whether made out by extrinsic statements of the arbitrator, or raised purposely in his award for the opinion of the courts, has been already discussed at length (*r*).

The later decisions in equity seem to enable one to pronounce, that the modern decisions of the common law courts on this head will meet with the sanction and adoption of the equity judges, except that the award will be set aside in

(*n*) Salkeld and Slater, In re, 12 A. & E. 767; Adams *v.* Great North of Scotland Rail. Co. (1891), 1 A. C. 31. See P. II. ch. 4, s. 4, d. 5, p. 242.

(*o*) Lancaster *v.* Hemington, 4 A. & E. 345. See P. II. ch. 5, s. 8, d. 1, p. 303.

(*p*) Cooper *v.* ——, 3 Rep. in Chanc. 42, 76, A.D. 1672, S. C. 2 Vern. 251; 1 Eq. Cas. Ab. 49; Younge *v.* Cooke, 3 Rep. in Chanc. 45, 82; Brown *v.* Brown, 1 Vern. 157, A.D. 1683.

(*q*) Wohlenberg *v.* Lageman, 6 Taunt. 250.

(*r*) Phillips *v.* Evans, 12 M. & W. 309. See P. II. ch. 5, s. 8, p. 303.

equity, where the mistake is admitted by the arbitrator. But the question will rarely arise in voluntary references out of court, for the arbitrator there may amend a clerical mistake in his award (*s*).

Void award when set aside.

III. *When the award is a nullity.*]—If the award be altogether void, and can be considered a nullity, and nothing can be done upon it but by suit, as where the arbitrator's authority has been revoked, the court will not usually interfere to set it aside, because any suit brought to enforce it must fail. But there is an exception, where something may be done under the award, which renders the interference of the court necessary; for instance, where the award ordered a verdict to be entered, the court would set it aside, though the submission had been revoked; since, if the award were allowed to stand, the party would be entitled to judgment, and might issue execution (*t*).

Award made after time expired.

Or revocation.

An award made after the time for making it has expired, will often be set aside (*u*), unless the conduct of the parties have amounted to an enlargement of the period (*x*); so also, as just noticed, will an award made after the submission has been revoked, either by the will of the party or by his death (*y*).

Improper stamp.

The want of a proper stamp is no ground for setting aside an award, when no steps have been taken to enforce it (*z*).

Deficient recital.

Nor can it be attacked for the want of a recital to show that the arbitrator has jurisdiction (*a*), nor for a false recital (*b*).

Two awards, each deciding part, no final award.

IV. *When the award is not final.*]—When the award is not final it will be set aside. If, without special power, the arbitrator make two awards, each deciding part of the matters referred, and not one entire award on all together, both may

(*s*) 52 & 53 Vict. c. 49, s. 7 (c).

(*t*) Doe d. Turnbull *v.* Brown, 5 B. & C. 384; Hobbs *v.* Ferrars, 8 Dowl. 779; Worrall *v.* Deane, 2 Dowl. 263.

(*u*) Swinford and Horn, In re, 6 M. & S. 226. See P. II. ch. 3, s. 1, d. 2, p. 136.

(*x*) Hallett *v.* Hallett, 7 Dowl. 389. See P. II. ch. 3, s. 2, d. 2, p. 148.

(*y*) Clapham *v.* Higham, 1 Bing. 87; Potts *v.* Ward, 1 Marsh, 366. See P. II. ch. 3, s. 3, d. 8, p. 166.

(*z*) Preston *v.* Eastwood, 7 T. R. 95.

(*a*) George *v.* Lousley, 8 East, 13. See P. II. ch. 5, s. 2, p. 257.

(*b*) Trow *v.* Burton, 1 C. & M. 533. See P. II. ch. 5, s. 2, p. 258.

be set aside, for there is no one final award on all the subjects (*c*). So also if the award fail to decide on all the matters referred for determination (*d*), whether the omission appear on the face of the award, or be shown to the court by affidavit; but it will not be set aside if the question undecided were not notified to the arbitrator as a matter in difference, or the parties showed by their conduct that they did not mean him to decide it (*e*). So it will be avoided if it reserve a point for the future decision of the arbitrator, or delegate the determination of it to another (*f*); but no objection attaches to delegating to the master the taxing of costs, or appointing a stranger to perform a mere ministerial duty (*g*).

Award omitting to decide all matters.

Reserving or delegating decision.

It will also be set aside as not being final, if, when it ought, for the purpose of costs, to show in whose favour the cause is decided, it award merely that the proceedings in the cause are to cease (*h*); or if it fail to decide every issue joined in the cause (*i*). Directing a nonsuit was not final (*k*). But a party in whose favour a mistake is made cannot avail himself of it to set aside the award. Thus a defendant cannot urge that the arbitrator has improperly divided a plea of set-off, awarding part of the issue raised on that plea in his favour, and part for the plaintiff: whereas the whole issue ought to have been found for the latter (*l*).

Not deciding the cause nor all the issues properly.

Mistake in favour of party moving.

The award would have been set aside in the Court of Queen's Bench (but not in the Exchequer) if it decided a cause only by an unauthorised direction that a verdict be entered (*m*). If it omit to award damages on the issues found for the plaintiff (*n*), it may be impeached, but not if there be an issue found for the defendant on a plea covering the whole

Directing unauthorised entry of verdict.

(*c*) Winter *v.* Munton, 2 Moore, 723. See P. II. ch. 5, s. 3, p. 260.

(*d*) Samuel *v.* Cooper, 2 A. & E. 752. See P. II. ch. 5, s. 4, d. 2, p. 266.

(*e*) Rees *v.* Waters, 16 M. & W. 263. See P. II. ch. 5, s. 4, d. 1, p. 261.

(*f*) Tandy *v.* Tandy, 9 Dowl. 1044.

(*g*) Pedley *v.* Goddard, 7 T. R. 73. See P. II. ch. 5, s. 4, dd. 10, 11, pp. 281, 283.

(*h*) Hunt *v.* Hunt, 5 Dowl. 422. See P. II. ch. 6, s. 2, d. 1, p. 338.

(*i*) Kilburn *v.* Kilburn, 13 M. & W. 671. See P. II. ch. 6, s. 2, dd. 3, 4, pp. 340, 342.

(*k*) Wild *v.* Holt, 9 M. & W. 161.

(*l*) Moore *v.* Butlin, 7 A. & E. 595.

(*m*) Hawkyard *v.* Stocks, 2 D. & L. 936; Cock *v.* Gent, 13 M. & W. 364. See P. II. ch. 6, s. 3, d. 3, p. 354.

(*n*) Wood *v.* Duncan, 7 Dowl. 91.

cause of action (*o*). It might be assailed for omitting to assess damages on a new assignment, on which the plaintiff had signed judgment for want of a plea (*p*); and probably in many cases for not assessing contingent damages on a demurrer (*q*).

Omitting to assess damages properly.

Not finding balance of defendant's set-off.

When all matters in difference, as well as the cause, are referred, and the arbitrator finds for the defendant on the general issue in debt, the award may be set aside for failing further to ascertain the amount of the defendant's set-off (*r*).

Directing unwarranted entry of judgment.

Deciding a cause by an unwarranted direction that a judgment be entered, was a sufficient ground of motion, but not if the award also showed by other provisions how the cause had been determined (*s*).

Judgment non obstante veredicto.

If the arbitrator, when empowered, neglected, although requested, to decide a question raised by the pleadings as to the plaintiff's right to judgment non obstante veredicto, the award would probably have been set aside (*t*).

Omitting to award rightly on costs.

When the arbitrator is bound to award some costs, and gives none, or to ascertain their amount, and fails to do so, a motion may be made to impeach his decision (*u*).

Not deciding cause separately from other matters.

On a general reference, when the costs of the cause abide the event of the award as to the cause, it will be a good ground of motion, that the arbitrator has awarded one gross sum in respect of the cause and all other matters together, since it cannot be seen for whom the cause is decided (*x*); or if the cause be determined for the plaintiff, since it cannot be said what amount of damages he has recovered in the action, so as to give information on what scale his costs are to be taxed (*y*).

Party moving not injured by omission.

But if no injury can result to the defendant from the omission to separate the damages, the defendant will not be allowed to impeach the award for this defect (*z*).

(*o*) Warwick *v.* Cox, 1 D. & L. 986. See P. II. ch. 6, s. 4, p. 356.

(*p*) Wykes *v.* Shipton, 8 A. & E. 246.

(*q*) Cooper *v.* Langdon, 9 M. & W. 60.

(*r*) Maloney *v.* Stockley, 2 Dowl. N. S. 122. See P. II. ch. 6, s. 4, p. 361.

(*s*) Doe d. Body *v.* Cox, 4 D. & L. 75. See P. II. ch. 6, s. 5, d. 1, p. 362.

(*t*) Allen *v.* Lowe, 4 Q. B. 66. See P. II. ch. 6, s. 5, d. 2, p. 365.

(*u*) Morgan *v.* Smith, 1 Dowl. N. S. 617. See P. II. ch. 7, s. 1, d. 3, p. 381.

(*x*) Crosbie *v.* Holmes, 3 D. & L. 566.

(*y*) Lund *v.* Hudson, 1 D. & L. 236. See P. II. ch. 7, s. 2, d. 2, p. 390.

(*z*) Taylor *v.* Shuttleworth, 6 Bing. N. C. 277.

If an award respecting partnership matters be not final for want of providing for the case of a deficiency of assets, and there be a deficiency in fact shown to the court, it will be set aside (*a*).

Award not providing for deficiency of partnership funds.

v. *When the award is uncertain.*]—When the award is uncertain it may be set aside. Thus, if it be doubtful whether the award has decided the questions referred (*b*), or how it has determined them (*c*); so, when it leaves a disputed amount of money, other than costs, unascertained (*d*); so when it does not specify which of two persons is to do a certain act (*e*); or, when empowered to give general directions what shall be done, the arbitrator fails to prescribe them with sufficient particularity (*f*).

As to amount.

Not specifying persons.

Not precise in its directions.

On a reference by an executor, an award ascertaining a balance due from the testator, and ordering the executor to pay the amount "out of the assets," will not be set aside as uncertain for omitting to ascertain whether there are assets (*g*).

Not finding on assets.

When the award is substantially inconsistent and repugnant, it will be set aside (*h*).

Inconsistent and repugnant.

vi. *When the arbitrator has exceeded his authority.*]—That the arbitrator has exceeded his authority is often a good ground of motion. It is so in all cases, unless the bad part is clearly separable from the rest of the award, and does not affect the good part. If he award on matters not submitted to him (*i*), or award as to costs without authority (*k*), or improperly direct costs to be taxed as between solicitor and

Excess of authority.

As to subject-matters.

As to costs.

(*a*) Routh *v.* Peach, 2 Anst. 519, S. C. 3 Anst. 637.

(*b*) Tribe *v.* Upperton, In re, 3 A. & E. 295.

(*c*) Martin *v.* Burge, 4 A. & E. 973. See P. II. ch. 5, s. 5, d. 1, p. 287.

(*d*) Marshall and Dresser, In re, 3 Q. B. 878. See P. II. ch. 5, s. 5, dd. 2, 3, pp. 288, 290.

(*e*) Lawrence *v.* Hodgson, 1 Y. & J. 16. See P. II. ch. 5, s. 5, d. 5, p. 294.

(*f*) Stonehewer *v.* Farrar, 6 Q. B. 730. See P. II. ch. 8, s. 2, d. 3, p. 437.

(*g*) Love *v.* Honeybourne, 4 D. & R. 814.

(*h*) Ames *v.* Milward, 8 Taunt. 637. See P. II. ch. 5, s. 7, p. 301.

(*i*) Tandy *v.* Tandy, 9 Dowl. 1044; Warren *v.* Green, Ca. temp. Finch, 141; Morgan *v.* Mather, 2 Ves. Jr. 15. See P. II. ch. 5, s. 9, p. 325.

(*k*) Boodle *v.* Davies, 3 A. & E. 200. See P. II. ch. 7, s. 2, d. 1, p. 389.

client (*l*), the award is open to objection; so, if without power to say what shall be done by the parties, he give unwarranted directions as to the replacement of some fixtures (*m*); or if, instead of deciding whether a title to an estate be good, he award that the party shall take it with all faults on receiving an indemnity (*n*); so if he attempt to regulate the payment of sums to come due in future, the submission being confined to present differences (*o*); so also if he award all the partnership stock and effects to one partner, when the submission contemplated a division between the two (*p*); so if of his own authority he appoint a receiver to collect and apply money of a firm pursuant to an award (*q*); so likewise if he direct a party to do an act, which would be a trespass on the property of another, or an act of waste, for which he would be liable to his landlord (*r*).

As to directions.

As to future payments.

As to partnership effects.

Appointing a receiver.

Ordering trespass or waste.

Excess in favour of party moving.

The excess will not in all cases form a ground for setting aside an award. Thus, where a party who had claimed compensation under the Lands Clauses Consolidation Act for his reversionary interest in some land required by a railway company, and who had demanded that the amount should be settled by arbitration, afterwards objected to the award, that the award assumed him to be in possession, and gave him a compensation for the immediate possession of the land, which was an excess of authority on the part of the umpire; the court said that the answer to that objection was, that such assumption, if actually made, was in his favour and to his advantage, and was therefore no matter of complaint for him (*s*).

Party deceiving opponent or arbitrator.

VII. *Where party or witness is in fault, or new matter discovered.*]—If either party be guilty of fraudulent concealment of matters which he ought to have disclosed, or if he

(*l*) Sockham *v.* Babb, 8 Dowl. 167. See P. II. ch. 7, s. 1, d. 3, p. 383.

(*m*) Price *v.* Popkin, 10 A. & E. 139.

(*n*) Ross *v.* Boards, 8 A. & E. 290. See P. II. ch. 8, s. 1, d. 1, p. 412.

(*o*) Morphett, In re, 2 D. & L. 967. See P. II. ch. 8, s. 1, d. 2, p. 420.

(*p*) Wood *v.* Wilson, 2 C. M. & R. 241. See P. II. ch. 8, s. 1, d. 4, p. 422.

(*q*) Mackay, In re, 2 A. & E. 356. See P. II. ch. 8, s. 4, d. 1, p. 446.

(*r*) Turner *v.* Swainson, 1 M. & W. 572. See P. II. ch. 8, s. 4, d. 3, p. 451.

(*s*) Bradshaw's Arbitration, 12 Q. B. 562.

wilfully mislead or deceive the arbitrator, the award may be set aside (*t*).

Whether discovery of new matter ground for setting aside award.

How far, when there has been no fraud or concealment, the mere discovery of new material matter will be a ground for setting aside the award, does not seem clear. According to the opinion of an Irish Court of equity, if a claim within the scope of the reference have been accidentally omitted to be brought forward, relief may be had in equity (*u*). In the English Court of Exchequer, however, it was considered as very doubtful, whether the fact that a material part of his case was not known to a plaintiff in a suit till after the award was made, would be sufficient to let in further inquiry (*x*).

On one occasion, Lord Hardwicke, C., said, "I will not say that in no case whatever new matter discovered after the award will not affect it. But I do not know any case where it has been allowed. An award differs from a decree in this respect. A decree is compulsory; the parties cannot bring on their cause or delay it before the court. But an award is the judgment of judges of the parties' own choosing, and they need not submit until fully approved of the merits of their case, and if they do, it is their own fault. But justice in courts must be done in its course, and neither party can prevent it. It seems, therefore, of dangerous consequence to say that new matter discovered will affect an award, as it will do a decree upon a bill of review" (*y*).

New evidence.

In another case, it is laid down by a court of common law, that it is not a sufficient ground for setting aside an award to allege merely that new evidence has been discovered since the award has been made. The affidavit must show what it is, that there is some surprise, and that it is such evidence as a reasonable diligence could not have obtained (*z*).

Surprise.

It is no ground for setting aside an award, that a party has been surprised by an unexpected case set up by his

(*t*) South Sea Co. *v.* Bumstead, 2 Eq. Cas. Ab. 80; Mitchell *v.* Harris, 2 Ves. Jr. 129 a; Metcalfe *v.* Ives, 1 Atk. 63; Gartside *v.* Gartside, 3 Anst. 735.

(*u*) Brophy *v.* Holmes, 2 Molloy, 1.

(*x*) Gartside *v.* Gartside, 3 Anst. 735.

(*y*) Ld. Montgomery *v.* Buckley, Joddrell's MSS., cited in Heming *v.* Swinnerton, 1 Coop. C. C. 418, note.

(*z*) Eardley *v.* Otley, 2 Chit. 42; Reynolds *v.* Askew, 5 Dowl. 682.

opponent on the reference, which he believes not to be true, if he did not apply to the arbitrator to postpone making his award, and to give time for inquiry (*a*).

Discovery party examined a felon.

The Court of Common Pleas refused to set aside an award on the ground that the parties had been examined by consent, and that subsequent to the award the plaintiff had discovered that the defendant was a convicted felon, then incompetent as a witness. The court laid some stress on the fact that the arbitrator stated that his judgment was founded wholly independently of the defendant's testimony (*b*).

Witness having given different evidence elsewhere.

So, too, the court refused to set aside on the ground merely that it was discovered after the award that a material witness had given evidence on another occasion apparently contradictory to that given by him before the arbitrator (*c*).

Married women or infants parties.

An award will not be set aside on the ground of married women or infants being parties to the submission, if the party objecting were aware of their condition when he entered into the reference (*d*), nor will it be set aside because an infant is ordered to pay costs (*e*).

Party insolvent.

After an extent in aid issued against the defendant, the prosecutor and the latter referred the question of the debt. Pending the reference, the defendant, who had inserted the debt in his schedule, was discharged by the Insolvent Debtors Act (1 G. IV. c. 119). The crown being no party to the reference, it was held that the defendant was discharged by his insolvency, and the award subsequently made was set aside (*f*).

Perjury of witness.

On one occasion, the court refused a motion to set aside an award, on the allegation that a witness had wilfully and corruptly given false evidence before the arbitrator, saying that proceedings might be taken against the witness for perjury, and that it would be setting a mischievous example to interfere at that time (*g*).

(*a*) Solomon *v.* Solomon, 28 L. J. Ex. 129.

(*b*) Smith *v.* Sainsbury, 9 Bing. 31.

(*c*) Glasgow, &c. Rail. Co. *v.* London & North Western Rail. Co., 52 J. P. 215.

(*d*) Warner, In re, 2 D. & L. 148; Wrightson *v.* Bywater, 3 M. & W. 199; Jones *v.* Powell, 6 Dowl. 483.

(*e*) Proudfoot *v.* Poile, 3 D. & L. 524.

(*f*) R. *v.* Bingham, 2 Tyrw. 46.

(*g*) Scales *v.* East London Waterworks, 1 Hodges, 91.

When in the third term after the award had been made the plaintiff moved to set it aside, on an affidavit of a witness, who stated that before the arbitrator he had sworn that he had supplied certain goods to the defendant, whereas, in fact, by arrangement between them, they had not been delivered; and the plaintiff also swore that he had only in that term received information of that circumstance; the court refused the application, partly on account of the delay, but also on the ground that the witness might have been cross-examined before the arbitrator, and that to allow such an affidavit to be sufficient would open the door to innumerable frauds (*h*).

Incorrect statement of witness.

On the principle de minimis non curat lex, the court refused a rule to set aside an award where the objection only applied to the decision in respect of a claim of 2*l.* 2*s.* (*i*).

No rule where sum in dispute trifling.

VIII. *When the award has been improperly procured.*]—In considering what may be the grounds of a motion to set aside an award, a distinction may be noticed between awards pursuant to submissions made rules of court by the inherent jurisdiction of the courts, and those on submissions of which the courts took cognizance by virtue only of the statute of William III. (*k*).

In an old case it was laid down that under that statute nothing is a ground for impeaching the award but manifest corruption of the arbitrators (*l*); but the language of the act of Will. III. provided that awards "procured by corruption *or undue means*" should be set aside, thus not limiting the grounds to corruption only.

"Corruption or undue means" only grounds by statute.

It is evident that the term "undue means" signifies something different from corruption; for, although there be no ground for imputing improper motives to the arbitrator, the court would set aside the award as procured by "undue means" if the course pursued on the reference were inconsistent with natural justice; as, for instance, if the witnesses were examined in the absence of the parties (*m*); or the

Proceeding contrary to justice is "undue means."

(*h*) Pilmore *v.* Hood, 8 Dowl. 21.

(*i*) Brown *v.* Hellerby, 26 L. J. Ex. 217, S. C. 1 H. & N. 729.

(*k*) 9 & 10 W. III. c. 15.

(*l*) Anderson *v.* Coxeter, 1 Stra. 301.

(*m*) Plews *v.* Middleton, In re, 6 Q. B. 845; Harvey *v.* Shelton, 7 Beav. 455.

PART III. CH. IX. S. 3.

plaintiff not allowed a proper opportunity of discussing his case (*n*).

Restriction of statute not adhered to.

The restriction, however, imposed by the language of the act of Will. III. was subsequently much disregarded, for the courts would listen to applications to set aside awards under the statute on other grounds than the two enumerated in the section (*o*); even when the motion was refused as being made later than the statute allowed, no objection was suggested that the grounds, that the award was defective on its face (*p*), or that the arbitrator had not sufficient materials before him, were such as the court could not entertain (*q*). On the contrary, where, the submission being under the statute, the arbitrator by consent had set out facts for the opinion of the court, the court set aside a part of the award as deciding contrary to law on the case stated (*r*). And Lord Eldon, C., observing on the act in one instance, remarked, "There is one case in which the courts have not considered themselves strictly bound by the words of the statute. The act is silent as to mistake or error of the arbitrators, yet it is now settled that an award may be set aside for mistake or error, if admitted by the arbitrators" (*s*). It seems probable that a similar liberal construction will be given to the words "improperly procured" in the Arbitration Act, 1889 (52 & 53 Vict. c. 49, s. 11 (2)).

Error in law on face of award.

Mistake admitted.

SECTION IV.

MOVING TO SET ASIDE AN AWARD.

PART III. CH. IX. S. 4.

1. *Making the motion to set aside the award.*]—In old times the application to set aside an award was by motion in open court for a rule nisi. Now, however, by R. S. C. Order LII. r. 2 (1883), "no motion or application for a rule nisi or order

No rule nisi.

(*n*) Spettigue *v.* Carpenter, 3 P. W. 361, S. C. Vin. Ab. Supp. Arb. p. 301.

(*o*) Veale *v.* Warner, 1 Saund. 327 d, notes.

(*p*) Lowndes *v.* Lowndes, 1 East, 276.

(*q*) Zachary *v.* Shepherd, 2 T. R. 781.

(*r*) Webb, In re, 8 Taunt. 443.

(*s*) Nichols *v.* Chalie, 14 Ves. 265, S. C. cited in Heming *v.* Swinnerton, 1 Coop. C. C. 419.

to show cause shall hereafter be made in any action or (a) to set aside, remit, or enforce an award, or (b) for attachment."

The application, therefore, now is commenced by notice of motion which must be set down on the list of opposed motions (*t*).

Notice of motion.

By rule 3 of the same order it is provided as to motions generally that previous notice of motion must be given to the parties affected; and by rule 5, two clear days must elapse between the service of the notice and the day named in the notice for hearing.

Grounds. Affidavits.

Rule 4 provides that "Every notice of motion to set aside, remit, or enforce an award, or for attachment, or to strike off the rolls, shall state in general terms the grounds of the application, and where any such motion is founded on affidavit a copy of any affidavit intended to be used shall be served with the notice of motion" (*u*).

Irregular service.

If the affidavit is served the day after, and not "with" the notice of motion, the court may condone the irregularity under Order LXX. r. 1 (*x*).

By Order XXXVIII. r. 2, every affidavit should be intituled in the cause or matter in which it is sworn (*y*), and must be stamped with a proper filing stamp (Order XXXVIII. r. 15).

What sufficient affidavit verifying award.

When the objections arise on the award, it must be verified by affidavit. The affidavit verifying the copy of the award to be a true copy need not state that the copy was compared with the original, for cases may frequently occur where the party may never see the original award, but only have a copy furnished him (*z*). An affidavit by the clerk to the town agent of the plaintiff's attorney, "that the paper writing hereto annexed marked D is a true copy of the

(*t*) Annual Practice, 1890-1, p. 143.

(*u*) As to practice before rules of 1883, see Smith *v.* Parkside Mining Co., 6 Q. B. D. 670; Phillips *v.* Gill, 1 Q. B. D. 78.

(*x*) Wyggeston Hospital, In re, 33 W. R. 551; 52 L. T. 101; Petty *v.* Daniel, 34 Ch. D. 172; Hampden *v.* Wallis, 26 Ch. D. 746.

(*y*) As to intituling affidavits under the old law, see Bainbrigge *v.* Houlton, 5 East, 20; Anon., 1 Smith, 358; Whitehead *v.* Firth, 12 East, 166; Rushworth *v.* Barron, 3 Dowl. 317; Reynolds *v.* Askew, 4 Dowl. 682; Pike *v.* Newman, 14 C. B. 425; Templeman and Reed, In re, 9 Dowl. 962; Imeson and Horner, In re, 8 Dowl. 651.

(*z*) Hawkyard *v.* Stocks, 2 D. & L. 936.

award or umpirage of A. B., as this deponent has been informed and believes," and that he received the said paper writing from the plaintiff's attorney in the country, was held a sufficient verification (*a*). So an affidavit by the defendant, "that the paper writing marked A was on," &c., "delivered by the arbitrator personally into the hands of this deponent as a copy of the award made by him in this cause," was considered to be a primâ facie proof that the copy was a correct copy (*b*). So also an affidavit, "that the paper writing annexed to the affidavit was, or contained, as the deponent (the defendant) believed, a true copy of the award, the deponent having been served with the same by the attorney of the plaintiff," was held sufficient (*c*).

But where the objection is dehors the award, as, for instance, that two of the arbitrators have made the award without consulting the third arbitrator, it is not necessary to bring the award before the court (*d*).

Immaterial alterations in affidavit.

As immaterial alterations in the affidavit would not vitiate it, it was not necessary, if sworn before a commissioner, that his initials should be put to such alterations, in order to show that they were made previous to its being sworn (*e*). But see now Order XXXVIII. r. 12.

Who may move to set aside award.

The parties to the submission or their representatives may move to set aside the award (*f*).

Executor of a party.

The executors or administrators of a deceased party being, as we have seen, at liberty to enforce it, and liable to its burdens as far as they have assets, have, it is presumed, a clear right to apply to set it aside (*g*).

Bankrupt or insolvent.

When bankruptcy or insolvency does not free the party from liability to perform an award, he cannot by such bankruptcy or insolvency be precluded from moving to set it aside, for he is clearly aggrieved by an improper award against him (*h*).

(*a*) Hawkyard *v.* Stocks, 2 D. & L. 936.

(*b*) Lund *v.* Hudson, 1 D. & L. 236.

(*c*) Hayward *v.* Phillips, 6 A. & E. 119.

(*d*) Hinton *v.* Meade, 24 L. J. Ex. 140.

(*e*) Imeson *v.* Horner, 8 Dowl. 651.

(*f*) Tyler *v.* Jones, 3 B. & C. 144; Lewis *v.* Winter, W. W. & D. 47; Tayler *v.* Marling, 2 M. & G. 55; Lewin *v.* Holbrook, 11 M. & W. 110.

(*g*) Ex parte Kemshead, 1 Rose, 149.

(*h*) Hemsworth *v.* Brian, 7 M.

Assignee.

Whenever the assignee, as is generally the case, has an interest in the award, it does not seem to be questioned that he would be entitled to move to impeach it (*i*).

Clause not to sue not preclude motion.

The clause in the submission prohibiting the parties from bringing any action or suit respecting the matters referred does not apply to prevent a motion to set aside the award (*k*).

Award raising point of law.

When an arbitrator, after finding a verdict for the plaintiff, states facts which show that the plaintiff could not legally sustain his action, but makes no provision for entering a nonsuit or finding a verdict for the defendant, in case the opinion of the court be against the validity of the plaintiff's claim, the court cannot order a nonsuit to be entered; but the proper application is to set the award aside (*l*).

Motion to set certificate aside.

Generally, the certificate by an arbitrator is looked upon as an award for all purposes of setting it aside, but if a verdict be taken subject to a certificate respecting the amount of damages, and the certificate be merely a note to the officer of the court, and be not considered an award, and there be grounds of objecting to it, the application to the court should be, not to set aside the certificate, but the verdict entered according to it (*m*).

Moving on last day of term.

The motion to set aside an award could not, it was said, be made on the last day of term (*n*). On one occasion, however, in the Court of Common Pleas, where, on the last day of term, a motion was made by the plaintiff to have his costs taxed pursuant to an award, the master having refused to tax them until the time for setting aside the award had expired, the court called on the defendant's counsel to move to set the award aside; and the motion was made and the rule refused on that day (*o*).

In the Common Pleas.

Appeal against decision of official referee.

A cause having been sent down for trial before an official referee, the referee on certain findings made by him in the

& G. 1009. See S. C. not S. P. 1 C. B. 131; Marsh *v.* Wood, 9 B. & C. 659; R. *v.* Bingham, 2 Tyrw. 46; Taylor *v.* Shuttleworth, 8 Dowl. 281.

(*i*) Hobbs *v.* Ferrars, 8 Dowl. 779; Tayler *v.* Marling, 2 M. & G. 55.

(*k*) Mackay, In re, 2 A. & E. 356.

(*l*) Peters *v.* Anderson, 5 Taunt. 596.

(*m*) Carmichael *v.* Houchen, 3 N. & M. 203.

(*n*) Nettleton *v.* Crosby, 1 Tidd's Pract. 498, 9th ed.; Watkins *v.* Phillpotts, M'L. & Y. 393.

(*o*) Hobdell *v.* Miller, 2 Scott, N. R. 163, S. C. in the notes to Little *v.* Newton, 1 M. & G. 978. See Adcock *v.* West, Ex., May 8, 1849.

case had directed judgment for the plaintiff. On a motion for a rule nisi to enter judgment for the defendant, the court refused to hear the counsel until he produced some affidavits or other evidence of what had taken place (*p*).

When party's own affidavit requisite.

Where an arbitrator, who by mutual agreement of the parties had closed the case, refused the application of the defendant's attorney for another hearing to receive new evidence in reply to some accounts put in by the plaintiff; a motion to set aside the award made on the affidavit of the defendant's attorney, alleging generally that he was not aware of the nature of the accounts, and that he was in possession of evidence sufficient to outweigh them, was refused (among other grounds) on this, that as he could only know the effect of the evidence from the defendant, the court could not set aside the award without an affidavit from the defendant himself (*q*).

Affidavit by barrister arbitrator.

The arbitrator, if a barrister, will not in general, in accordance with a rule laid down by the bar, and sanctioned by the judges, make any affidavit in order to support or defeat an application to set aside the award (*r*); nor, though he be willing to furnish the court with his notes of the evidence for the purpose of the argument, will the court receive them, or approve of a verified copy of them being used, as either course would be an infringement of the spirit of the above rule (*s*).

Lay arbitrator.

There is no objection to affidavits being made by lay arbitrators; they consequently are often the most material witnesses as to the facts. How far the courts will take into consideration the statement of an arbitrator as to the grounds of his award not made upon oath, but brought before the court by the affidavit of another, has been previously fully discussed (*t*).

Statements of arbitrator not on oath.

Affidavits after motion.

After the court had taken the objection that the application to set aside the award was made too late, the court would not allow affidavits to be then filed to account for the delay (*u*).

(*p*) Stubbs *v.* Boyle, 46 L. J. N. S. C. L. 136, S. C. 2 Q. B. D. 124.

(*q*) Ringer *v.* Joyce, 1 Marsh, 404.

(*r*) See P. II. ch. 11, s. 4, d. 3, p. 510.

(*s*) Doe d. Haxby *v.* Preston, 3 D. & L. 768. See P. II. ch. 11, s. 4, d. 3, p. 511.

(*t*) P. II. ch. 5, s. 8, d. 2, p. 310; P. II. ch. 11, s. 4, d. 2, p. 509.

(*u*) Riccard *v.* Kingdon, 15 L. J. Q. B. 269.

Filing affidavits.

Whether the rule nisi was refused or granted, the party must have filed the affidavits on which the motion was made; but if he neglected to do so, the court would not grant a rule to compel him, until he had been called upon by his opponent to file them (*x*).

Second motion to set aside award.

The courts will very rarely permit a second application to set aside an award, when the party has once failed in consequence of a defect in the way in which he has brought his case forward. The courts will assume that the objections taken on the first rule are all that can be taken to the award (*y*). The only excepted instances are where the defects are in the title or jurat of the affidavit (*z*).

In one instance, where the rule was discharged on a preliminary technical objection, that a copy of the award had not been annexed to the affidavit verifying it, and that therefore the court had not the contents of the award before it, Patteson, J., expressed his opinion that had the rule been discharged within the term limited for moving to set aside the award, the party might, within the term, as a matter of course, have obtained a fresh rule on correcting his mistake, as the defect was not in the substance of the affidavit, but a mere slip of form; and he allowed a second application to set the award aside, although the term had expired, as the previous rule had been enlarged by consent (*a*); but on a subsequent occasion the same learned judge, with the concurrence of the full Court of Queen's Bench, intimated that in the above case he thought he had gone too far (*b*).

Since a motion to set aside an award is no longer made by rule nisi, it is not necessary to retain in the text the cases on drawing up the rule nisi, which are, however, referred to in the notes (*c*).

Whether pleadings before the court.

On a motion to set aside an award, as on a rule to set aside a verdict, the Court of Queen's Bench would look at the

(*x*) Pilmore *v.* Hood, 8 Dowl. 21.

(*y*) Hellyer and Snook, In re, 2 Chitt. 265; R. *v.* Great Western Rail. Co., 1 D. & L. 874.

(*z*) R. *v.* Great Western Rail. Co., 1 D. & L. 874.

(*a*) Sherry *v.* Oke, 3 Dowl. 349.

(*b*) R. *v.* Great Western Rail. Co., 1 D. & L. 874.

(*c*) Christie *v.* Hamlet, 2 M. & P. 316, S. C. 5 Bing. 195; Crosbie *v.* Holmes, 3 D. & L. 566, 568, note. See Browne *v.* Collyer, 20 L. J. Q. B. 426; Barton *v.* Ransom, 5 Dowl. 597; Lund *v.* Hudson, 1 D. & L. 236; Platt *v.* Hall, 2 M. & W. 391; Holloway *v.* Monk, 8 Dowl. 138.

record in the cause if necessary, although the rule were not drawn up on reading it; but as in the Common Pleas a rule for setting aside a verdict was drawn up on reading the record, it is presumed that in the case of setting aside an award in that court the rule nisi should have been drawn up on reading the record whenever it was requisite to bring the record to their notice (*d*).

Where, from the nature of the objections, it became necessary for the court to look at the pleadings in a second action referred, together with the one in which the order of reference was made and the verdict taken by consent, the pleadings in that second action had to be brought before the court by the affidavits in support of the motion, and the rule was defective if they were not stated in them; yet, if the affidavits in answer set them forth, the court would look at the whole pleadings, and decide on the objections raised (*e*).

If a cause were referred before plea by a judge's order, and an objection to the award were founded on the contents of the declaration, it was proper to draw up the rule nisi on reading the declaration (*f*).

Grounds of motion must be stated.

II. *Stating the grounds of motion.*]—We have previously mentioned that by Order LII. r. 4, the notice of motion must state in general terms the grounds of the application. The old rule of H. T., 1853, r. 169, was to the effect that the several objections intended to be insisted upon should be stated in the rule nisi.

Both these rules being much the same as the still older rules of the several courts, the cases previously decided on the ancient practice are still to some extent applicable.

Rule applies to certificate of arbitrator.

The rule requiring the grounds of objection to an award to be stated applies equally to a certificate, whether the arbitrator is to certify generally for whom the verdict is to be entered, or only to certify to the associate the amount of damages for which the verdict for the plaintiff is to be entered (*g*). In one instance, where the grounds were omitted, Bayley, B., held that the rule might be amended on that point (*h*).

(*d*) Sherry *v.* Oke, 3 Dowl. 349.
(*e*) Allen *v.* Lowe, 4 Q. B. 66.
(*f*) Crosbie *v.* Holmes, 3 D. & L. 568, note.
(*g*) Carmichael *v.* Houchen, 3 N. & M. 203.
(*h*) Whatley *v.* Morland, 2 C. & M. 347.

In general, however, the party cannot avail himself of any ground which he does not specify. Thus, where an award was considered bad for not giving damages on an issue found for the plaintiff, the court said that, as the objection was not hit by the rule nisi, they could not set aside the award (*i*).

Party confined to grounds stated in the rule.

It was not sufficient to state in the rule the head of objection on which the party meant to rely, as that the award was uncertain, not final, that the arbitrator had exceeded his authority, or that he had not awarded on all the matters referred to him; but the rule should have stated each objection specifically, and shown in what respect the award was uncertain, or not final, in what respect he had exceeded his authority, and in what respect he had failed to decide all the matters submitted; for the purposes of the regulation would have been defeated if parties might state a general objection, and then go into any number of particular objections which might range themselves under it; and as different objections might, on reading an award, occur to different minds, it might happen that a party supporting an award against a rule stating the objections in a general form, might raise some objection which had not been thought of by the opposite side (*k*). It is not clear how far these observations hold good now, when the application may state in *general terms* the grounds of the application.

Stating objections specifically.

The following objections: "that the facts stated by the arbitrator on the face of his award are not sufficient to enable the court to decide the points of law thereby intended to be raised, or the several points of law which he was requested by the defendant to raise;" "that the arbitrator has not by his said award raised the points which on the part of the plaintiff he was requested to raise;" "that the award is not final, certain, and mutually binding, because it raises points for the opinion of the court which the arbitrator was not requested by either party to raise or state on the face of his award" (*l*); "that the arbitrator has made his award under a misapprehension of the terms of the reference" (*m*); were in old times all considered to be too general.

Forms of objection too general.

(*i*) Grenfell *v.* Edgcome, 7 Q. B. 661.

(*k*) Boodle *v.* Davies, 3 A. & E. 200; Jones *v.* Powell, 6 Dowl. 483.

(*l*) Bradbee *v.* Christ's Hospital, 4 M. & G. 714.

(*m*) Allenby *v.* Proudlock, 4 Dowl. 54.

Whether general statement helped by specific affidavit.

Sometimes, however, the generality of the statement of objection in the rule has been held to be cured by the particularity of the affidavit in pointing out the particular defect. Thus, where the rule stated, as the ground of moving, that the arbitrator had not decided all matters in difference, and the affidavit on which it was obtained specified certain matters alleged to have been in difference, and which were not mentioned in the award, the court held that the rule, coupled with the affidavit, sufficiently explained the nature of the objection, so as to satisfy the general regulation (*n*).

This lax construction of the regulation of the court, that the rule nisi might be helped out by the affidavits, was disapproved of in a following case, where the degree of particularity above stated to be requisite was held to be what was intended (*o*); and in a later instance, Coleridge, J., stated that *Rawsthorn* v. *Arnold* (*p*) was not an authority on which he was disposed to act (*q*).

But in a more modern case in the Exchequer, where the rule nisi was obtained, among others, on a ground "that the arbitrator had not awarded on a matter in difference submitted to him," and the objection was taken that it was too general, and the two last-mentioned cases were cited, the court held it sufficient; as the object of the rule was that parties should not wander about in search of the defect relied on by their opponents, and in the case before them the affidavits directed their attention to that matter in difference which it was alleged by the rule had not been awarded on (*r*). And later, Wightman, J., refusing to allow a party to rely on a statement in the rule nisi, "that the arbitrator had exceeded his authority," stated, that had the affidavits specifically pointed out any objection of the nature of excess, he should have considered himself bound by the authorities to hold it sufficient, until there had been a declaration of the court to the contrary (*s*).

Particular words limiting general statement.

If the rule nisi stated an objection in general words, which were followed by particular words of complaint, even sup-

(*n*) Rawsthorn *v.* Arnold, 6 B. & C. 629.
(*o*) Boodle *v.* Davies, 3 A. & E. 200.
(*p*) 6 B. & C. 629.
(*q*) Gray *v.* Leaf, 8 Dowl. 654.
(*r*) Dunn *v.* Warlters, 9 M. & W. 293, S. C. 1 Dowl. N. S. 626.
(*s*) Staples *v.* Hay, 13 L. J. Q. B. 60, S. C. 1 D. & L. 711.

posing under the general statement, if it stood alone, a particular defect might have been brought before the court, still by the latter clause the inquiry would be narrowed to the grievance specified therein (*t*).

Chancery Division notice of motion specifying grounds.

A notice of motion in the Chancery Division to set aside an award on a reference of an action in that division should have specified the grounds of objection with the same particularity as a rule nisi to set aside an award in the Queen's Bench Division (*u*).

Statement too general void.

The effect of a ground of objection being too general, is merely to prevent the party taking advantage of it; it does not hinder him relying on other grounds of objection, which are sufficiently specifically stated in the rule (*x*).

SECTION V.

OPPOSING THE MOTION TO SET ASIDE THE AWARD.

1. *Practice on opposing the motion.*]—According to an old rule of the Court of Queen's Bench (*y*), and the practice of the Common Pleas (*z*), cause could not be shown against the rule for setting aside an award on the last day of term, but the rule would be enlarged and made peremptory for the next term. In the Exchequer, however, the practice did not seem so strict, for instances are not wanting when the argument against an award was heard on the last day of the term (*a*).

Showing cause on last day of term.

Turning motion into special case.

Sometimes, when cause is about to be shown, if the facts be complicated, the court will direct that the matter be turned into a special case, and the validity of the award will be considered when the case comes on for argument (*b*).

(*t*) Boodle *v.* Davies, 3 A. & E. 200; Brown *v.* Probert, 1 Dowl. 659.

(*u*) Mercier *v.* Pepperell, 19 Ch. D. 58.

(*x*) Boodle *v.* Davies, 3 A. & E. 200; Gray *v.* Leaf, 8 Dowl. 654.

(*y*) M. T. 36 G. III. K. B.

(*z*) Bignall *v.* Gale, 2 M. & G. 364. The court acted on this rule, In re Burdon, May 8, 1858.

(*a*) Phillips *v.* Evans, 12 M. & W. 309.

(*b*) Staniforth *v.* Lyall, 4 M. & P. 829; Hocken *v.* Grenfell, 4 Bing. N. C. 103.

Inspecting original agreement of reference.

The original agreement of reference might be looked at on a motion to set aside an award, though the rule nisi was not drawn up on reading it, for the rule nisi was drawn up on reading the rule making the agreement of reference a rule of court, and the agreement of reference was in law part of the rule embodying it (*e*). A submission now has the same effect as if it had been made an order of court (*f*).

Showing cause.

II. *What may be shown for cause against the motion.*]—The party supporting the award may show for cause why the motion should be refused, the preliminary objections, that the application to set the award aside has been made too late (*g*); or that the affidavits on which the motion has been made are defective (*h*); or further that the rule nisi had been improperly drawn up (*i*). So, with regard to the merits, he may bring forward affidavits to deny or explain away the matters of fact alleged as the grounds of motion; or if the imputation be of a defect in law, he may support the sufficiency of the award by argument, so as at least to render it doubtful whether the award be bad, and if he succeed so far, the court will not set it aside (*k*).

Motion too late.

Affidavits defective.

Grounds false in fact.

Point of law doubtful.

Error in favour of party moving.

It may be shown as good cause, that the error for which the party is seeking to impeach the award is one in his own favour, and by which he cannot possibly be injured (*l*).

Irregularity waived.

If the award be impeached on the ground of an irregularity in the proceedings before the arbitrator, it may be shown in answer to the motion, that the irregularity was waived by the subsequent conduct of the party intending to rely on it; as, for instance, by his lying by with knowledge of the objection and taking the chance of an award in his favour (*m*). But when an award is impeached on the ground of one party in the absence of the other holding private meetings with the

Not when public justice interested.

(*e*) Oswald *v.* Ld. Grey, 24 L. J. Q. B. 69.

(*f*) Arbitration Act, 52 & 53 Vict. c. 49, s. 1.

(*g*) See s. 2 of this chapter, p. 654.

(*h*) See s. 4 of this chapter, d. 1, p. 677.

(*i*) See note at p. 481 for the old cases.

(*k*) Cock *v.* Gent, 13 M. & W. 364; Bowen *v.* Williams, 3 Ex. 93.

(*l*) Taylor *v.* Shuttleworth, 6 Bing. N. C. 277; Moore *v.* Butlin, 7 A. & E. 595; Bradshaw's Arbitration, 12 Q. B. 562.

(*m*) Bignall *v.* Gale, 2 M. & G. 830; Wyld, Ex parte, 30 L. J. Bank. 10, S. C. 2 De G. F. & J. 642. See P. II. ch. 4, s. 1, d. 9, p. 197. See P. II. ch. 4, s. 4, dd. 3, 5, pp. 232, 243.

arbitrator, similar misconduct on the part of the other party cannot be relied on to prevent the court setting aside an award, for the matter concerns not the individual only, but the due administration of justice (*n*).

Time enlarged by consent.

If the ground of motion be, that the award was made after the limited time, and that the enlargement was by two arbitrators without the knowledge of the third, or that the award was made by two without consulting the third, it may be shown for cause that by his conduct the party objecting had impliedly or expressly consented to the course adopted (*o*).

Matter omitted never brought forward to be decided.

When the ground charged is, that the award is not final for leaving a particular question undecided, it may be answered by proving that the question was never brought before the arbitrator at all (*p*); or only for a collateral purpose, and not as a matter of difference for his decision (*q*), or that the parties had practically agreed that he need not determine it (*r*).

No dispute about matter left undecided.

If the award be assailed for uncertainty in not specifying the amount of a sum of money, or in any other particular, it may be argued that the court will presume there was no dispute about the question, or it may be shown that in fact there was none (*s*).

Affidavits to support award bad on face.

In one case, an award being objected to, on the ground that a direction in it was uncertain, it was admitted that the direction was uncertain and void; but it was contended that it was mere surplusage, and would therefore not affect the rest of the award, as it was said that the arbitrator had no power to make the direction at all; it being, as was alleged, respecting a matter not in difference. On affidavits being referred to to prove that such was the fact, Lord Denman, C.J., expressed a doubt whether the court would look upon affidavits to support an award bad on its face (*t*).

Party moving

Accepting the money awarded (sometimes even under

(*n*) Harvey *v.* Shelton, 4 Beav. 455.

(*o*) Hallett *v.* Hallett, 7 Dowl. 389; Peterson *v.* Ayre, 23 L. J. C. P. 129. See P. II. ch. 3, s. 2, d. 2, p. 148.

(*p*) Middleton *v.* Weeks, Cro. Jac. 200.

(*q*) Rees *v.* Waters, 16 M. & W. 263. See P. II. ch. 5, s. 4, d. 1, p. 263.

(*r*) Rees *v.* Waters, 16 M. & W. 263; Cooper *v.* Langdon, 9 M. & W. 60.

(*s*) Cargey *v.* Aitcheson, 2 B. & C. 170. See P. II. ch. 5, s. 5, d. 4, p. 292.

(*t*) Marshall and Dresser, In re, 3 Q. B. 878.

PART III. CH. IX. S. 5.

protest), or costs of the award, is such an admission of the validity of the award, that it may be shown as a conclusive answer to the plaintiff's attempt to set the award aside (*u*).

having accepted money under the award.

If an arbitrator, who is to settle the price of land taken by a railway company, and to direct what conveyance is to be executed, merely award the price, saying nothing about a conveyance, the court, to support the award, will, it seems, sometimes, under peculiar circumstances, presume that the company obtained title to the land between the order of reference and award, so that a conveyance became unnecessary (*x*).

Having paid money awarded.

It was decided in Chancery that a voluntary payment of the amount awarded, with full knowledge of all the facts on which the party relied to avoid the award, would prevent him from sustaining proceedings to set it aside (*y*). But in a more modern instance at common law, Patteson, J., on an ex parte application, said, that it did not appear to him that the fact of having paid the money made any difference, or prevented the party from moving to set the award aside; and he granted a rule nisi for that purpose (*z*).

Allowing opponent to act on award.

It could not be shown for cause, on a motion by a tenant, that by allowing his landlord, without objection, to do repairs to the demised premises, pursuant to the directions of the award, he had waived his right to impeach it (*a*).

SECTION VI.

DECISION ON MOTION TO SET ASIDE AN AWARD.

PART III. CH. IX. S. 6.

1. *Result of the motion to set aside the award.*]—The courts of law will always construe awards, and hear motions respecting them, with a desire to sustain the judgment of the

Courts favour validity of awards.

(*u*) Kennard *v.* Harris, 2 B. & C. 801. See per Channell, B., in Smalley *v.* Blackburn Rail. Co., 27 L. J. Ex. 65; Parrott *v.* Shellard, 16 W. R. 928.

(*x*) Smalley *v.* Blackburn Rail. Co., 2 H. & N. 158, S. C. 27 L. J. Ex. 65.

(*y*) Goodman *v.* Sayers, 2 J. & W. 249.

(*z*) Bartle *v.* Musgrave, 1 Dowl. N. S. 325.

(*a*) Hayward *v.* Phillips, 6 A. & E. 119.

tribunal which the parties have selected, and which in so many instances acts most beneficially for them (*b*). On one occasion, however, Coleridge, J., observed, "There are many expressions in the cases as to the manner in which the courts ought to construe awards, which appear to me to be often used with too much strength. Awards are to be construed sensibly, as all other instruments" (*c*).

Award not set aside unless clearly void.

The courts would not set an award aside on motion, unless it were clearly void on the grounds on which it was impeached, because then there was an end of it altogether; whereas if an action were brought, the question of its validity might be in general more formally raised, and taken to a court of error (*d*).

Allowing fresh affidavits.

After cause had been shown, the court usually would either discharge the rule or make it absolute; but on one occasion, after the argument, the Court of Common Pleas enlarged the rule till the following term, to give the parties the opportunity of filing fresh affidavits, in order that the facts might be more fully stated; additional affidavits were accordingly filed, and the case was re-argued in the subsequent term (*e*).

Whether award set aside in part only.

When the arbitrator has exceeded his power in awarding on a matter not submitted to him, or in giving unauthorized directions, if the portion of the award containing the excess can be entirely separated, that alone may be rejected, while the rest of the award will stand good; but though considered a nullity, the court will not usually make absolute the rule to set aside that part, but will discharge the rule wholly (*f*); but if the court cannot see that that part of the award made in the proper exercise of the arbitrator's authority is wholly unaffected by the objectionable provisions, the entire award must fall (*g*). So though it be not final (as when finding substantially for the plaintiff, it fails to decide all the issues,

(*b*) Templeman and Read, In re, 9 Dowl. 962.

(*c*) Stonehewer *v.* Farrar, 9 Jur. 203.

(*d*) Cock *v.* Gent, 13 M. & W. 364; Stalworth *v.* Inns, 13 M. & W. 466.

(*e*) Little *v.* Newton, 2 M. & G. 351, 353.

(*f*) See cases cited P. II. ch. 5, s. 9, p. 325. Boodle *v.* Davies, 3 A. & E. 200, contrà, where the rule was discharged in part only. In the Caledonian Rail. Co. *v.* Lockhart, 3 Macq. 808, the House of Lords, supporting the award, declined to point out what parts of it were bad for excess.

(*g*) Tandy *v.* Tandy, 9 Dowl. 1044. See P. II. ch. 5, s. 9, p. 331.

on the event of which the costs depend), the plaintiff, by allowing the defendant costs on all issues undetermined, may maintain the award as to the good part (*h*). So, also, if it be defective for want of certainty as to a part which is separable, as, for instance, if it award costs without ascertaining their amount, when the arbitrator ought to have found it, the whole award need not be set aside; but the rest may be supported, if the party alone intended to be benefited by the provisions as to the costs agree to waive all claim to them (*i*).

Where a cause and all matters in difference were referred, and the arbitrator found for the plaintiff in the cause, and then stated facts pursuant to a power given in the submission; the court, deciding that the action could not be maintained on the case stated in the award, directed a nonsuit to be entered in the action, and that the rest of the award should stand good. The report does not show whether there was a conditional award of a nonsuit in case the court should be of opinion that the plaintiff was not entitled to recover. It is also to be noticed, that the court came to this decision on an application to set the award aside (*k*).

New trial when award in a cause set aside.

When a verdict is taken subject to a reference, if the award be set aside there must be a new trial, as the verdict is subject to the award; if one fall the other must follow (*l*).

Discharging rule with costs.

II. *Costs of the motion to set aside the award.*]—When the motion is dismissed, the court will, as in other cases, exercise a discretion whether it is to be dismissed with costs. If the motion had been made on slight grounds, the rule would generally be discharged with costs (*m*). Where the objection was that the arbitrator had decided contrary to law, costs were refused, on the ground that the point had been fully submitted to the court when the rule was moved (*n*). In a later case, where the award was assailed as repugnant for finding inconsistent issues in favour of the same party, costs

(*h*) England *v.* Davison, 9 Dowl. 1052.

(*i*) Morgan *v.* Smith, 1 Dowl. N. S. 617. See P. II. ch. 5, s. 9, d. 1, p. 325.

(*k*) Sherry *v.* Oke, 3 Dowl. 349.

(*l*) Thompson *v.* Jennings, 10 Moore, 110.

(*m*) Snook *v.* Hellyer, 2 Chitt. 43.

(*n*) Wade *v.* Malpas, 2 Dowl. 638.

were granted, Lord Denman, C.J., intimating that in such cases the practice was to discharge the rule with costs (*o*).

Costs of motion when costs in the cause.

Where a rule for setting aside an award on a cause was discharged and nothing said about the costs of the motion, they would be costs in the cause (*p*). Where the arbitrator had directed a verdict for the plaintiff, and stated special facts in his award, on which the defendant moved to set it aside, but the court directed the verdict to stand for the plaintiff, but at an amount of damages less than the arbitrator had given; the plaintiff was held to be entitled to the costs of showing cause against the rule, although the defendant had succeeded in part: for the practice had always been to consider these costs as costs in the cause, since there was, in fact, no verdict until the discussion of the award was over, and therefore all proceedings till then were steps in the cause (*q*). Where the defendant put a construction upon the award which induced the plaintiff to move to set it aside, and the court, considering the defendant's construction untenable, discharged the plaintiff's rule, it was held that the plaintiff was not entitled to the costs of the motion; and Tindal, C.J., said, that as the award was not set aside, the motion must take the ordinary course, and the costs of it be costs in the cause (*r*).

An award in the plaintiff's favour being referred back, on a motion by the defendant to set it aside, and sustained as valid on the arbitrator's explanation, the plaintiff was allowed the costs of the motion (*s*).

Arbitration Act, 1889.

By the Arbitration Act, 1889, s. 20, the court retains full authority over the costs of any order made under the act. Further, full power over costs of all proceedings in the Supreme Court is given to the court or judge by Finlay's Act (53 & 54 Vict. c. 44), s. 5.

Appeal against refusal to set aside.

III. *Appeal.*]—In the Chancery Division where the judge has refused to set aside an award, the appeal against the

(*o*) Duke of Beaufort *v.* Welch, 10 A. & E. 527.
(*p*) Clarke *v.* Owen, 2 H. & W. 324.
(*q*) Goodall *v.* Ray, 4 Dowl. 1.
(*r*) Hocken *v.* Grenfell, 4 Bing. N. C. 103.
(*s*) Goddard *v.* Smith, 13 L. T. 159.

PART III. CH. IX. S. 6.

refusal should be set down on the interlocutory list, and not in the final list (*t*).

Interlocutory. None against decision of Q. B. D. on compulsory reference.

When there has been a compulsory reference to arbitration in the Queen's Bench Division, the decision by the Divisional Court on an appeal under Order LIX. r. 3, against the award is made final unless leave to appeal further is given (*u*).

The power of appealing from the Divisional Court in other cases depends on the general law. At common law there was no appeal.

As to appeals against the report of a referee, see Part II. Ch. VI. s. 7 (*v*).

(*t*) Delagoa Bay Rail. Co. *v.* Tancred, 61 L. T. 343.

(*u*) 47 & 48 Vict. c. 61 (Judicature Act, 1884), s. 8. See p. 809.

(*v*) Page 367.

CHAPTER X.

SETTING ASIDE THE JUDGMENT ENTERED UP PURSUANT TO AN AWARD.

Contents of the tenth chapter.

UNDER what circumstances the judgment entered up in the cause referred pursuant to the award might be set aside as void or irregular under the old law, is shortly stated in this chapter. The cases may throw light upon the modern practice.

Setting aside judgment.

If the plaintiff, pursuant to the award, entered up a verdict and signed judgment in the cause referred, the defendant might, within the time limited for setting aside awards, move to set aside both judgment and award, if the latter were defective. Thus the court would set aside a judgment signed pursuant to an award, if the arbitrator had no power to order judgment to be signed; but though the motion were to set aside both the judgment and award, the court would not set aside the award, if it were doubtful, whether there was not a sufficient award, assuming the unauthorized direction as to the judgment rejected as surplusage (*a*).

When arbitrator no power to award judgment.

Judgment entered on reference by sheriff.

As the sheriff, on a trial by jury under a writ of trial, had no power to permit a verdict to be taken subject to a reference, the verdict and judgment entered pursuant to an award on a submission under such circumstances would be set aside, but not necessarily the award itself, for that might be perfectly valid (*b*).

Setting aside judgment after time for

Although the time for setting aside the award might have long elapsed, the party was at liberty, as soon as the judg-

(*a*) Doe d. Body *v.* Cox, 15 L. J. Q. B. 317.

(*b*) Wilson *v.* Thorpe, 6 M. & W. 721; Harrison *v.* Greenwood, 15 L. J. Q. B. 92.

setting aside award expired.

ment had been signed, to move to set the latter aside; and on such a motion the court would determine the validity of the award on its face; for there was no other method than this by which the defendant could contest the validity of the judgment (*c*). It was immaterial whether execution had been issued, or if issued, whether it had been executed. In the former case, the motion, it seems, was to set aside the judgment and to restrain the plaintiff from issuing execution (*d*); in the latter, to set aside the judgment and writ (*e*), and if a levy had been made, also to return the amount (*f*).

After motion to set aside award discharged.

This step might have been taken by the defendant, whether he had omitted to move to set aside the award itself (*g*), or having applied, had had his rule discharged (*h*).

The motion may be founded on the same ground of alleged defects apparent on the award on which a motion to set aside the award has been made and refused; for the court, we have seen, will not set aside the award unless the objection be clearly good, and refuse to decide a doubtful point; but on the rule to set aside the judgment, the court are necessarily bound to come to a determination on the validity of the award, since refusing the rule has the effect of establishing the award (*i*).

Not for defects in award other than shown on face.

It used to be the law, that for no other defects in the award than those apparent on its face could the judgment entered pursuant to it be impeached (*k*) after the time for setting aside the award had expired.

Conduct of plaintiff precluding him from objecting.

Where the defendant's counsel at the first meeting objected to proceeding, until the order of reference was amended, so as to enable the arbitrator to find for the defendant on the second issue, and the plaintiff's counsel contended, and the arbitrator agreed, that the order as it stood gave the arbi-

(*c*) Brooks *v.* Parsons, 1 D. & L. 691; Manser *v.* Heaver, 3 B. & Ad. 295; Doe d. Madkins *v.* Horner, 8 A. & E. 235; Wrightson *v.* Bywater, 3 M. & W. 199.

(*d*) Doe d. Madkins *v.* Horner, 8 A. & E. 235.

(*e*) Manser *v.* Heaver, 3 B. & Ad. 295.

(*f*) Wrightson *v.* Bywater, 3 M. & W. 199.

(*g*) Manser *v.* Heaver, 3 B. & Ad. 295.

(*h*) Wrightson *v.* Bywater, 3 M. & W. 199.

(*i*) Wrightson *v.* Bywater, 3 M. & W. 199. See Gravatt *v.* Attwood, 19 L. J. Q. B. 474.

(*k*) Manser *v.* Heaver, 3 B. & Ad. 295; Doe d. Madkins *v.* Horner, 8 A. & E. 235; Wrightson *v.* Bywater, 3 M. & W. 199; Macarthur *v.* Campbell, 2 A. & E. 52. See Brooks *v.* Parsons, 1 D. & L. 691.

trator such power, and the arbitrator found for the defendant on that issue, the court refused to set aside the judgment entered for the defendant, on the plaintiff's contention that the finding was an excess of authority, as the plaintiff had by his conduct in effect consented to the construction of the order put upon it by the arbitrator (*l*).

Party bankrupt before award.

It is no ground for setting aside the judgment signed by the defendant pursuant to the award, that before the award was made the plaintiff had become bankrupt (*m*).

Irregularity in entering judgment.

Though the award were good, if there were any irregularity in entering a verdict pursuant to the award, or in signing judgment or issuing execution, the court, on a proper application, would set aside the proceedings (*n*).

Practice under new rules.

We have already seen, p. 372, that, under Order XL. rules 6 and 6 (a), the judgment directed by the referee or arbitrator may be set aside on the ground that, on the findings as entered, it is wrong. In the Queen's Bench Division, the motion must be made in a Divisional Court. But when the objections are not to the judgment on the findings, as above stated, but on other grounds, according to Kay, J., in the Chancery Division, the application should be made to the Court of Appeal (*o*). We have also seen that the Queen's Bench Divisional Court, under Order XXXVI. r. 52, will not only set aside the judgment directed by the referee to be entered for the one party, but will enter judgment for the other side when it thinks it is just (*p*). Order XXXVI. r. 55 (*c*), makes this rule apply to arbitrators as well as referees.

Signing judgment for costs of cause and reference, irregular.

In one instance, where the master had taxed the costs of the cause and reference and award together in one allocatur, and judgment had been signed for the whole, a motion was made to set it aside, on the ground that the costs of the reference and award had been improperly included; the court treated it as an irregularity only, to which two answers were applicable in the particular case, namely, that there had been an unreasonable delay in making the application; and,

(*l*) Gravatt *v.* Attwood, 19 L. J. Q. B. 474.

(*m*) Andrews *v.* Palmer, 4 B. & A. 250.

(*n*) Hayward *v.* Ribbans, 4 East, 309; Callard *v.* Paterson, 4 Taunt. 318.

(*o*) Serle *v.* Fardell, W. N. 1890, pp. 25, 43; Bannister *v.* Macdonald, W. N. 1890, p. 50.

(*p*) See also Proudfoot *v.* Hart, 25 Q. B. D. 42, and note on the case in the Annual Practice (1890-91), p. 122.

secondly, that the defendant's attorney had distinctly assented to that mode of taxation, knowing that the judgment could only be entered for the whole amount of costs in the allocatur (*q*).

Whether requisite to state objections in rule nisi.

The rule of court which required that objections should be stated in the rule nisi on a motion to set aside the award did not, it seems, apply to a rule nisi to set aside the judgment; and the objection intended to be relied on need not have been specified therein, at least if it were one apparent on the face of the award (*r*). See now, however, Order LXX. r. 3, which, on applications to set aside proceedings for irregularity, requires the several objections to be stated.

(*q*) Bignall *v.* Gale, 3 M. & G. 858.

(*r*) Manser *v.* Heaver, 3 B. & Ad. 295.

CHAPTER XI.

IMPEACHING AN AWARD IN EQUITY.

THE present chapter treats of the old practice of impeaching an award in equity. This is still of importance, as the common law courts now exercise equitable jurisdiction.

Scope and contents of the eleventh chapter.

In its first section it examines into the jurisdiction of the Chancery Division over awards, and remarks shortly on the grounds for which equity would hold an award void.

The second discusses the various modes of proceeding to set the award aside, and the circumstances under which the respective methods were available.

SECTION I.

IN WHAT CASES CHANCERY HAS JURISDICTION TO SET ASIDE AN AWARD.

1. *Jurisdiction of Chancery to set aside award.*]—The courts of equity have always exercised jurisdiction over awards, although the submission was by agreement out of court and incapable of being made a rule of court (*a*). This jurisdiction subsists at the present day (*b*).

Setting aside in equity award on submission by agreement.

On the reference of an action at common law, whether the submission were by order of a judge, or order of Nisi Prius, or rule of a court of common law, the Court of Chancery had undoubted authority to set aside the award, and to prevent a party taking advantage of its provisions in his favour. For

When submission in an action at common law.

(*a*) Greenhill *v.* Church, 3 Rep. in Chanc. 49.

(*b*) Hamilton *v.* Bankin, 3 De Gex & Smale, 782.

when an order of reference of a cause depending in a court of law was made a rule of court, and application was made in the court of law to enforce the award, a court of equity considered the reference by rule of court merely as a proceeding in the court of law, modified and regulated by the consent of the parties; and whether the circumstance of consent to this mode of carrying on the suit might or might not be deemed worthy of consideration in equity, the mere fact that the parties had so far regulated the proceeding at law, could not bar the jurisdiction of equity to grant an injunction to restrain the proceeding to enforce the award at law, or to set the award aside. The statute 9 & 10 W. III. c. 15, did not in any way interfere with the ancient power of the courts of equity, when an action was referred, and the submission made a rule of court, not under the statute, but at common law (*c*).

Not affected by the statute of Will. III.

Much discussion took place in old times respecting the jurisdiction of the Court of Chancery to set aside an award made on a submission out of court, containing a clause for making it a rule of court under the statute 9 & 10 W. III. c. 15 (*d*).

Jurisdiction of equity.

And it was ultimately decided that that statute confined the jurisdiction over the award to that court only of which the submission was or could be made a rule (*e*); and that the fact of whether or not it had been so made a rule before the filing the bill was immaterial (*f*); and that when the submission was to be made a rule of the Court of Chancery, that that court had jurisdiction to set the award aside, only in the summary manner pointed out by the act, and not by *bill*, at least when the proceeding by *motion* was equally efficient (*g*).

Later cases show equity no jurisdiction.

(*c*) Nichols *v.* Chalie, 14 Ves. 265; Nichols *v.* Roe, 3 M. & K. 431; Lord Lonsdale *v.* Littledale, 2 Ves. Jr. 451; Brown *v.* Brown, 1 Vern. 157; Chuck *v.* Cremer, 2 Phill. 477.

(*d*) Cases on the jurisdiction of Chancery: Ward *v.* Periam, cited Chicot *v.* Lequesne, 2 Ves. Sr. 316; cited also in notes to Auriol *v.* Smith, 1 Turn. & R. 131; Reynell *v.* Luscomb, A.D. 1727, cited in Auriol *v.* Smith, 1 Turn. & R. 135, notes; Allardes *v.* Campbell, Bunb. 265; Kampshire *v.* Young, 2 Atk. 155.

(*e*) Fetherstone *v.* Cooper, 9 Ves. 67; Spettigue *v.* Carpenter, 3 P. W. 361; Steff *v.* Andrews, 2 Madd. 6; Gwinett *v.* Bannister, 14 Ves. 530; Goodman *v.* Sayers, 2 J. & W. 249; Davis *v.* Getty, 1 S. & S. 411; Dawson *v.* Sadler, 1 S. & S. 537; —— *v.* Mills, 17 Ves. 419.

(*f*) Nichols *v.* Roe, 5 Sim. 156; on app. 3 M. & K. 431.

(*g*) Heming *v.* Swinnerton, 1 Coop. C. C. 386; Yates *v.* Barnard,

Application of Arbitration Act, 1889.

The Arbitration Act, which repeals the statute of Will. III., provides, by section 26, that the repeal shall not affect any right acquired or liability incurred before the commencement of the act, or the prosecution of any legal proceedings for ascertaining or enforcing such liability. The commencement of the act was 1st January, 1890. Court is defined to mean her Majesty's High Court of Justice (s. 27). The Act is not to affect a pending arbitration (s. 25).

Grounds in equity same as at common law generally.

As in most cases there is no substantial distinction between the courts of law and equity as to the grounds on which awards may be set aside in each (*h*); to avoid repetition, the grounds on which an award may be impeached are stated in the one chapter on setting aside awards on motion (*i*). The cases referred to in the notes are those only which are more particularly connected with proceedings in equity (*k*).

When evidence of merits let in.

Though no bill lay to set aside an award on a question of fact decided by the arbitrators, yet evidence of the merits would be let in, so far as it threw light on their conduct (*l*).

In an action on an award the defendant relied on the fact that the arbitrator had improperly submitted to the judgment of a third person. The defendant failed, as such misconduct was only a ground of motion to set the award aside, not of plea. He then filed a bill to set aside the award and stay execution on the judgment. Wood, V.-C., dismissed the bill, holding that though there had been a clear miscarriage, the Court of Chancery, in the absence of fraud or gross injustice, should exercise its jurisdiction only when the matter was fresh and brought before the court within the time which the courts of law had adopted for such motions, by analogy to the provi-

cited in Heming *v.* Swinnerton, 1 Coop. C. C. 422, notes, per Sir J. Leach, V.-C.; Smith *v.* Whitmore, 33 L. J. Ch. 218, S. C. 1 Hem. & M. 576, S. C. in error, 33 L. J. Ch. 713, S. C. 2 De G. J. & S. 297.

(*h*) Lingood *v.* Eade, 2 Atk. 501; R. *v.* Wheeler, 3 Burr. 1257.

(*i*) See P. III. ch. 9, s. 3, p. 664.

(*k*) Cases on setting aside award in equity: Champion *v.* Wenham, Amb. 245; Chuck *v.* Cremer, 2 Phill. 477, S. C. 17 L. J. Ch. 287; Grafham *v.* Turnbull, 44 L. J. Chanc. 538; The Londonderry and Enniskillen Rail. Co. *v.* Leishman, 12 Beav. 423; Harding *v.* Wickham, 2 J. & Hem. 676; Hill *v.* Ball, 2 Bligh, N. S. 1; Pitcher *v.* Rigby, 9 Price, 79; Morgan *v.* Pindar, 3 Rep. in Chanc. 76; Jones *v.* Bennett, 1 Bro. P. C. 528.

(*l*) Goodman *v.* Sayers, 2 J. & W. 249, 250.

sions of the stat. 9 & 10 W. III. c. 15. On appeal, Knight-Bruce, L.J., affirmed the judgment, saying that the applicant had by his conduct lost his equity against the award and the judgment. But Turner, L.J., dissented, being of opinion that the Court of Chancery ought not to limit the exercise of its jurisdiction by the rules as to time for motions laid down by the courts of law, and that the party had not lost his equity (*m*).

Equitable proceedings under Arbitration Act, 1889.

Proceedings of this equitable character may, perhaps, be more frequently taken henceforth, as the Arbitration Act, 1889, does not prohibit all but summary proceedings to set the award aside, the sole remedy open under the statute of W. III., now repealed.

Award under statute made on mistake.

Commissioners appointed by statute to ascertain the bounds, and fix the rent payable to the crown for certain mines, made an award, giving a benefit to a miner, on the faith of his having agreed to pay a sum for certain byegone workings of the mine. The commissioners were not authorized by the statute in imposing on the miner such condition of payment. The miner having refused to comply with the supposed terms, an information was filed in Chancery, at the suit of the crown, with a view to enforce payment, or to set the award aside, on the ground of fraud and mistake: but the court being of opinion that the miner had never entered into the agreement, though the commissioners mistakenly supposed that he had, held the claim for the payment not maintainable on the facts; and they also refused to set aside the award, there being no fraud shown; since, as the time limited by the act for making the award had expired, the miner, if the award were set aside, would lose the whole benefit of the Act of Parliament, without any fault of his own, on account of a mistake of the commissioners (*n*).

(*m*) Smith *v.* Whitmore, 33 L. J. Ch. 218, S. C. 1 Hem. & M. 576, S. C. in error, 33 L. J. Ch. 713, S. C. 2 De G. J. & S. 297.

(*n*) Attorney-General *v.* Jackson, 5 Hare, 355.

SECTION II.

WHAT THE MODES OF PROCEEDING TO SET ASIDE AN AWARD IN EQUITY.

1. *Proceeding by bill to set aside an award.*]—Before the Judicature Acts, when the submission was by judges order, order of Nisi Prius, or rule of a court of common law, or by private agreement not under the statute of William III., the proceedings to set aside the award were by bill (*o*).

Submission not under the statute, bill lay to set aside award.

After a reference on the trial of an issue directed out of Chancery, the jurisdiction of Chancery over the suit was at an end, and the court could not direct a new trial of the issue though the party were dissatisfied with the award. If, however, the award were objected to on the ground of corruption in the arbitrators, the facts might, perhaps, have been brought before the court by a supplemental bill (*p*).

In a bill to set aside an award the particular ground on which it was sought to impeach it ought to have been charged with all its circumstances (*q*).

Bill must have particularized objections to award.

An award made on a submission by agreement between the plaintiff and defendant, who were partners, appointed persons in the nature of receivers to collect and pay the debts of the firm, and to pay over the surplus in moieties to the plaintiff and defendant. The plaintiff filed a bill, which, stating the award, and that there was a deficiency in the funds, and that several demands had been enforced by creditors against him, prayed contribution from the defendant, and an account generally. The defendant pleaded the award, and the court allowed the plea, as the bill did not state as a specific objection to the award that it was not final, for not having provided for a deficiency of assets, or set forth the deficiency, or show what debts the plaintiff had been forced to pay (*r*).

On a rehearing, it appeared that by the award the plaintiff was to be at the risk of all debts incurred after a

(*o*) Greenhill *v.* Church, 3 Rep. in Chanc. 49, 89; Lord Lonsdale *v.* Littledale, 2 Ves. Jr. 451.

(*p*) Woodley *v.* Johnston, 1 Molloy, 394.

(*q*) Tittenson *v.* Peat, 3 Atk. 529.

(*r*) Routh *v.* Peach, 2 Anst. 519.

certain day, on which day the partnership was awarded to end. Though the bill stated that the debts in respect of which contribution was sought were incurred by the partnership, the court thought this might apply to debts incurred after the day, for as between creditors and the firm the partnership still existed; and that as the arbitrators had proceeded on a supposition that the partnership effects were sufficient to pay all demands up to that time, the court would presume the supposition well founded until it was expressly negatived; and so the order allowing the plea was affirmed (*s*).

If a party received the money awarded, and delayed filing his bill for nine months, his bill would have been dismissed, though he wrote the words "under protest" on the head of the receipt for the money (*t*).

What a ground of demurrer to the bill.

When the bill to set aside the award impeached it on grounds which the court could not entertain, as, for instance, that the arbitrator had come to a wrong decision on the matters referred, demurring to the bill was the proper mode of questioning the sufficiency of the objections (*u*).

Party proceeding at law no ground of demurrer.

It was not a cause of demurrer to a bill to set aside an award, charging collusion and corruption of the arbitrator, that the parties had proceeded in a court of law, and that there would be a remedy in that court; for the proceeding under the authority of the court of law might be perfectly incompetent; since that which would subvert the award, might, it was said, arise out of the answers in equity, and there was a great difference in compelling that discovery in answer to pointed interrogatories from affidavits at law, where the parties could not be pressed to make a full answer (*x*). This reasoning has lost much of its force, since parties may now be made to answer interrogatories at law.

In an old case, on a demurrer to a bill to be relieved against an award for excessive damages given, it was ordered that the defendant should answer, but that the benefit of the demurrer should be saved to the hearing (*y*).

(*s*) Routh *v.* Peach, 3 Anst. 637.
(*t*) Parrott *v.* Shellard, 16 W. R. 928.
(*u*) Pitcher *v.* Rigby, 9 Price, 79.
(*x*) Lord Lonsdale *v.* Littledale, 2 Ves. Jr. 482.
(*y*) Younge *v.* Cooke, 3 Rep. in Chanc. 45, 82, A.D. 1673.

We have previously seen that an arbitrator might be made a defendant to a bill to set aside an award, when charged with corruption or gross misconduct, with a view to fix him with payment of costs, and could not demur (*z*).

When arbitrator to be made a defendant.

When the arbitrators were properly made parties to a bill to be relieved against an award on a suggestion of misbehaviour on their part, according to Lord Northington, C., it was a notorious fixed rule that the plaintiff was entitled to read their answer against their co-defendant interested in the award, who contended that the award ought to be supported (*a*).

Answer of arbitrator read against co-defendant.

II. *Proceeding by motion to set aside an award.*]—The mode of proceeding to set aside an award in the Chancery Division on motion is now much the same as in the Queen's Bench Division (*b*). If the reference was by order of the Court of Chancery made in a suit depending in that court, the usual and proper method of impeaching the award was by motion supported by affidavits (*c*).

Submission by order of equity, award set aside on motion.

On a reference under the statute of W. III. (*d*), when the submission provided for its being made a rule of Chancery, in ordinary cases, it is clear that the proceeding by motion summarily, according to the provisions of the act, was the only available course (*e*). Even when the subjects of reference included a suit in Chancery, Lord Cottenham, C., decided that the court had no jurisdiction by *bill*, when the objections were such as could be as conveniently and effectually discussed in the former method of proceeding (*f*).

Submission under statute of Will. III. award set aside on motion.

Before an application was made to set aside an award, the submission must have been made an order of court, and a notice of motion to set aside the award must have been given. The motion might be made on the usual days in term or out of term, and, by special leave of the court, on other days also. This leave was obtainable on an ex parte application (*g*).

Notice of motion.

Notice of motion in term or out of term.

(*z*) See P. II. ch. 11, s. 3, p. 502.

(*a*) Rybott *v.* Barrell, Coxe MSS. Linc. Inn, S. C. 2 Eden, 131; cited also 1 Coop. C. C. 383; Steward *v.* East India Co., 2 Vern. 380, contrà.

(*b*) See ante, P. III. ch. 9, p. 652.

(*c*) Crawshay *v.* Collins, 3 Swanst. 90, S. C. 1 Wils. C. C. 31; Dick *v.* Milligan, 2 Ves. Jr. 23.

(*d*) 9 & 10 W. III. c. 15.

(*e*) Dawson *v.* Sadler, 1 S. & S. 537.

(*f*) Heming *v.* Swinnerton, 1 Coop. C. C. 386; 2 Phill. 79.

(*g*) 2 Daniell's Chanc. Pract. by Headlam, 1453; Smith's Hand-Book of Chanc. Pract. 58.

Grounds of motion.

It was not necessary, nor was it usual, in old times, that the notice of motion should state the grounds on which it was sought to impeach the award; but the more modern practice was to state them with the same particularity as in a rule nisi to set aside an award at common law (*h*).

Entitling affidavits.

It is to be observed that where the award was under a submission other than by order of court made in a suit, that the affidavits to be used on the motion should have been entitled, "In the matter of the arbitration between [the parties], and the matter of the [the act giving the court jurisdiction over the award]" (*i*).

Cross motion.

This notice of motion might have been given, and come on to be heard as a cross motion with the motion to make the award an order of court (*k*).

No appeal against the decision.

It may be here mentioned that on a motion to set aside an award, before the Judicature Act, when the submission had been made an order of the Court of Chancery under the statute, the order of that court confirming the award was held to be final, and not subject-matter of appeal to the House of Lords (*l*).

Appeal from refusal to set aside award.

Where a judge in the Chancery Division has refused to set aside an award, the appeal against the refusal should now be set down on the interlocutory, and not on the final, list (*m*).

No order nisi to set aside.

It was not the usual practice in Chancery to move for a rule nisi to set aside an award, but it was done in one case under peculiar circumstances (*n*). Now Order LII. r. 2 (1883), prohibits rules nisi for this purpose.

Old practice filing exceptions to award.

III. *Filing exceptions to an award in a suit.*]—When matters in a suit were referred to an arbitrator by an order of Chancery made by consent in the cause, according to the ancient practice, the arbitrator was looked upon in much the same light as a master; his award was considered as little conclusive as a master's report, and orders to confirm awards

(*h*) Mercier *v.* Pepperell, 19 Ch. D. 58. Ord. LII. r. 4, requires grounds to be stated in general terms.

(*i*) Re Law, 4 Beav. 509.

(*k*) Wilkinson *v.* Page, 1 Hare, 276.

(*l*) O'Sullivan *v.* Hutchins, cited in Bignold *v.* Springfield, 7 C. & F. 85; 2 Daniell's Chanc. Pract. by Headlam, 1356, 1357.

(*m*) Delagoa Bay Rail. Co. *v.* Tancred, 61 L. T. 343.

(*n*) Elliott *v.* South Devon Rail. Co., 2 De Gex & S. 17.

were as necessary as orders to confirm reports (*p*). It was, moreover, prescribed, that the award ought to be filed and confirmed before the party could ground any order on it, and that after it was filed, and an order to confirm it nisi obtained, the other side was at liberty to file exceptions to it, which were to be decided on argument (*q*). Now, however, since the decision of the arbitrator is looked upon as that of the court, and held to be final, the practice is changed; and exceptions can no longer be taken to an award, except, probably, in the rare cases where the arbitrator is expressly substituted for the master to take the accounts in the cause like that officer (*r*).

Present practice no exceptions but when arbitrator put for master.

(*p*) Crawshay *v.* Collins, cited in Heming *v.* Swinnerton, 1 Coop. C. C. 419, notes, S. C. 3 Swanst. 90; 1 Wils. C. C. 31; 1 Swanst. 40.

(*q*) Vernon *v.* Wells, 2 Dick. 452; Crofton *v.* Connor, 1 Bro. P. C. 530; Cresly *v.* Carrington, 1 Vern. 469; Hide *v.* Cooth, 2 Vern. 109.

(*r*) Crawshay *v.* Collins, 3 Swanst. 90, S. C. 1 Wils. C. C. 31; 1 Swanst. 40; 1 Coop. C. C. 419, notes; Woodbridge *v.* Hilton, 2 Dick. 640, S. C. 1 Bro. C. C. 398; Price *v.* Williams, 3 Bro. C. C. 163; Knox *v.* Symmonds, 1 Ves. Jr. 369; Dick *v.* Milligan, 2 Ves. Jr. 23, S. C. 4 Bro. C. C. 117, 536; Ford *v.* Gartside, 2 Cox, 368.

CHAPTER XII.

EFFECT OF THE FAILURE OF THE REFERENCE.

PART III. CH. XII.

Scope and contents of the twelfth chapter.

As it is evident, from what has been already said respecting the results of a reference which has become ineffectual from no award having been made, or if made, from its having been condemned as invalid, that the matters submitted to the arbitrator are in general left in the same position as if no reference had ever taken place; it is sufficient in this concluding chapter, respecting the consequences of an abortive arbitration, to narrow our observations to the one or two points which yet require an explanation: namely, respecting the effect of the failure of the reference on the action referred, which is noticed in the first section; and the question treated of in the second section,—whether the courts will decree specific performance of a contract, whose terms were to have been settled by an arbitration, which has become fruitless.

SECTION I.

THE REFERENCE FAILING, PROCEEDING IN THE CAUSE REFERRED.

PART III. CH. XII. S. 1.

Reference failing, action proceeds.

When an action at law is referred, and the reference proves abortive, either from no award having been made, or if made, from its having been afterwards set aside, the parties may go on with the proceedings in court, unless it were stipulated in the agreement of reference, or agreed to at the time of the submission, that the cause should be terminated (*s*).

(*s*) Lowes *v.* Kermode, 8 Taunt. 146; Harries *v.* Thomas, 2 M. & W. 32.

When juror withdrawn.

Withdrawing a juror on a submission at Nisi Prius does not of necessity put an end to the cause. If the reference fail, the plaintiff is not concluded in the action, unless the cause were abandoned by consent. The parties may, however, consent not only to give up the cause, but to preclude themselves from bringing a fresh action for the same matter (*t*).

When verdict taken, new trial on failure.

When a verdict has been taken on a submission at Nisi Prius, and the reference has failed, either from the arbitrator's refusal to accept it or his omission to enlarge the time (*u*), or his death (*x*), or from the order of reference being annulled (*y*), or from the award being set aside, or from other causes (*z*), and the parties do not agree to a second reference, the ordinary course, as the case has never been decided, is to send it down again for a new trial. Where an action by an infant plaintiff (suing by his next friend) was referred before trial by verbal agreement, and the record was withdrawn, and the arbitrator awarded in favour of the defendant, and directed the plaintiff to pay all costs, the court directed that on the plaintiff's refusal to abide by the award and to comply with its terms, the defendant should be at liberty to proceed to trial in the action by proviso (*a*).

Infant plaintiff avoiding award.

Award set aside, verdict falls.

When the award is set aside, the first verdict taken subject to the reference is impliedly set aside as well, although the rule to set aside the award is silent respecting the verdict.

Before new trial first verdict must be set aside.

But when the reference fails before an award is made, and the plaintiff wishes to proceed in the cause, before a new trial is had, the verdict taken by consent subject to the reference, and already entered on the Nisi Prius record, or standing in the associate's book, must be set aside; for a second verdict will be considered irregular while the first remains, unless, indeed, the irregularity have been waived by both parties (*b*).

Verdict on writ of trial subject to reference.

If the verdict be taken subject to the reference, on the trial of a cause on a writ of trial, the plaintiff must get rid of the

(*t*) Harries *v.* Thomas, 2 M. & W. 32; Moscati *v.* Lawson, 1 H. & W. 572.
(*u*) Hall *v.* Phillips, 9 Bing. 89.
(*x*) Harper *v.* Abrahams, 4 Moore, 3.
(*y*) Morgan *v.* Miller, 6 Bing. N. C. 168.
(*z*) Bacon *v.* Cresswell, 1 Hodges, 189; Thompson *v.* Jennings, 10 Moore, 110.
(*a*) Godfrey *v.* Wade, 6 Moore, 488.
(*b*) Hall *v.* Rouse, 6 Dowl. 656; Evans *v.* Davies, 3 Dowl. 786.

verdict before he takes the cause down to trial again; for the verdict is not a nullity, though the under-sheriff has of himself no authority to refer the cause (*c*).

Award set aside, costs of first trial.

When an award was set aside, the case was analogous to that of a venire de novo, and it was settled law before the Judicature Acts that if the rule were silent as to costs, the party for whom the verdict was entered subject to the reference would not be entitled to the costs of the first trial, though he succeeded on the second (*d*).

Compelling defendant to refer again.

Sometimes, instead of the cause being sent down to a new trial, the jurisdiction which the court retained over the verdict would, at the instance of the plaintiff, be exercised to compel the defendant to submit the case again to the same or a fresh arbitrator. When the plaintiff was entitled to some damages, and the only question was respecting the amount, the court will allow the plaintiff to enter judgment, and sue out execution for the amount of damages taken on the verdict by consent (though some indulgence would sometimes be given to the defendant's bail), if, on the first reference failing, the defendant refused to consent to a new arbitration; for the legal liability had been already decided in favour of the plaintiff, and so the failure of the reference did not entirely reopen the cause (*e*). Such seems now to be the settled rule, though the first time such an application was made, the court seemed startled by the novelty, and refused it, notwithstanding the defendant had acted contrary to good faith; the court, however, delivered the postea to the plaintiff, with liberty to enter a verdict reducing the amount of damages to a shilling (*f*).

When only amount of damages referred.

The cases as reported do not seem quite consistent as to the extent of power which the courts retain over the verdict.

When cause referred generally.

Even when the submission included the general merits of the case, and not merely the amount of damages, the Court of

(*c*) Harrison *v.* Greenwood, 15 L. J. Q. B. 92, S. C. 3 D. & L. 353.

(*d*) Wood *v.* Duncan, 5 M. & W. 87; Reg. Gen. H. T. 2 W. IV. r. 64, rep. 8; Bing. 297; 3 B. & Ad. 383; 1 M. & Scott, 424; 2 C. & J. 85; 2 Tyrw. 346; Payne *v.* Bailey, 7 Moore, 147, S. C. 3 B. & B. 304; Poole *v.* Selwood, 1 Price, 310; Summers *v.* Formby, 1 B. & C. 100; Burchall *v.* Ballamy, 5 Burr. 2698.

(*e*) Evans *v.* Davies, 3 Dowl. 786; Woolley *v.* Kelly, 1 B. & C. 68; Taylor *v.* Gregory, 2 B. & Ad. 774.

(*f*) Harper *v.* Abrahams, 4 Moore, 3.

Queen's Bench, on the reference failing, asserted the *power* of directing judgment to be entered up and execution to issue for the full amount of the verdict taken, unless the defendant would enter into a new submission; though it was said to be a matter of *discretion* when the court would exercise the power (*g*).

Where the arbitrator allowed the original time to elapse without enlargement, the court considering the reference beneficial, thus compelled the defendant to consent to a fresh enlargement (*h*). They refused, however, thus to compel a reference, but sent the case down to a new trial, where, through neglect of the plaintiff's attorney, the time for making the award had elapsed before the order of reference had been delivered to the arbitrator (*i*). Nor would they send a case back to the arbitrator, where one award had been made and afterwards set aside as defective, for the defendant might reasonably have no confidence that a second award of the same arbitrator would be more valid (*k*).

The Court of Exchequer, however, seemed to be of opinion, that when a general reference proved abortive, they had no power over a defendant to force him to refer again, and consequently could not exercise a discretion (*l*).

Plaintiff refusing to refer, court not enter verdict for defendant.

If the defendant were the party who pressed for a fresh recourse to arbitration, and the plaintiff refused to agree, the case must have gone down to a new trial; for though the court could set aside the verdict entered for the plaintiff, they had no authority to allow a verdict to be entered for the defendant (*m*).

Reference failing, suit in equity proceeds.

Similar to the rule in law was the practice in equity. For there, when a suit was referred, and the reference proved abortive, the suit proceeded as if there had never been a recourse to arbitration (*n*). There was sometimes in orders of Chancery referring a suit, a provision, "any of the parties to be at liberty to apply to the court as they shall be advised."

(*g*) Wilkinson *v.* Time, 4 Dowl. 37; Porch *v.* Hopkins, 1 D. & L. 881.

(*h*) Wilkinson *v.* Time, 4 Dowl. 37.

(*i*) Doe d. Fisher *v.* Saunders, 3 B. & Ad. 783.

(*k*) Porch *v.* Hopkins, 1 D. & L. 881.

(*l*) Burley *v.* Stephens, 1 M. & W. 156; Evans *v.* Davies, 3 Dowl. 786; Chesalyn *v.* Dalby, 2 Y. & C. 170.

(*m*) Cottam *v.* Partridge, 2 M. & G. 843.

(*n*) Cooth *v.* Jackson, 6 Ves. 11; Crawshay *v.* Collins, 3 Swanst. 90.

PART III. CH. XII. S. 1.

Clause reserved liberty to apply.

This reserved liberty extended two ways. It authorized, if an award were made, proceedings on the award, and if the arbitration did not proceed, an application as if the reference had not been made (*o*).

Abortive award on reference by Quarter Sessions.

On a reference by order of Quarter Sessions, if it becomes impossible for an award to be made (*p*), or if the award made be set aside (*q*), the Queen's Bench Division may order the Court of Sessions to enter continuances, and hear the appeal.

Under the Lands Clauses Act.

If, when a question of compensation is referred to arbitration under the Lands Clauses Consolidation Act, 1845, the arbitrators or umpire do not make their award within the three months allowed them respectively, or if no final award be made, the question of such compensation shall be settled by the verdict of a jury under the statute (*r*).

SECTION II.

ENFORCING IN EQUITY A CONTRACT DEPENDENT ON AN ABORTIVE REFERENCE.

PART III. CH. XII. S. 2.

No action when submission of essential terms and no part performance.

A submission to arbitration is often made respecting some of the terms of a contract, as, for instance, for the sale or lease of lands. When the arbitrators are to decide that which is of the essence of the contract, and they fail to do so, and there has been no part performance, neither the submission nor the contract can be carried out in equity.

Reference failing, equity not divide estate nor fix purchase price.

The Court of Chancery could not be substituted for the arbitrators to make a division of an estate (*s*). On the like principle, when estates were to be sold at a price to be fixed by arbitrators, and they could not agree in their valuation, or in the appointment of an umpire, the Court of Chancery

(*o*) Crawshay *v.* Collins, 3 Swanst. 90.

(*p*) 12 & 13 Vict. c. 45, s. 14. See Appendix of Statutes.

(*q*) 12 & 13 Vict. c. 45, s. 13. See Appendix of Statutes.

(*r*) 8 & 9 Vict. c. 18, s. 23. See Appendix of Statutes.

(*s*) Cooth *v.* Jackson, 6 Ves. 11.

would refuse to direct the master, or any other person, to ascertain the price, and compel the intended purchaser to take the estate at that price; because his only agreement was, to take it at a price ascertained in a specified mode, and to make him take it at a price determined in any other way would be to make him do something which he had never agreed to do. For the price is of the very essence of a contract of sale, and when the arbitrators do not fix it there is no contract. The case of an agreement to sell at a fair valuation is essentially different. In that case no particular means of ascertaining the value is pointed out, and there is nothing, therefore, precluding the court from adopting any means adapted to that purpose (*t*).

A railway company having agreed with a landowner to make all such necessary crossings as his surveyor should, within one month after their taking the land, notify to them, refused to make the crossings which the surveyor, after the month had elapsed, notified to them to make; it was held that there was no contract which the court could enforce (*u*).

Death of agent to whom estimate is to be submitted for approval.

By agreement, a railway company's engineer was to submit to the landowner's agent "for approval" his estimate of the cost of making a road, and in case of difference the amount was to be determined by B., and the amount, when agreed or determined, was to be paid to the landowner. The estimate was not sent in till after the death of the agent. It was held that the submission of the estimate for the agent's approval was of the essence of the contract, that B. had no authority to act, and that the court could not enforce a specific performance (*x*).

Death of party, award drawn but not executed.

Even where the arbitrators had agreed on their award, and put down the terms in writing, but one of the parties died before they had executed the award, and thus consequently revoked their authority, the Court of Chancery refused to

(*t*) Milnes *v.* Gery, 14 Ves. 400; Pritchard *v.* Overy, 1 J. & W. 396; Tillet *v.* Charing Cross Bridge Co., 26 Beav. 419; Vickers *v.* Vickers, L. R. 4 Eq. 529; Richardson *v.* Smith, L. R. 5 Chanc. 648.

(*u*) Earl of Darnley *v.* London, Chatham, and Dover Rail. Co., 3 De G. J. & S. 24, S. C. 36 L. J. Ch. 404, S. C. House of Lords, L. R. 2 H. L. 43.

(*x*) Firth *v.* Midland Rail. Co., L. R. 20 Eq. Cas. 100, S. C. 44 L. J. Chanc. 538.

enforce the contract according to the price which the arbitrators had agreed to allow (*y*).

Contract enforced when submission not of essence and part performance.

But if the matter of the submission be not of the essence of the contract, and especially if there have been a part performance, a court of equity will enforce the contract, notwithstanding the reference has been ineffectual. Thus, where a party who had conveyed certain estates as security for a debt, the amount of which was to be ascertained by arbitration, on the reference failing by the death of the arbitrator, took proceedings in equity to have his lands conveyed to him, the court referred it to the master to ascertain the amount of the charge (*z*). So, also, where a clause in a contract provided that the terms of a lease, to be granted by one party to the other, were to be settled by a party named, the court, being of opinion that the agreement was binding and concluded, and such as ought to be carried into execution, and that the agency of that particular individual was not of the essence of the contract, but only connected with matter of detail, decreed a specific performance, and directed the master to settle the terms of the lease (*a*).

When submission not of essence.

Terms of separation.

Where a divorce suit was agreed to be settled on terms and a draft deed of separation was prepared by an arbitrator, the parties disagreeing, and the wife prayed for specific performance of the agreement by the executors of the deed as settled or modified as the court should think fit, Kay, J., deciding that the arbitrator had exceeded his authority in providing as he did that the wife should have the custody of the children, ordered that the draft should be amended, and the deed drawn up and executed with a clause giving the wife certain access to the children, but not their custody (*b*).

When part performance, though submission of essence of contract.

If there have been a part performance of the contract, though the submission which fails be respecting the price, it will sometimes be enforced, and the duty of the arbitrator undertaken by the court. When a party agreed for a lease of certain lands, the rent to be fair and reasonable, and as arbitrators to be named should fix, and he entered into the lands and held possession of them many years, and expended

(*y*) Blundell *v.* Brettargh, 17 Ves. 232.

(*z*) Cheslyn *v.* Dalby, 2 Y. & C. 170.

(*a*) Gourlay *v.* Duke of Somerset, 19 Ves. 429. See Rowe *v.* Wood, 1 J. & W. 315, 346.

(*b*) Evershed *v.* Evershed, 46 L. T. N. S. Ch. D. 690.

money on them: the reference proving abortive, the Court of Chancery referred it to the master to ascertain what the fair rent should be (*c*).

Valuation of partnership.

Where two partners had agreed that on the determination of the partnership one should purchase the share of the other at a valuation to be made by two persons, one to be appointed by each partner, and the partnership, after having been carried on for some time, was determined, it was held that though the valuation could not be made because no umpire was provided, this court would carry out the agreement, and of itself ascertain the value of the share, as the determination of the price by valuers was not of the essence of the agreement (*d*).

Act of arbitrator not part performance of contract.

Acts done by the arbitrators towards the execution of their duty, such as surveying the lands, will not be considered acts of part performance of the agreement, so as to sustain the bill for specific performance (*e*).

Contract enforced, party preventing award being made in time.

When the reference becomes abortive in consequence of the fault of a party to the submission, equity has been known to interfere and enforce it against him. Thus, when on an agreement to sell lands at a valuation to be made before a certain day, the vendor refused to allow the referees to enter on the lands to value them, so that no price was fixed within the time limited, the Vice-Chancellor decreed that the valuation should be made by them, as if no time had been limited, and that the contract should be carried into execution according to such valuation; for though time is as essential in equity as in law, yet in equity a defendant is not permitted to set up a legal defence which has grown out of his own misconduct (*f*).

(*c*) Gregory *v.* Mighell, 18 Ves. 328.

(*d*) Dinham *v.* Bradford, L. R. 5 Chanc. 519.

(*e*) Cooth *v.* Jackson, 6 Ves. 11; Blundell *v.* Brettargh, 17 Ves. 232.

(*f*) Morse *v.* Merest, 6 Madd. 26.

APPENDIX.

APPENDIX OF FORMS.

[*For terms deemed to be included in all submissions out of court, unless the contrary is expressed, see the schedule to the Arbitration Act*, 1889 (52 & 53 *Vict. c.* 49), *p.* 798, *in Appendix of Statutes.*]

SUBMISSIONS.

FORM I.

1. Memorandum of an agreement (*a*) made this [] day of [], A.D. [], between A. B., of [], and C. D., of []. — Submission by agreement.

2. Whereas disputes and differences have arisen, and are still subsisting, between the above-mentioned parties, it is hereby agreed by and between them, to refer all disputes and matters in difference whatsoever between them (*b*). — Recital of differences, subject referred.

3. To the award, order, and final determination of X. Y. of [], Esq., barrister-at-law. — Appointment of arbitrator.

4. So as the above-mentioned arbitrator make and publish his award in writing, and signed by him, of and concerning the matters referred, ready to be delivered to the parties or to either of them (*c*). — Formal requisites of award.

5. Or if they or either of them shall be dead before the making of the award, to their respective personal representatives who shall require the same (*d*). — Death of party no revocation.

6. On or before the [] day of [] next (*e*), or on or before any other day to which the arbitrator shall by any writing signed by him, indorsed on this submission, from time to time enlarge the time for making his award (*f*). — Duration, power to enlarge time.

(*a*) See P. I. ch. 3, s. 2, d. 2, p. 53, as to submissions by agreement.
(*b*) See P. II. ch. 2, p. 123, as to the subject-matters referred.
(*c*) See P. II. ch. 5, s. 1, p. 247, as to the formal requisites of the award.
(*d*) See P. II. ch. 3, s. 3, d. 7, p. 166, as to this provision against the death of a party.
(*e*) See P. II. ch. 3, s. 1, p. 136, as to the duration of the arbitrator's authority.
(*f*) See P. II. ch. 3, s. 2, p. 143, as to enlarging the time.

FORM I.

Power over costs.

7. And it is further agreed, that the costs of preparing and executing these presents and a duplicate hereof, and the costs of the reference and award, shall be in the discretion of the arbitrator, who may direct to, and by whom, and in what manner, the same or any part thereof shall be paid (*g*).

Parties and witnesses to be sworn.

8. And that the witnesses on the reference and the parties (*h*) (if examined) shall be examined on oath or affirmation (*i*).

Power to proceed ex parte.

9. And that the arbitrator shall be at liberty to proceed ex parte, in case either party, after reasonable notice, shall at any time neglect or refuse to attend on the reference, without having previously shown to the said arbitrator what the latter shall consider good and sufficient cause for omitting to attend (*k*).

Power to call for documents.

10. And that the parties respectively shall produce before the arbitrator all books, deeds, papers, accounts, vouchers, writings, and documents within their possession or control, which the arbitrator may require and call for, as in his judgment relating to the matters referred (*l*).

Parties to forward, not prevent award.

11. And that the parties respectively shall do all other acts necessary to enable the arbitrator to make a just award; and that neither of them shall wilfully and wrongly do or cause to be done any act to delay or prevent the arbitrator from making his award (*m*).

Parties to abide by award.

12. And it is further agreed, that the said parties, their executors and administrators, shall, on their respective parts, in all things stand to, obey, abide by, perform, fulfil, and keep the award, so to be made and published as aforesaid (*n*).

Parties not to bring action.

13. And that none of them shall bring or prosecute action against the arbitrator or against any other of them, concerning the matters referred (*o*).

Power to refer back award.

14. And it is further agreed, that in the event of either of the parties, their executors or administrators, being dissatisfied with the award, or disputing its validity, and moving the court to set the same or any part thereof aside, or on any motion being made respecting the said award, the said court, whether the award be insufficient in law or not, shall have power, if it shall think fit, to remit the award, or the matters

(*g*) See P. II. ch. 7, s. 1, p. 377, as to costs.
(*h*) See P. II. ch. 4, s. 1, d. 6, p. 185, as to examining the parties.
(*i*) See P. II. ch. 4, s. 1, d. 5, p. 182, as to examination on oath.
(*k*) See P. II. ch. 4, s. 1, d. 10, p. 197, as to proceeding ex parte.
(*l*) See P. II. ch. 4, s. 1, d. 7, p. 190, as to production of documents.
(*m*) See P. I. ch. 3, s. 8, p. 106, as to preventing award being made.
(*n*) See P. III. ch. 3, p. 539, as to action for non-performance of award.
(*o*) See P. I. ch. 3, s. 5, p. 68, as to agreement not to sue.

hereby referred, or any of them, from time to time, to the reconsideration and determination of the said arbitrator (*p*).

Conclusion.

15. In witness whereof the said parties have hereunto set their hands, the day and year first above written.

Witness, A. B.
O. P. C. D.

CLAUSES IN SUBMISSIONS (*q*).

Recital special differences; matters referred.

16. [*This clause may be used instead of clause* 2, *in the above Form I.*] —Whereas certain differences and disputes have arisen and are still pending between the said parties [*for instance*, "as to whether the said A. B. is indebted to the said C. D. in any and what sum of money, and as to the price the said C. D. ought to pay for the stock in trade taken by him off the hands of the said A. B."], it is agreed by and between them that the same shall be referred, &c.

Recital action pending; matters referred.

17. [*Instead of clause* 2, *Form I.*]—Whereas an action is now depending in the Queen's Bench Division of her Majesty's High Court of Justice, wherein the said A. B. is the plaintiff, and the said C. D. the defendant, it is agreed [*if it be intended not to refer the action, but only the subject of action, add* "that all proceedings in the action shall be stayed, but that in order to ascertain, settle, and adjust all accounts, claims, and demands in dispute in the said action"], that the same [*if the reference is to be general, add*, "and all matters in difference between the parties"] shall be referred, &c.

Recital action in Chancery dismissed; matters referred.

18. [*Instead of clause* 2, *Form I.*]—Whereas the said A. B., on or about the [] day of [], A.D. [], commenced an action in the Chancery Division of the High Court of Justice against the said C. D. praying [*here state the substance of the claim*]; and whereas the said parties have agreed, that the said action in the said Chancery Division shall be dismissed, without costs, and that the several matters, questions, and differences hereunder specified, viz., whether [*here enumerate the points to be decided*] shall be referred, &c.

Recital partnership; matters referred.

19. [*Instead of clause* 2, *Form I.*]—Whereas A. B., C. D., E. F., G. H., and I. K., have carried on the business of [], in partnership, and

(*p*) See P. II. ch. 10, p. 479, as to power of court to refer back; and also as to duty of arbitrator, when award referred back.

(*q*) The following clauses and provisions to the end of Form No. I., together with those already inserted in the body of the preceding agreement of reference, comprise, it is believed, all those that are in general use, as well as some special clauses, which it is trusted may be of service.

They have been all set forth together, to give parties a large choice, out of which to select those that may suit their particular case.

For the sake of convenience, they are collected in the first form of submission, which happens to be that of a submission by agreement; but they may equally be inserted, either verbatim, or with little alteration, in a submission by bond, by deed, by judge's or master's order, by order of Nisi Prius, or rule of court.

FORM I.

the accounts between them have become involved, and differences have arisen among them relating thereto, it is hereby agreed that the copartnership accounts and all matters in difference between the parties, or any of them, or between any one or more of them, and any other one or more of them, shall be referred, &c.

Appointment of two arbitrators and umpire.

20. [*Instead of clause* 3, *Form I.*]—to the award, order, final end, and determination of U. V. and X. Y., arbitrators nominated by the said A. B. and the said C. D. respectively, and "in case the said arbitrators shall not agree to the umpirage of S. T." [*or* "in case they shall not agree to the award of such person, as the said arbitrators shall appoint as umpire"], *or* "in case they disagree about making an award, or fail to make an award before the [] day of [], then to the award, umpirage, final end, and determination of such umpire, as the said arbitrators shall by writing under their hands, indorsed on these presents, before they enter upon the consideration of the matters referred, nominate and appoint (*r*).

Appointment of umpire from time to time.

21. [*Instead of clause* 3, *Form I.*]—to the award, order, final end, and determination of U. V. of [], and X. Y. of [], and in case the said arbitrators shall not agree in the determining any matter or thing, or matters or things, hereby referred to them; the matter or thing, or matters or things, on which they shall not agree, shall from time to time be referred to and determined by such persons as they the said arbitrators shall appoint in writing [before they enter upon the consideration of the matters referred].

Before entering on reference.

After difference arisen.

22. [*This provision may be inserted instead of the words between the brackets*, "and such appointment of an umpire shall from time to time be made, as soon as conveniently may be after such difference of opinion shall from time to time arise"] (*r*).

Appointment of two arbitrators who are to appoint a third.

23. [*Instead of clause* 3, *Form I.*]—to the award, order, arbitrament, final end, and determination of U. V. of [], and X. Y. of [], and of such third arbitrator as the said U. V. and X. Y. shall, by writing under their hands, to be indorsed on these presents, before they proceed in this arbitration, nominate and appoint to act with them [*when it is intended that any two out of the three shall be empowered to act, add the words*, "or any two of them"] (*s*).

Formal requisites of award.

24. [*Instead of clause* 4, *Form I.*]—so as "the said arbitrators" [*or* "the said arbitrators or any two of them," *or* "the said arbitrators or umpire"]—make and publish ["his or"] their award ["or umpirage"] in writing, under ["his or"] their hands, [*or* "under their hands and seals"] of and concerning the matters referred, ready to be delivered to the parties or any of them (*t*).

(*r*) See P. II. ch. 4, s. 4, p. 223, as to the umpire.

(*s*) See P. II. ch. 4, s. 3, p. 214, as to joint arbitrators.

(*t*) See P. II. ch. 5, s. 1, p. 247, as to the formal requisites of the award.

FORM I.

Duration, powers to enlarge.

25. [*Instead of clause* 6, *Form I.*]—[*When the arbitrator is to have no power to enlarge the time, omit all in clause* 6 *that follows the word* "*next*"] (*u*). [*When the arbitrator is to have a limited power of enlargement say*] on or before the [] day of [], or on or before any other day not later than the [] day of [] to which "the said arbitrator" [*where there are arbitrators and an umpire with the same limit of time, say*, "the said arbitrators or umpire"] shall (*it is better to add*, "by any writing" *or* "by any writing signed by him" [*or* "him or them"], *or* "by any writing under his hand" [*or* "his or their hands"] "at the foot of these presents") enlarge the time for making his [*or* "his or their"] award (*or* "award and umpirage") (*x*).

Umpire with further time than arbitrator.

26. [*Instead of clause* 6, *Form I.*]—[*When there are two arbitrators and an umpire, but the latter is to have a later day for making his award, adapt either of the preceding forms to the case of two arbitrators, and add*] and "in case the said arbitrators do not make and publish their award on or before the said [] day of [] [*when no time is limited for the arbitrators, say, instead of the preceding clause*, "in case the said arbitrators finally disagree about making an award"] then so as the said umpire make and publish his award or umpirage, &c. [*continue adapting the clauses* 4, 24, *and* 25, *to the case of the umpire, giving him a later period, or a general power of enlargement*] (*y*).

Death of party not to affect reference.

27. [*This may be added explanatory of clause* 5, *Form I.*]—that the submission hereby made shall not be defeated or affected by the death of the said parties, or any of them, pending the same, but shall or may be proceeded in, and the matters in difference determined, in the same manner as if the award of the said arbitrators had been made or determined in the lifetime of the party or parties so dying; and the executor or administrator, executors or administrators, of the party or parties so dying shall be, and be deemed and considered to be, a party or parties to the reference or submission hereby made, any rule of law or equity to the contrary notwithstanding (*z*).

Costs of reference to abide event.

28. [*Instead of clause* 7, *Form I.*]—that the costs of the reference and award shall abide the event of the award (*a*).

Costs of cause abide event.

29. [*Instead of clause* 7, *Form I.*]—[*when an action is referred, with or without other matters, a common provision is*] that the costs "of the cause" [*or* "of the cause and of the special jury"] shall abide the event of the award (*b*) as to the "cause," and that the costs of the

Costs of

(*u*) See P. II. ch. 3, s. 1, p. 136, as to the duration of the arbitrator's power.

(*x*) See P. II. ch. 3, s. 2, p. 143, as to enlarging the time.

(*y*) See P. II. ch. 4, s. 4, d. 4, p. 234, as to the commencement of the umpire's authority.

(*z*) See P. II. ch. 3, s. 3, p. 152, as to death revoking authority.

(*a*) See P. II. ch. 7, s. 2, p. 373, as to duty of arbitrator when costs abide the event.

(*b*) See P. II. ch. 7, s. 2, d. 2, p. 390, as to costs abiding the event.

FORM I.

reference and award shall be in the discretion of the arbitrator, who may direct to, and by whom, and in what manner, the same or any part thereof shall be paid (*c*). [*The following addition is very useful with respect to the costs of an action when they abide the event*]—and that the arbitrator shall have all the powers of certifying which a judge of the High Court of Justice would have had on the trial of the said cause (*d*).

reference in arbitrator's discretion.

Power to certify for costs.

Costs as between solicitor and client.

30. That the arbitrator shall be empowered to award costs to be paid as between solicitor and client (*e*).

Evidence taken by one arbitrator may be acted on by both, or by umpire.

31. That the said X. Y. shall be at liberty forthwith, and alone, to take evidence, as he may think fit, relating to the said causes, suits, and matters in difference; and that the said arbitrators and the umpire shall respectively be at liberty to proceed upon the evidence, which shall be taken before the said arbitrators, or before the said X. Y. alone.

Umpire not to re-hear case unless requested.

32. That the said umpire shall be at liberty to act upon the evidence taken before the said arbitrators, and (unless requested to hear evidence) to make his award without hearing any witnesses, or receiving any fresh evidence: provided nevertheless, that if either party request him to rehear the witnesses, or any of them, or tender any fresh evidence relative to the matters in difference, the said umpire shall rehear such witnesses and receive such evidence.

Dispensing with regular evidence.

33. That it shall be lawful for the arbitrators or the umpire to obtain information upon or in respect of the premises hereby referred, or any of them, either by the statements of the parties hereto, or of any of them, made either in private, or in the presence of the other party or parties, or by parol or written evidence, or by such other ways or means as they or he shall in their or his judgment think most advisable, and deem most applicable to the nature and circumstances of the case (*f*).

Power to arbitrator to proceed ex parte.

34. [*Instead of clause* 9, *Form I.*]—that the said arbitrator shall be at liberty to proceed ex parte in case of the non-attendance of either of the said parties, or of their witnesses, after [] clear days' previous notice in writing, under the hand of the said arbitrator, given to the said parties respectively, or left at his or their respective offices, or of their solicitors or agents in London, notifying the time and place of meeting to proceed with the said reference (*g*).

(*c*) See P. II. ch. 7, s. 1, d. 3, p. 383, as to costs in discretion of arbitrator.

(*d*) See P. II. ch. 7, s. 3, p. 404, as to certifying for costs.

(*e*) See P. II. ch. 7, s. 1, d. 3, p. 380, as to what costs arbitrator may award.

(*f*) See P. II. ch. 4, s. 1, p. 172, as to the ordinary mode of conducting the case. P. II. ch. 4, s. 2, p. 207, as to taking legal or scientific opinion.

(*g*) See P. II. ch. 4, s. 1, d. 10, p. 197, as to proceeding ex parte.

FORM I.

35. That the said arbitrator "at the request of either party shall" [*or if it be not intended to be compulsory*, "shall be at liberty to"] raise by a sufficient statement of facts any point of law on the face of his award for the opinion of the court (*h*). Power to arbitrator to state a case.

36. That the arbitrator shall enter upon the reference and make a preliminary award, stating the facts necessary to raise the question, whether [*for instance*, "whether at law the defendants are concluded by the certificates given by Mr. O. P., the resident engineer of the defendants, and produced in court on the trial of this cause"], and that the opinion of the court be taken on that point, before the said arbitrator proceeds with the rest of the reference. Power to make preliminary award, raising a point of law.

37. That the said arbitrator shall be at liberty to direct a verdict to be entered in the said cause for the plaintiff or the defendant, as he shall think proper (*i*). Power to direct entry of verdict.

38. That the said arbitrator shall be at liberty "to direct judgment to be entered for the plaintiff or the defendant in the said action" [*or, a more restricted power*, to "direct judgment by default to be entered against the defendants in the said action"]. [*Or, a more general power*, "to order such judgments and proceedings to be had and taken in or about the said action and matters in difference, as to the said arbitrator shall seem fit"] (*k*). Power to award entry of judgment. Judgment by default, &c.

39. That the said arbitrator shall be at liberty to direct the said action to be discontinued (*l*). Power to award discontinuance.

40. [*When the costs of the cause abide the event, this clause may often usefully be added*]—that the said arbitrator shall, unless requested in writing to find on any specific issues joined in the said action, be at liberty to find generally for the plaintiff or for the defendant; and that the costs of any specific issues, if found, shall abide the event of the award on each (*m*). Relieving arbitrator from finding on the issues.

41. That the arbitrator, if he shall think it necessary, shall be at liberty, and is hereby authorised to appoint an accountant to assist him, at the expense of the said parties, who shall be liable to such accountant for his reasonable remuneration; and that as between the said parties the expense of such accountant "shall be borne and paid in equal moieties by the said parties" [*or* "shall be in the discretion of the arbitrator"]; such accountant to be required to make his solemn declaration according to the statute, of the truth of the account or statement to be made out by him (*n*). Power to employ an accountant.

(*h*) See P. II. ch. 5, s. 8, d. 5, p. 318, as to stating a case in the award.

(*i*) See P. II. ch. 6, s. 3, p. 350, as to awarding entry of a verdict.

(*k*) See P. II. ch. 6, s. 5, p. 362, as to awarding entry of judgment.

(*l*) See P. II. ch. 6, s. 1, p. 337, as to disposing of a cause without deciding it.

(*m*) See P. II. ch. 6, s. 2, p. 338, as to awarding on a cause and the issues joined in it.

(*n*) See P. II. ch. 4, s. 2, p. 207, as to the arbitrator delegating his power.

FORM I.

Power to order what shall be done.

42. That the arbitrator shall be at liberty to order and determine what he shall think fit to be done by either of the parties respecting the matters referred, or any of them.

Power to order drains to be made.

43. That the said arbitrator shall in and by his said award or awards order and direct what shall be done to remove the annoyances complained of, with reference to the drainage, by whomsoever they were created, and shall direct what drains and other works shall be made, and at whose expense and by whom the said drains and works and any other drains already made shall be used and maintained, so as to provide for the drainage, not only of the houses and premises of the parties in the said actions, but also of the houses and premises on the properties of the said C. D., E. F., and G. H., parties to this submission.

Power to order removal of obstructions.

44. That the said arbitrator shall have power to direct what shall be done respecting the removal of any of the obstructions charged in the statement of claim in the said action, and to direct the prostration of the whole or any part of the embankment in the indictment mentioned, as he shall think fit (*o*).

Power to cause plans and maps of lands to be made.

45. [*In submissions respecting lands the following clause may be useful.*] —That it shall be lawful for the said arbitrators, or their umpire, to admeasure, or cause the said lands to be admeasured, and to make, or cause to be made, a plan or map, or plans or maps, of the said messuage, farm lands, and hereditaments, and to do and execute all such further and other acts, matters, and things, with respect to the same, as they or he shall think necessary and proper for the purposes of this reference.

Costs of such maps and plans.

46. [*This may follow the preceding clause*]—and that the costs, charges, and expenses of preparing and executing these presents, and of making such admeasurements, plans, and maps as aforesaid [*insert, when necessary,* "and of making such valuation, appraisement, and division as aforesaid"], and of all such other necessary acts, matters, or things, which shall be done and executed as aforesaid, "shall be borne and paid by and between the said A. B. and C. D. in equal shares and proportions" [*or* "shall be in the discretion of the said arbitrators or umpire"].

Principle on which to calculate value of the land.

47. That for the purpose of making the valuation of the portion of White Acre Farm, mentioned in the schedule, the arbitrator shall previously fix and determine, and specify in his award, the best and most improved yearly rent, for which the lands mentioned in the schedule might reasonably be expected to have been let at the date of this agreement, and shall calculate the value of the said lands at [] years' purchase of such improved rent.

(*o*) See P. II. ch. 8, s. 2, p. 430, as to arbitrator's duty in executing the power. See also award of prostration of the embankment, post, Form LXV.

48. That if either party shall by affected delay, or otherwise, wilfully prevent the arbitrator from proceeding in the reference, or from making his award, he shall pay such costs to the other as "the above-mentioned court" [*or* "the arbitrator"] shall think reasonable (*p*). Party preventing arbitrator to pay costs.

49. And because the parties hereto on both sides are willing to make the admissions hereinafter mentioned, so as to save the expense of proving the several matters so admitted, therefore "it is agreed" [*or, if the submission be by judge's order, say instead,* "by the like consent I do further order;" *if by order of Nisi Prius, say,* "it is further ordered"] that the following admissions be made, that is to say [*here specify the admissions*]. Making admissions.

50. [*Instead of clause* 14, *Form I.*]—that in the event of any application to the said court on the subject of this order, the reference, or the award, the court may, if it think fit, refer back to the said arbitrator [*sometimes it may be as well to insert,* "or to any other person whom the court shall appoint"] the whole or any part of the matter of this order upon such terms as the said court shall think proper (*q*). Power to court to refer back. To same or different arbitrator.

51. [*Where U. V. has been nominated as arbitrator by A. B., and X. Y. by C. D., it may be convenient to add this clause*]—that in case the said U. V. shall die, or refuse, or become incapable to act as arbitrator, before the whole of the premises hereby referred shall be determined by the said arbitrators or their umpire, then the said A. B., his heirs, executors, or administrators, shall forthwith thereafter nominate and appoint some other fit and indifferent person to be arbitrator in the stead and place of the said U. V.; and so in like manner upon the decease, or neglect, or refusal to act, of any arbitrator succeeding to the place of the said U. V. [*A similar clause should be inserted as to the arbitrator appointed by C. D. Then let it conclude*] that every arbitrator so to be appointed as a substitute for the said U. V. or X. Y., or any succeeding arbitrator, shall have the same powers and authorities as the arbitrator for whom the substitution is made would have had, had he continued to act (*r*). Provisions for appointing new arbitrators.

52. [*This may follow the preceding clause*]—that if the said A. B. or C. D., or their heirs, executors, or administrators, or any of them respectively, when bound to appoint a new arbitrator, pursuant to the above provisions, in lieu of any arbitrator who may die, refuse to act, or become incapable, shall neglect, or refuse so to do for one-and-twenty days, after a notice in writing on the part of the party or parties entitled to require such appointment shall have been served on the party or parties bound to make such appointment, then the latter party or Liquidated damages for refusing to appoint new arbitrator.

(*p*) See P. I. ch. 3, s. 8, d. 2, p. 107, as to moving for costs under this clause.

(*q*) See P. II. ch. 10, p. 479, as to power of court to refer back, and also as to power and duty of arbitrator on reference back.

(*r*) See as to substituting new arbitrators, P. II. ch. 3, s. 3, d. 6, p. 165.

FORM I.

parties shall pay to the former party or parties the sum of £ [] by way of liquidated damages for such neglect or refusal (*s*).

Penalty for breach of submission.

53. And for the due execution and observance of the agreement hereinbefore contained on the part of the said A. B. [*and also for any other party for whom A. B. is liable*], the said A. B. doth hereby bind himself, his heirs, executors, and administrators, in the sum of £ []. [*Add a similar agreement by C. D.*].

Parties to pay arbitrator's charges.

54. And the said parties [*or* "the said solicitor of the said parties"] jointly and severally agree to and with the said arbitrator, in consideration of his taking upon himself the burthen of the reference, to pay to the said arbitrator his reasonable charges for the arbitration and award.

II.

Agreement of reference, concise form.

We agree to refer all matters in difference between us to the award of X. Y. (*t*).

A. B.
C. D.

III.

Agreement of reference by executor as to testator's estate.

Memorandum of agreement made this [] day of [], A.D. [], between A. B. of [], and C. D. of [].

Whereas the said A. B. is executor of the last will and testament of E. F., late of [], deceased, and whereas certain differences have arisen between the said A. B. as such executor and the said C. D., in regard to claims by the said A. B., as such executor, against the said C. D., and by the said C. D. against the said A. B., in respect of the said testator's estate; it is hereby agreed by and between the said parties, to refer all matters in difference respecting the said testator's estate to the final award of X. Y. of [], for him to determine whether the said A. B., as such executor, has any and what claim against the said C. D., and whether the said C. D. has any and what claim against the said testator's estate, so as, &c. [*continue as in Form I., clauses* 4, 5, 6].

Reference not to be an admission of assets.

And it is further agreed that this submission to arbitration shall not be deemed or taken to be an admission by the said A. B. that he has assets of the said testator,* but that the said A. B. shall be at liberty to deny before the said arbitrator "that at the date of this submission he had any assets in his hands lawfully liable to the demands of the said C. D." [*or* "at any time before the case is closed, that he has at the time of such denial assets in his hands lawfully liable to the demands of the said C. D."]; and if the said

(*s*) See P. I. ch. 3, s. 4, d. 2, p. 62, as to liquidated damages.

(*t*) See p. 798 for terms in Sched. I., Arbitration Act.

A. B. shall make such denial as aforesaid, that he the said arbitrator, if requested by the said C. D., shall inquire "whether at the date of this submission the said A. B. had" [*or* "whether at the time of such inquiry the said A. B. has"] assets of the said testator lawfully liable to pay the whole or any part of the sums claimed by the said C. D. And if the said arbitrator shall on the balance find any money to be due to the said C. D., he shall, if he shall find that the said A. B. had at the time to which the said inquiry referred assets liable to the demands of the said C. D., direct the said A. B. to pay to the said C. D. the balance, or so much thereof as the assets so found to be liable shall be sufficient to satisfy. And if the said arbitrator shall find that the said A. B. had no such assets, or not enough of such assets to pay the whole amount so found due to the said C. D., he shall be at liberty to award that the said A. B. shall pay to the said C. D. the said amount (or as much thereof as the assets in hand do not avail to satisfy as aforesaid), out of any assets which may have come into the hands of the said A. B. since the time to which the said inquiry respecting the assets refers, or which may hereafter come into them. And that if the said arbitrator shall find any money due from the said C. D., he shall direct the latter to pay the same to the said A. B. [*Add such other clauses as may be suitable*] (*u*).

Arbitrator to inquire as to assets.

Finding assets, to direct executor to pay sum due.

Finding no assets to direct executor to pay out of assets quando.

Arbitrator to direct payment to executor of money due.

IV.

[*Commence as in the previous Form as far as the asterisk*]—and that the said arbitrator shall not consider or inquire whether the said A. B. had or has any assets of the said testator, nor shall his award conclude, or be construed to conclude, any questions as to assets, but shall leave the same entirely open. And it is further agreed that if the said arbitrator shall find any balance of money due to the said A. B. as such executor, he shall direct the said C. D. to pay the same to the said A. B.; but if he shall find a balance in favour of the said C. D., he shall add a direction that the said A. B. shall pay the same to the said C. D. out of the assets (if any) which may be in his hands, or which may hereafter come to them; and that it shall not be lawful for the said arbitrator to direct the said A. B. to pay in any other manner.

Agreement of reference by executor as to liability, not as to assets.

To direct executor to pay out of assets, if any.

V.

And the said A. B. and the said C. D. do each of them, for himself, his executors, and administrators, covenant, promise, and agree to and with the other of them, his executors and administrators, that if at any time or times during the co-partnership, or at or after any determination

Arbitration clause in deed of partnership.

(*u*) See P. I. ch. 2, s. 2, d. 4, p. 29, as to executors parties to reference.

thereof, any variance, dispute, doubt or question shall arise, happen, or be moved between the said parties or either of them, their executors or administrators, in, for, about, or touching the consideration of these presents, or the joint concern or co-partnership, or any covenant, agreement, clause, matter or thing herein contained, or in the construction hereof, or in anywise relating hereto; then every such variance, dispute, doubt, or question, shall be referred to, and be resolved and determined by two fit and indifferent persons, to be elected and chosen one by each of the said partners, within twenty days next after such variance, dispute, doubt, or question shall arise, happen, or be moved; with power to the arbitrators to elect an umpire in case of dispute: and that each of the said partners, his executors and administrators, shall abide by, perform, and keep the award and determination of the arbitrators, or of their umpire, without any further dispute or trouble whatsoever.

Provision for liquidated damages for refusing to appoint an arbitrator.

And that, if either the said A. B. or C. D., his executors, or administrators, shall neglect or refuse to appoint an arbitrator pursuant to the above provisions for twenty-one days after the other of them shall have appointed such arbitrator on his part, and shall have served a written notice requiring the party so neglecting or refusing to make such appointment; * the party so neglecting or refusing shall pay to such other the sum of £ [], by way of liquidated damages for such neglect or refusal (*u*).

On refusal single arbitrator may act alone.

[*Or this clause may be inserted after the asterisk, instead of the provision for liquidated damages*]—then the arbitrator appointed by the party serving such notice shall at the request of such party proceed to hear and determine such matters in difference, as if he were an arbitrator appointed by both parties for that purpose; and that if after the said arbitrator shall have been so requested as aforesaid, either party shall revoke, or attempt to revoke the authority of the said arbitrator, such party shall pay to the other of them £ [], as liquidated damages; and the said arbitrator, if requested, shall proceed to hear and determine the said matters, notwithstanding such revocation or attempted revocation (*x*).

Liquidated damages for revocation.

Arbitrator to proceed notwithstanding revocation.

VI.

Submission by bond.

(*y*) Know all men, by these presents, that I, C. D., of [], am held and firmly bound to A. B., of [], in £ [], of good and lawful money of Great Britain, to be paid to the said A. B., or his certain attorney, executors, administrators, or assigns; for

(*u*) See P. I. ch. 3, s. 4, d. 2, p. 63, as to liquidated damages.

(*x*) See P. II. ch. 3, s. 3, d. 3, p. 161, as to effect of award after revocation in equity. See also P. II. ch. 3, s. 3, d. 6, p. 165, as to substituting new arbitrators by statute.

(*y*) See P. I. ch. 3, s. 2, d. 3, p. 54, as to submissions by bond.

which payment, well and truly to be made, I bind myself, my heirs, executors, and administrators, firmly by these presents, sealed with my seal. Dated the [] day of [], in the year of our Lord []. Whereas [*here state the existence of differences between A. B. and C. D., or enumerate the special matters in dispute, as in a submission by agreement* (*see Form I.*), *and proceed*], and it is agreed by and between the said A. B. and C. D. to refer "the same" [*if the special matters have been recited and the reference is to be general, say*, "the same and all matters in difference between them"] to U. V., of [], and X. Y. of [], with liberty to them to choose and appoint an umpire. Now the condition of this obligation is such, that if the above-bounden C. D., his heirs, executors, and administrators, do and shall on his and their part and behalf in all things well and truly stand to, obey, abide by, observe, perform, fulfil, and keep the award, order, arbitrament, final end, and determination of the said arbitrators respecting the matters referred; so as the said arbitrators make and publish their award in writing of and concerning the same, ready to be delivered to the parties, or if they or either of them shall be dead before the making of the award, to their respective personal representatives who shall require the same; on or before the [] day of [], or on or before any other day not later than the [] day of [], to which the said arbitrators shall by any writing signed by them, indorsed on these presents, enlarge the time for making their said award: and in case the said arbitrators shall not make an award of and concerning the premises within the time limited as aforesaid; then if the said C. D., his heirs, executors, and administrators, do and shall upon his and their part and behalf, in all things well and truly stand to, obey, abide by, observe, perform, fulfil, and keep the award, order, arbitrament, umpirage, final end, and determination of the person so by the said arbitrators to be chosen and appointed as umpire as aforesaid; so as the said umpire do make and publish his award or umpirage in writing [*continue as in Form I., clauses 4, 5, and 6, adapting them to the case of an umpire*], then this obligation to be void, otherwise to remain in full force. And it is further agreed by and between the said A. B. and C. D. that [*here add such of the clauses and provisions given in Form I. as are applicable*].

Recital in condition.

Subjects referred to two arbitrators and umpire.

Condition to abide award.

Arbitrators not making award, to abide award of umpire.

Signed, sealed, and delivered, in the presence of O. P. C. D. (L.S.)

[*A. B. should execute to C. D. a similar bond with a similar condition.*]

VII.

[*Money bond by D., E., and F., jointly and severally to A., B., and C.*]—Whereas the above-bounden D., E., and F., and the above-named A., B., and C., lately carried on the trade and business of [] in partnership; and whereas divers differences and disputes

Submission by bond of all matters in difference between six partners.

have arisen between the said A., B., C., D., E., and F., with respect to such trade and business, and the accounts relating thereto; and whereas it has been agreed to refer all such differences and disputes between the said parties, or any of them, to the award of X. Y., of [], an arbitrator, appointed by and on the several parts and behalves, as well of the said D., E., and F., as of the said A., B., and C., to arbitrate respecting the same. Now the condition of the above-written obligation is such, that if the above-bounden D., E., and F., and each of them, their and each of their heirs, executors, and administrators, and every of them, shall on his or their respective parts and behalves, in all things well and truly stand to, obey, perform, fulfil, and keep the award to be made by the said X. Y., of and concerning the said trade and dealings, and all accounts, differences, and disputes relative thereto, and of and concerning all actions, cause and causes of action, suits, claims, damages, and demands whatsoever, now or at any time heretofore had, made, moved, brought, commenced, or depending by or between the said parties, or any of them: so as the above-mentioned arbitrator [*continue as in Form No. I., clauses* 4, 5, *and* 6], then this obligation to be void, otherwise to remain in full force (*z*). [*Add such clauses as may be advisable, as, for instance, the clause authorizing the employment of an accountant. See Form I., clause* 41. *There must be a similar bond from A., B., and C., to D., E., and F., with a similar condition.*]

Condition.

Subject-matters referred.

VIII.

Submission by deed.

This indenture, made between A. B., of [], and C. D., of [], of the first part; E. F., of [], of the second part; and G. H., of [], of the third part.

Recital.

Whereas differences have arisen, and are depending between the said A. B. and C. D., and the said E. F., and also between the said A. B. and the said E. F., and also between the said E. F. and the said G. H., touching and concerning [*here shortly state the matters*]: and in order to put an end to the said differences, the said parties have agreed to refer "the same" [*or* "all matters in difference"] to the award of X. Y., of [].

Agreement to refer.

Consent to abide by award.

Now this indenture witnesses, that they, the said A. B., C. D., E. F., and G. H., do and each of them doth, each for himself severally and respectively, and for his several and respective heirs, executors, and administrators, covenant and agree with each other, his heirs, executors, and administrators respectively, to stand to, abide by, observe, and perform the award and determination of the said X. Y. of and concerning the premises aforesaid; so as the above-mentioned arbitrator [*continue as in Form I., clauses* 4, 5, *and* 6]. And the said parties do hereby

(*z*) See P. I. ch. 3, s. 2, d. 3, p. 54, as to submission by bond.

further agree that [*add clauses considered advisable*]. In witness whereof the said parties hereto set their hands and seals, the [] day of [], in the year of our Lord [].

Signed, sealed, and delivered, by the said [], in the presence of

A. B. (L.S.)
C. D. (L.S.)
E. F. (L.S.)
G. H. (L.S.)

IX.

In the High Court of Justice. [], 18 . No. .
[] Division.
Master in Chambers.

Between A. B., Plaintiff,
and
C. D., Defendant.

Upon hearing [*the solicitors and agents upon both sides*], and by their consent, it is ordered as follows :— Judge's order of reference.

1. [*State matters to be referred*] shall be referred to the award of [].

2. The arbitrator shall have all the powers as to certifying and amending of a judge of the High Court of Justice.

3. The arbitrator shall make and publish his award in writing of and concerning the matters referred, ready to be delivered to the parties in difference, or such of them as require the same (or their respective personal representatives, if either of the said parties die before the making of the award), on or before the [] next, or on or before such further day as the arbitrator may from time to time appoint and signify in writing signed by him and indorsed on this order.

4. The said parties shall in all things abide by and obey the award so to be made.

5. The costs of the said cause [*often here are inserted the words* "shall abide the event"] and the costs of the reference and award shall be [*usually* "in the discretion of the arbitrator"].

6. The arbitrator may (if he think fit) examine the said parties to this action, and their respective witnesses, upon oath or affirmation.

7. The said parties shall produce before the arbitrator all books, deeds, papers, and writings in their, or either of their, custody or power relating to the matters in difference.

8. Neither the plaintiff nor the defendant shall bring or prosecute any action against the arbitrator of or concerning the matters so to be referred.

9. If either party, by affected delay or otherwise, wilfully prevent the said arbitrator from making an award, he or they shall pay such costs to the other as ["the court or a judge"] may think reasonable and just.

10. In the event of either of the said parties disputing the validity of the said award, or moving the ["court"] to set it aside, the said ["court"] shall have power to remit the matters hereby referred, or any or either of them, to the reconsideration of the arbitrator.

11. In the event of the arbitrator declining to act, or dying before he has made his award, the said parties may, or if they cannot agree, the master may, on application by either side, appoint a new arbitrator.

12. Unless restrained by any order of the Court or judge, the party or parties in whose favour the award shall be made shall be at liberty [] days after service of a copy of the award on the solicitor or agent of the other party to sign final judgment in accordance with the award, and for all costs that he or they may be entitled to under this order and under the award, together with the costs of the said judgment.

Dated the [] day of [], 18 (*a*).

X.

In the High Court of Justice. [], 18 . No.
[] Division.
Master in Chambers.
Between [], Plaintiff,
and
[], Defendant.

Order of reference to master.

Upon hearing [], and upon reading the affidavit of [], filed the [] day of [], 18 , and [].

It is ordered that this action [*or* "the matters of account in this action," *or* "the following questions in this action being matters of account, namely," *stating them*] be referred to the certificate of one of the masters of the Supreme Court of Judicature, with all the powers as to certifying and amending of a judge of the High Court of Justice, and that the costs of the [] and of the reference be in the discretion of the master, and that the costs of this application be [].

Dated the [] day of [], 18 (*b*).

(*a*) This form is given in the Rules of the Supreme Court, App. K.

(*b*) This form is given in the Rules of the Supreme Court, App. K.

XI.

In the High Court of Justice. [], 18 . No. .
Queen's Bench Division.
Master [], Master in Chambers.

Between A. B., Plaintiff,
and
C. D., Defendant.

A. v. B. Let the ["plaintiff's" *or* "defendant's"] solicitor or agent attend me at my chambers in the Royal Courts of Justice on [] next, at [] of the clock in the [] noon, to show cause why the question or questions arising in this action [*or* "the question whether (*state the question*)"] should not be referred to an official referee [*or* "to Mr. X. Y. as special referee," *or* "to a special referee to be agreed on by the parties," *or* "named by the master"] for inquiry and report, pursuant to the Arbitration Act, 1889, s. 13. [*Such other terms as are deemed advisable may be added.*]

Summons for reference under s. 13 of the Arbitration Act, 1889.

XII.

[*Commence as in the preceding form*]—to show cause why all the questions and issues of fact and of account [*or* "the following question or issue of fact or account, viz." (*setting forth the question*)], arising in this action [*or* "matter"], should not be ordered to be tried before an official referee [*or* "before Mr. X. Y. as special referee," *or* "before a special referee to be agreed upon by the parties,"] pursuant to s. 14 of the Arbitration Act, 1889. [*Add any requisite terms.*]

Dated the [] day of [], A.D. [].

Summons for reference under s. 14 of the Arbitration Act, 1889.

XIII.

In the High Court of Justice.
Chancery Division.
[*Name of Judge.*]
[*Or* "In the Court of Appeal."]

[*Title of action and matter and reference to the record.*]

Take notice that this Honourable Court will be moved before his lordship, Mr. Justice —— [*or* before ——] [*if the motion is to be made except in the usual court, state where*], on the [] day of [], at eleven o'clock of the forenoon, or as soon after as counsel can be heard, by Mr. A. B., counsel on the part of the above-named plaintiff [*or* "defendant"], that, pursuant to the Arbitration Act, 1889, s. 14, it may be referred to the official

Notice of motion to have accounts taken before referee under s. 14 of the Arbitration Act, 1889.

referee in rotation [*or* "Mr. X. Y. of K., as special referee"], to take the following accounts [*here specify the accounts*], and that in taking the said accounts no settled account may be disturbed. And that what, upon taking the said accounts, may be reported to be due from either of the said parties to the other of them, may be ordered to be paid by the party from whom to the party to whom the same shall be reported to be due, within one calendar month after the date of the report of such referee.

Dated this [] day of [], 18 .

To the plaintiff [*or* "the defendant," *or* "Mr. A. B., solicitor for the plaintiff," *or* "defendant," *or* "petitioner," *or* "respondent."]

XIV.

In the High Court of Justice.

[] Division. [], 18 . No. .

Master in Chambers.

Between [], Plaintiff,
and
[], Defendant.

Order of reference under s. 13 of the Arbitration Act, 1889.

Upon hearing [] and upon reading the affidavit of [], filed the [] day of [], 18 , and [].*

It is ordered that the following question arising in this action, namely [], be referred for inquiry and report to [], under s. 13 of the Arbitration Act, 1889, and that the costs of this application be [].

Dated the [] day of [], 189 (*c*).

XV.

[*Commence as in Form XIV.*]

Order of reference under s. 13 of the Arbitration Act, 1889.

As to a nuisance.

It is ordered, pursuant to the Arbitration Act, 1889, s. 13, that it be referred to Mr. X. Y. of [], as special referee, to survey and inspect the premises of the plaintiff and of the defendant respectively, and the premises adjoining thereto respectively, and to report whether or not the plaintiff's premises are affected by noise arising or coming from the defendant's stables as ordinarily used by the defendant, and if so, then in what manner, and to what extent, and how the same is caused and arises: and also to report, whether the plaintiff's premises are or are likely to be injuriously affected by the drainage coming from the defendant's stables, as at present used, and if so, to what extent, and in what manner the same is caused or arises.

Dated the [] day of [], A. D. [].

(*c*) This form is taken from the form given by the Rules of the Supreme Court of December, 1889, Appendix K., No. 32.

XVI.

In the High Court of Justice.

[] Division. [], 18 . No. .

Master in Chambers.

Between [], Plaintiff,

and

[], Defendant.

Order of reference under s. 14 of the Arbitration Act, 1889.

Upon hearing [] and upon reading the affidavit of [], filed the [] day of [], 18 , and [];

It is ordered that the cause (or matter or the [*state whether all or some, and, if so, which of the questions are to be tried*] in this cause or matter) be tried by [], who shall have all the powers as to certifying and amending of a judge of the High Court of Justice, and shall make his report of and concerning the matters ordered to be tried as aforesaid, pursuant to the Statute [*or* direct judgment to be entered and otherwise deal with the whole action pursuant to Order XXXVI., r. 50].

And it is further ordered, that the said [] may, if he think fit, examine the parties to this action, and their respective witnesses, upon oath or affirmation, and that the said parties shall produce before the said [] all books, deeds, papers, and writings in their or either of their custody or power relating to the matters so ordered to be tried.

And it is further ordered, that neither the plaintiff nor the defendant shall bring or prosecute any action against the said [] or against each other, of or concerning the matters so ordered to be tried, and that if either party, by affected delay or otherwise, wilfully prevent the said [] from making his report, he or they shall pay such costs to the other as the Court, or a Judge, may think reasonable and just.

And it is further ordered, that in the event of the said [] declining to act, or dying before he has made his report, the said parties may, or if they cannot agree, one of the Judges of the High Court may, upon application by either party, appoint a new [].

And it is ordered that the costs of this application be [].

Dated the [] day of [], 189 (*d*).

XVII.

Order of reference under s. 14 of the Arbitration Act, 1889. Later form (*e*).

Upon hearing the solicitors on both sides, and upon reading the affidavit of [] filed herein.

It is ordered that the whole of this cause be tried by an official referee who shall have all the powers of certifying and amending of a

(*d*) This form is taken from Appendix K., R. S. C., December, 1889, No. 33.

(*e*) This is the latest form prescribed under Ord. LXI., r. 33, by the practice masters. Appendix K., No. 33 (a).

judge of the High Court of Justice, and shall direct judgment to be entered, and otherwise deal with the whole action pursuant to Order XXXVI., r. 50.

Dated the [] day of [], 18 .

XVIII.

In the High Court of Justice. [], 18 . No. .
[] Division.

Between A. B., Plaintiff,
and
C. D., Defendant.

Order of reference at Nisi Prius on the usual terms.

At a sitting held at [the Guildhall] on the [] day of [], 18 , before Sir L. M., Knight, one of the justices of Her Majesty's High Court of Justice;

Power to direct judgment.

It is ordered by the court, by and with the consent of the parties, their counsel and solicitors, that the jury find a verdict for the plaintiff for the amount claimed, subject to the award or certificate, order, arbitrament, final end, and determination of X. Y., Esq., barrister-at-law, of the Inner Temple, who is hereby empowered to direct that judgment shall be entered for the plaintiff or for the defendant, or a nonsuit entered, as he shall think proper, and to whom this action "is" [*if the reference is of all disputes, add, instead of* "is" "and all matters in difference between the said parties are"] hereby referred, so as the said arbitrator do make and publish his award or certificate in writing of and concerning the matters hereby referred, ready to be delivered to the said parties, or to either of them, or if they or either of them shall be dead before the making of the said award or certificate, to their respective personal representatives, requiring the same, on or before the [] day of [], sitting next ensuing the date of this order, with liberty to the said arbitrator, under his hand in writing, to enlarge the time for making his said award or certificate.

Power to enlarge the time.

To certify.

It is also ordered, that the said arbitrator shall have all the power as to certifying and otherwise of a judge of the High Court of Justice.

To receive evidence.

It is also ordered, by the like consent, that the said arbitrator shall have authority to hear, receive, and examine evidence touching the matters hereby referred, and that the said parties shall produce before the said arbitrator all such books, deeds, papers, and writings, in their or either of their custody or power, relating to the matters in difference, as the said arbitrator shall think fit to require.

Costs of action abide event.

Costs of reference and award in discretion.

It is likewise ordered, by and with the like consent, that the costs of the action shall abide the event and determination of the said award, and that the costs of the reference and award or certificate shall be in the discretion of the said arbitrator.

It is likewise ordered, by and with the like consent, that the said arbitrator may find generally for the plaintiff or for the defendant, and need not find on any specific issues, unless required to do so: the costs of any such specific issues (if found) to abide the event. General finding sufficient.

It is likewise ordered, by and with the like consent, that the said parties do and shall on their respective parts in all things stand to, abide by, obey, perform, fulfil and keep the award or certificate, order, arbitrament, final rule, and determination of the said arbitrator so to be made and published; and that neither of the said parties do or shall proceed in or prosecute any action or suit against the said arbitrator, or against each other respectively, for any matter relating to the arbitration or the award or certificate to be made in pursuance of this order. Parties to obey award. Not to sue.

It is further ordered, by and with the like consent, that if either of the said parties shall by affected delay or otherwise wilfully prevent the said arbitrator from making his award or certificate, or shall not attend after reasonable notice, and without such excuse as the said arbitrator shall be satisfied with, and adjudge to be reasonable, then the said arbitrator may proceed ex parte, and the parties occasioning the delay shall pay to the other such costs as the court shall think reasonable and just. Power to proceed ex parte. Party preventing award to pay costs.

And it is ordered, by and with the like consent, that in the event of any other application to the court on the subject of this order, the reference, or the award or certificate, the court may (if it shall think fit) at any time, and from time to time, refer back to the said arbitrator the whole or any part of the matter of this order, upon such terms as the court shall think proper. Court may refer back.

It is also ordered, that in the event of the said arbitrator declining to act, or dying before he shall have made his award or certificate, the said parties may, or if they cannot agree, the court may, on application by either side, appoint a new arbitrator. Power to appoint new arbitrator.

By the Court. O. P.,
Associate.

XIX.

When the cause and all matters in difference are referred the following clause may be added: Reference of cause and all matters.

And it is ordered by and with the like consent, that either party shall give four days notice in writing of any matter beyond the cause intended to be set up, and that unless restrained by any order of the court or a judge, the party or parties in whose favour the award shall be made shall be at liberty seven days after service of a copy of the award on the solicitor or agent of the other party to sign final judgment in accordance with the award, and for all costs that he or they may be entitled to under this order and under the award, together with the costs of the said judgment.

XX.

[*Commence as in the preceding forms.*]

Order of reference, a juror withdrawn.

B. v. D. } It is ordered by the court, by and with the consent of the parties, their counsel and solicitors, that the last juryman sworn and impaneled in this cause be withdrawn out of the panel, and that this cause and all matters in difference be referred, &c.

XXI.

[*Commence as in the preceding forms.*]

Order of reference to state a special case.

B. v. D. } It is ordered by the court, by and with the consent of the parties, their counsel and solicitors, that the jury find a verdict for the plaintiff, damages £4 4*s.*, and costs forty shillings; subject to the statement of the facts in a special case by X. Y., Esq., barrister-at-law, for the opinion of the Queen's Bench Division of the High Court of Justice; so as the said X. Y. do publish the special case ready to be delivered to the said parties, or either of them; or if they, or either of them, shall be dead before the making of the said special case, to their respective personal representatives, requiring the same; on or before the fourth day of Hilary sitting next; with liberty for the said X. Y., under his hand in writing at the foot hereof, to enlarge the time for making the said special case.

Death no revocation.

Power to enlarge time.

Power to examine on oath.

And it is also ordered, by the like consent, that the said X. Y. shall be at liberty, if he shall think fit, to examine the witnesses to the facts in this suit upon oath; and for that purpose the said witnesses to be examined before the said X. Y. touching the matters to be stated shall be sworn before the said X. Y.; and that the said parties shall produce before the said arbitrator all such books, deeds, papers, and writings in their or either of their custody or power relating to the matters in difference as the said X. Y. shall think fit to require.

Power to call for documents.

Costs of special jury.

It is likewise ordered, by and with the like consent, that the costs of the special jury shall abide the event.

Costs for preventing special case.

It is further ordered by the like consent, that if either of the said parties shall, by affected delay or otherwise, wilfully prevent the said X. Y. from drawing up the said special case, or shall not attend after reasonable notice, and without such excuse as the said X. Y. shall be satisfied with, and adjudge to be reasonable, then the said X. Y. may proceed ex parte, and the party occasioning the delay shall pay to the other such costs as the said court shall think reasonable and just.

Power to proceed ex parte.

By the Court. T. D.,
Clerk at the sittings of Nisi Prius.

XXII.

[*Commence as in an order of reference at Nisi Prius.*]

The Queen on the prosecution of A. B. and another against C. D. and twelve others. } It is ordered by the court, by and with the consent of the prosecutors and defendants, their counsel and solicitors, that the jurors be discharged from giving a verdict [*or* "that a verdict of guilty be entered against the defendants"], subject to the award, order, arbitrament, final end, and determination of X. Y., Esq., barrister-at-law [*when a verdict of guilty has been entered, add,* "who is hereby empowered to order the verdict of guilty to be set aside, and a verdict of not guilty to be entered instead thereof on behalf of all or any of the defendants, and"], to whom all matters in difference between the prosecutors and the defendants, or any or either of them, are hereby referred. [*Continue as in Form XVIII.*] And it is also ordered, that the costs of the prosecution and defence, and of the reference and award, shall be in the discretion of the said arbitrator, who, &c. [*continue as in Form XVIII.*].

Order of reference of indictment.

Jurors discharged, or verdict of guilty subject to award.

Costs of prosecution and defence.

XXIII.

In the High Court of Justice. Queen's Bench Division. [], 18 . No. .

Between A. B., Plaintiff,
and
C. D., Defendant.

Monday, the [] day of [], A. D. [].

Upon hearing Mr. [] of counsel for the plaintiff, and Mr. [] of counsel for the defendant, and by their consent, it is ordered that all matters in difference "in this cause" [*or* "between the parties in this cause," *as the case may be*] be referred to the award, order, arbitrament, final end, and determination of X. Y., Esq., barrister-at-law; so as, &c. [*as in Form No. I., clauses* 4, 5, *and* 6]. And by the like consent, as aforesaid, it is further ordered, that the costs of the cause shall abide the event of the said award, and that the costs of the reference and of this rule shall be in the discretion of the said arbitrator. [*Instead of this clause, any suitable variation of Form I., clauses* 18, 29, *or* 30, *may be adopted.*] And that [*here add such other clauses as are deemed advisable. See Form I.*](*f*).

Submission by rule of court.

Costs.

By the Court.

(*f*) See P. I. ch. 3, s. 6, d. 2, p. 72, as to submissions by rule of court.

XXIV.

Demand of arbitration for compensation under the Lands Clauses Consolidation Act.

Recital: notice lands required.

Amount of compensation offered.

Dispute respecting amount.

Statement of interest in the lands.

Amount of compensation claimed.

Demand of arbitration.

Whereas I, A. B., of [], received notice in writing from the "[] Railway Company" [*or the promoters of the public undertaking, naming them by their proper title*], that they required for the purposes of their "railway" [*or other public undertaking*] the lands and tenements specified in the said notice, comprising the lands and tenements specified in the underwritten schedule, and that they were willing to treat for the purchase of the same, and that they intended to take the same pursuant to the powers given them by certain Acts of Parliament (*g*). And whereas the said "company" [*or* "promoters"] have offered me the sum of £ [], and no more, as the purchase-money and compensation for my interest in the lands and tenements so intended to be taken, and for the damage that may be sustained by me by reason of the execution of the works connected with the said "railway" [*or other public undertaking*]. And whereas I am not satisfied with that amount, and do not agree to receive and accept the same as sufficient compensation, and a dispute has arisen between me and the said "railway company" [*or other promoters*] respecting the same. [*If no sum have been offered by the promoters, leave out the above paragraph, and say,* "and whereas a dispute has arisen between me and the said 'railway company' (*or other promoters*) respecting the amount of purchase-money and compensation to be paid me for my interest in the said lands and tenements, and for the damage that will be sustained by me by reason of the execution of the works connected with the said 'railway' (*or other undertaking*)"]. And whereas the said "company" [*or* "promoters"] have not yet issued their warrant to the sheriff to summon a jury in respect of such lands:—I hereby state that I am interested in the lands and tenements set out and described in the first division of the said schedule as tenant in fee simple, and in the lands and tenements set out and described in the second division of the said schedule as tenant for years of the same, under a lease from H. K., of [], for fourteen years from "Michaelmas Day, A.D. 1881" [*or as the case may be, taking care to show the interest and the length of the term unexpired*]. And I claim in respect of such my interest in the said lands and tenements the sum of £ [*a sum exceeding fifty pounds*], as purchase-money and compensation; regard being to be had not only to the value of the lands and tenements so intended to be taken, but also to the damage which I shall sustain by reason of the severing of the lands and tenements intended to be taken from my other lands and tenements, or otherwise injuriously affecting such other lands and tenements by the exercise of the powers of the acts above referred to, or of any acts incorporated therewith. And I hereby give notice to the said "company" [*or* "promoters"] that I desire to have the amount of such compensation settled by arbitration, pursuant to the provisions of the

(*g*) See P. I. ch. 3, s. 7, d. 5, p. 98, as to submissions under the Lands Clauses Consolidation Act, 1845.

Lands Clauses Consolidation Act, 1845.* And I request the said "company" [*or* "promoters"] to concur with me in the appointment of a single arbitrator, and failing such concurrence, to nominate and appoint an arbitrator on their part, to whom, together with an arbitrator to be appointed and nominated by me, the dispute respecting the amount of such compensation shall be referred. [*Instead of the concluding words of this form, after the * there often follows an appointment of an arbitrator by the landowner. It may be in these words:* "And I do hereby appoint A. B. of (), to be the arbitrator on my part to settle and determine the amount of the purchase-money and compensation to be paid to me by the said 'company' (*or* 'promoters') in respect of my said interest in the aforesaid lands and tenements so intended to be taken, and I request the said 'company' (*or* 'promoters') to nominate and appoint an arbitrator on their part"] (*h*).

Requesting promoters to appoint an arbitrator.

Appointment of arbitrator.

The [] day of [], A.D. [].

A. B.

To "the [] Railway Company" [*or the promoters of, &c., as the case may be*].

Schedule [*here specifically describe the lands*].

XXV.

(*i*) Whereas I, A. B., am "the owner in fee of a certain messuage and premises, called [], with the appurtenances" [*or* "possessed of a certain farm and premises, with the appurtenances, called (), for the residue yet unexpired of a term of fourteen years, from Michaelmas, 1881"], [*or otherwise describe the particular premises and the interest of the party*], situate at [], in the parish of [], in the county of []. And whereas my said lands and premises have been injuriously affected by the execution of the works of the [*here state the name of the railway or other public undertaking*] in the manner following, that is to say [*here state shortly the nature of the injury*]. And whereas I am entitled to compensation in respect of such injury. And whereas you [*the railway company or the promoters*] have not made me satisfaction for the same:—I hereby give you notice, that I claim the sum of £ [*a sum exceeding fifty pounds*], as compensation for the aforesaid injury; and that unless, within twenty-one days after the receipt of this notice, you pay the said amount, or enter into a written agreement to pay the same, I desire to have the amount of such compensation settled by arbitration,* and request you to concur with me in the appointment of a single arbitrator, or to appoint an

Demand of arbitration respecting compensation for premises injured by making a railway, &c.

(*h*) Before appointing an arbitrator and calling on the promoters also to appoint one, an attempt should be made to agree on a single arbitrator: *Yates* v. *Mayor of Blackburn*, 29 L. J. Ex. 447, S. C. 6 H. & N. 61.

(*i*) See 8 & 9 Vict. c. 18, s. 68.

arbitrator on your part, to whom, together with an arbitrator to be appointed by me, the question as to compensation shall be referred. [*If the party appoint an arbitrator at once, he may, instead of the concluding words after the* *, *insert the appointment as in the last form.*]

The [] day of [], A.D. [].

A. B.

To [the [] railway company *or other promoters*].

XXVI.

Appointment of arbitrator under the Lands Clauses Consolidation Act.

Recital: notice lands required.

Whereas, under the provisions of the North Staffordshire Railway (Pottery line) Act, 1846, and the North Staffordshire Railway (Churnet Valley line) Act, 1876, and of certain other acts incorporated therewith, the North Staffordshire Railway Company are entitled to take, and have given due notice in writing to Messrs. J. H., S. B., and J. G., of [], in the county of Stafford, coalmasters, that they require for the purpose of the railway part of a certain wharf, land and tenements, situate in the parish of Stoke-upon-Trent, in the said county; in which the said Messrs. J. H., S. B., and J. G. are interested [*state the interest*]: which said land and tenements are specifically described in the said notice, and also in the "underwritten" [*or* "annexed"] schedule; and whereas the said company have offered to the said Messrs. J. H., S. B., and J. G., the sum of £ [], as compensation in respect of the said land and tenements; and whereas the said Messrs. J. H., S. B., and J. G. are not satisfied therewith, and have required that the amount of such compensation should be determined by arbitration (*k*); now these presents witness, that "the said North Staffordshire Railway Company" [*or* "the said Messrs. J. H., S. B., and J. G."], pursuant to the provisions of the said recited acts, and of the Lands Clauses Consolidation Act, 1845, and of the other acts incorporated with the said recited acts, do hereby appoint "G. M'D. of [], in the said county, mining agent" [*or* "J. H. B., of (), in the said county, surveyor"], to be an arbitrator to settle and determine the amount of purchase-money and compensation to be paid by the said North Staffordshire Railway Company to the said Messrs. J. H., S. B., and J. G., in respect of their interest in the said land and tenements so intended to be taken as aforesaid, and for the damage that may be sustained by them by reason of the execution of the works of the said railway; regard being had by the said arbitrator not only to the value of the land and tenements so intended to be taken, but also to the damage, if any, to be sustained by the said Messrs. J. H., S. B., and J. G., by reason of the severing of the land and tenements so intended to be taken from the other lands and tenements of the said

Compensation offered, refused.

Demand of arbitration.

Appointment of arbitrator.

Subject-matter of reference.

(*k*) See P. 1, ch. 3, s. 7, d. 5, p. 98, as to submissions under the Lands Clauses Consolidation Act, 1845.

Messrs. J. H., S. B., and J. G., or otherwise injuriously affecting such other lands and tenements by the exercise of the powers of any of the said acts.

Dated this [] day of [], A.D. [].

W. T. C. } Directors of the North Staffordshire
J. R. } Railway Company.

[*Or*, O. P., Secretary of the North Staffordshire Railway Company.]

[*Or, when the appointment is by the landowners.*] J. H.
S. B.
J. G.

Schedule to the above. Schedule.

[*Here specifically describe the premises to be taken.*]

XXVII.

Appointment of arbitrator by a railway company under the Lands Clauses Consolidation Act.

In pursuance of the provisions of the East and West India Docks and Birmingham Junction Railway Act, 1846, and of the Lands Clauses Consolidation Act, 1845, incorporated therewith, the East and West India Docks and Birmingham Junction Railway Company do, by this writing under the hand of their secretary, nominate and appoint E. F., of [], land surveyor, to be the arbitrator on their behalf in a question of disputed compensation, to be made by the said company to J. L., of [], in the county of Middlesex, for his interest [*here state the interest thus*, "as tenant in fee simple in possession;" *or* "as tenant under a lease for seven years to expire at Michaelmas, 1890;" *or as the case may be*], in the lands and hereditaments specified in the schedule hereunder written (which are required to be purchased by the said company), and for the damage to be sustained by the said J. L. in the execution of the works of the said railway.

Dated the [] day of [], one thousand eight hundred and [].

H. C.,
Secretary to the said company.

Schedule above referred to.

A piece or parcel of land as now staked and set out for the purposes of the before-mentioned railway; together with all houses, buildings, timber and other trees, hedges, fences, ways, rights, members, and appurtenances thereto belonging, situate and being in the parish of St. John, South Hackney, in the county of Middlesex; and containing by admeasurement one acre, two roods, and nineteen perches, or thereabouts, be the same a little more or less; being part of several closes or parcels of land and hereditaments comprised in the plan of the said railway, deposited with the clerk of the peace for the county of Middlesex, and referred to by the before-mentioned act of parliament, and

described in the book of reference deposited with the said plan, and also referred to by the said act as under.

Parish of St. John, South Hackney, in the county of Middlesex.

No. on Plan.	Description of Property.	Owner or Reputed Owner.	Lessee.	Occupier.
35	Pasture.	The Rev. T. M. and J. L.	——	J. L.

XXVIII.

Appointment of single arbitrator to act for both parties, the promoters refusing to appoint an arbitrator.

Whereas the "[] Railway Company" [*or other promoters, as the case may be*], lately gave me notice in writing that they required to take, for the purposes of their "railway" [*or other undertaking, following the terms of notice*], certain lands and tenements specified in the said notice, and in the underwritten schedule.

Recital: notice lands required.

Dispute as to amount of compensation.

And whereas a dispute arose between me and the said "[] Railway Company" [*or* "promoters"] respecting the amount of purchase-money and compensation to be paid to me by them, for my interest [*state the interest as in the previous form*] in the said lands and tenements, and for the damage that might be sustained by me by reason of the execution of the works of the said "railway" [*or other undertaking*]; regard being to be had, not only to the lands and tenements so intended to be taken, but also to the damage, if any, to be sustained by me, by reason of the severing of the lands and tenements so intended to be taken from my other lands and tenements, or otherwise injuriously affecting such other lands and tenements by the exercise of the powers given them by the Lands Clauses Consolidation Act, 1845, or by their special act, or by any act incorporated therewith.

Notice demanding arbitration and appointment of arbitrator.

And whereas, before they issued their warrant to the sheriff to summon a jury in respect of such lands and tenements, I served them with a notice in writing, signifying my desire to have the amount of such compensation settled by arbitration, and stated in such notice the interest in respect of which I claimed compensation, and the amount of compensation which I claimed, and requested them by such notice to appoint an arbitrator to determine such dispute, and stated in such notice the matter required to be referred to arbitration. And whereas I appointed J. H. B., of [], to be an arbitrator to determine such dispute, and notified such appointment to the said "company" [*or* "promoters"]. And whereas the space of fourteen days has elapsed since the said dispute arose, and since the service of the aforesaid request in writing, and since the appointment by me of such arbitrator, and the notification thereof to the "company" [*or* "pro-

moters"]; and the said "company" [*or* "promoters"] have failed to appoint an arbitrator: I now hereby, in pursuance of the provisions of the Lands Clauses Consolidation Act, 1845, and of the acts above referred to, appoint the said J. H. B. to act on behalf both of me and of the said company, in hearing and determining the said dispute.

Failure of promoters to appoint.

Appointment of arbitrator to act for both parties.

Dated the [] day of [], A.D. [].

A. B. (*l*).

Schedule.

[*Here specify the lands, as in the original appointment of the arbitrator.*]

XXIX.

(*m*) Whereas the [the [] railway company *or other promoters of the undertaking*] "in consequence of my absence from the kingdom" [*or* "in consequence of my not having been found by them"], procured a valuation to be made under the Lands Clauses Consolidation Act, 1845, of the compensation to be paid in respect of my estimated interest in the lands and premises described in the underwritten schedule; and have deposited the amount of such valuation, being the sum of £ [], in the Bank of England, pursuant to the provisions of the above statute: and whereas I am dissatisfied with such valuation, and have given the said [*railway company or promoters*] due notice in writing, requiring that the question of such compensation shall be submitted to arbitration, and calling upon them to appoint an arbitrator:—I hereby appoint O. P., of [], an arbitrator, to determine whether the said sum so deposited as aforesaid by the said [*the railway company or other promoters*], was a sufficient sum; or whether any, and what further sum, ought to be paid or deposited by them.

Appointment of arbitrator by party dissatisfied with surveyor's valuation.

The [] day of [], A.D. [].

A. B.

XXX.

We, the within-named U. V. and X. Y., do hereby nominate and appoint Q. R., of [], to be the umpire, pursuant to the within-contained provisions. [*It is better to add* "provided he will accept such office."] As witness our hands this [] day of [], A.D. [] (*n*).

Appointment of umpire by arbitrators indorsed on submission.

Witness, U. V.
O. P. X. Y.

(*l*) See *Bradley* v. *London and North Western Railway Company*, 5 Ex. 769; ante, P. I. ch. 3, s. 7, d. 5, p. 100.

(*m*) See 8 & 9 Vict. c. 18, ss. 58, 59, 64, 65.

(*n*) See P. II. ch. 4, s. 4, p. 223, as to appointing an umpire.

XXXI.

Appointment of an umpire by arbitrators.

Pursuant to the powers given to us "by an agreement of reference, made on the [] day of [], A.D. []," (*or* "by the agreement of reference contained in the condition of two mutual bonds, made and executed on the [] day of [], A.D. [], by A. B., of [], and C. D., of [], respectively, each to the other;" *or* "by an order of Nisi Prius, made on the [] day of [], A.D. [], in a cause in which A. B. was plaintiff, and C. D. defendant"), we, the thereby appointed arbitrators, do by these presents nominate and appoint Q. B., of [], to be the umpire, according to the provisions of the above-mentioned "agreement of reference" [*or* "bonds of submission," *or* "order of Nisi Prius"], provided he be willing to accept such office. As witness our hands this [] day of [], A.D. [].

Witness, U. V.
O. P. X. Y.

XXXII.

In the High Court of Justice.
Queen's Bench Division.
Judge in Chambers.

Judge's order appointing umpire under the Arbitration Act, 1889.

In the matter of an arbitration between J. L., appellant, and The Churchwardens and Overseers of the Poor of the parish of S., in the county of L., and J. T., coal proprietor, and R. F., coal proprietor, and L. D., flour dealer, respondents.

Upon hearing counsel for the appellant and for the respondents [except J. T. and R. F.]; and upon reading the affidavits of the appellant and the affidavits of A. B., of C. D., and of E. F.; I do order that T. T. Esq., barrister-at-law, be appointed the umpire herein, pursuant to the Arbitration Act, 1889.

Dated the [] day of [], A.D. [].

J. T. C.

XXXIII.

Appointment of umpire by the arbitrators under the Lands Clauses Consolidation Act.

We,—the undersigned G. M'D., of [], in the county of Stafford, mining agent, appointed an arbitrator by and on behalf of the North Staffordshire Railway Company; and the undersigned J. H. B., of [], in the said county, surveyor, appointed an arbitrator by and on behalf of Messrs. J. H., S. B., and J. G., pursuant to the provisions of the Lands Clauses Consolidation Act, 1845, and the North Staffordshire Railway (Pottery line) Act, 1846, and the North Staffordshire Railway (Churnet Valley line) Act, 1846, and of the other acts incorporated with the two last recited acts; to settle and

determine the amount of purchase-money and compensation to be paid by the North Staffordshire Railway Company to the said Messrs. J. H., S. B., and J. G. in respect of their interest [*here state the interest as in Form XXIV.*] in the lands and hereditaments specifically described in the underwritten schedule, intended to be taken by the said company for the purposes of their railway, and in respect of the damage to be sustained by them by reason of the execution of the works of their railway: regard being to be had by us, not only to the value of the said lands and hereditaments so intended to be taken, but also to the damage, if any, to be sustained by the said Messrs. J. H., S. B., and J. G., by reason of the severing of the lands and hereditaments so intended to be taken from the other lands and hereditaments of the said Messrs. J. H., S. B., and J. G.; or otherwise injuriously affecting such other lands and hereditaments by the exercise of the powers of any of the acts above referred to:—do hereby, before entering upon the matters referred to us, nominate and appoint A. L. B., of [] in the county of Lancaster, mine agent, to be the umpire in the matter of the said arbitration, pursuant to the provisions of the Lands Clauses Consolidation Act, 1845. As witness our hands this [] day of [], A.D. [].

G. M'D.
J. H. B.

Schedule. [*Here specify the lands.*]

XXXIV.

Appointment of umpire by justices or the Board of Trade under the Lands Clauses Consolidation Act.

Whereas the arbitrators appointed by the [*state the name and title of the railway company, or promoters of the public undertaking*] and A. B., respectively, pursuant to the Lands Clauses Consolidation Act, 1845, and the [*here state the special act*]; to settle and determine the amount of purchase-money and compensation to be paid by the said [*railway company or the promoters*] to the said A. B., in respect of his interest [*the interest should be stated as in Form XXIV., or may be specified in the schedule*] in the lands and premises specifically described in the under-written schedule, intended to be taken by the said [*railway company or the promoters*] for the purposes of their [*the undertaking*], and in respect of the damages to be sustained by him by reason of the execution of the works of the said [*railway or undertaking*]; regard being to be had by them, not only to the lands and premises so intended to be taken, but also to the damage (if any) to be sustained by the said A. B., by reason of the severing of the lands and premises so intended to be taken from the other lands and premises of the said A. B., or otherwise injuriously affecting such other lands and premises by the exercise of any of the powers of the said acts; "have refused" [*or* "have for seven days after request from the said (*the promoters or the landowner, as the case may be*) neglected"] to appoint an umpire, and whereas application has been made by the said [*the promoters or the*

landowner, as the case may be]* unto us, O. P. and Q. R., two of her Majesty's justices of the peace in and for the county of [*county in which the lands are situated*], assembled and acting together, and not being interested in the matter, to appoint an umpire:—we, the said O. P. and Q. R., being such justices as aforesaid, and so assembled and acting together, and not being interested in the matter, do hereby appoint [*in the case of a railway company, where the appointment is to be by the Board of Trade* (*o*), *substitute for the sentence after the asterisk*, "to the Board of Trade to appoint an umpire, the said Board do hereby appoint"] S. T., of [], to be the umpire to determine the matter of the said arbitration, pursuant to the provisions of the Lands Clauses Consolidation Act, 1845.

The [] day of [], A.D. [].

O. P. } Justices of the Peace, acting in and
Q. R. } for the county of [].

[*Or signature of secretary or other appointed officer of the Board of Trade.*]

Schedule. [*Here specifically describe the lands, &c.*]

XXXV.

Appointment by the two arbitrators of a third arbitrator.

[*Commence as in Forms XXXI. or XXXIII.*]—do by this memorandum in writing under our hands, made before we have entered upon the consideration of the matters referred, nominate and appoint Q. R., of [], to be the third arbitrator to act with us in the consideration and determination of the same, according to the provisions of the "above-mentioned" [*or* "within-contained"] "agreement of reference," [*or* "bonds of submission," *or* "order of Nisi Prius"] (*p*).

As witness our hands the [] day of [], A. D. [].

Witness, U. V.
O. P. X. Y.

XXXVI.

Notice to the company of appointment of arbitrator by the claimants.

To the D Waterworks Company, and all others whom it may concern.

We, the undersigned C. P., E. P., and J. G. P., of [], in the county of [], paper makers and stainers, send greeting. Whereas we the said C. P., E. P., and J. G. P. are, and from the time of the execution of the works by you the said company hereinafter

(*o*) P. II. ch. 4, s. 4, d. 1, p. 225. (*p*) See P. II. ch. 4, s. 3, p. 214, as to joint arbitrators.

mentioned continually have been the occupiers, under a lease for [] years yet unexpired [*or, as the case may be,* "the owners in fee"] of certain lands, tenements, hereditaments, and premises, that is to say, of a certain paper-mill and premises called the H Paper Works, in the township of [] in the parish of [], in the county of [], and we have been during all the time aforesaid, and still are, carrying on the business of paper makers in co-partnership in the said mill and premises [*omit this last paragraph if the claim is by owners not in occupation*], and have been during all the time aforesaid, and are as such occupiers [*or* "owners"] of the said paper-mill and premises entitled [*if the claim is by owners, insert* "for ourselves and the occupiers of the said mill and premises"] to the full enjoyment of the water of a certain stream called Wendale Brook, which used to flow and still of right ought to flow through and pass the said paper-mill and premises, and the water of which said stream we ["and the occupiers aforesaid"] were and are entitled to use, and did use, and do use for the purposes of the said water-mill. And whereas by reason of you the said company having under the authority of the said D Waterworks Act, made and constructed and from thence continually maintained certain reservoirs and works, and having by reason thereof from the time of such construction permanently diverted and abstracted part of the water of the said stream, and obstructed and interfered with the enjoyment by us [and the occupiers aforesaid] of the water of the said stream, and injured and deteriorated such water, the said paper-mill and premises and the beneficial occupation thereof by us for the purposes aforesaid have been and are thereby injuriously affected, and the value of the said paper-mill and premises has been and is greatly diminished. And whereas we did on the [] day of [], in pursuance of the powers and provisions of the said first-mentioned act, give you the said company notice in writing that we as such occupiers [*or* "as such owners"] as aforesaid, demanded as and for compensation for such injury the sum of £5000, and we in such notice desired that in the event of you the said company being unwilling to pay the said sum, and of you the said company neglecting or declining to enter into a written agreement for that purpose within twenty-one days after the receipt of the said notice by you the said company, to have the amount of such compensation settled by arbitration according to the provisions of the Lands Clauses Consolidation Act, 1845. And whereas you the said company have not paid the said amount of compensation so claimed by us as aforesaid, and have neglected to enter into any written agreement to pay the said amount of compensation, although more than twenty-one days have elapsed since the receipt of the said notice by you the said company, and have not agreed with us in the appointment of a single arbitrator to settle the same: Now, therefore, know ye that we the said C. P., E. P., and J. G. P., for the purpose of causing all questions and disputes between us and you the said company respecting the said compensation so claimed by us as aforesaid to be settled by arbitration in pursuance of the said D Waterworks Act, and the provisions of

the Lands Clauses Consolidation Act, 1845, and of the several other acts incorporated with the D Waterworks Act, do hereby on our part and behalf nominate and appoint A. B., of [], in the county of [], consulting engineer, to be an arbitrator to settle and determine all the questions and disputes between you the said company and us respecting the said compensation so claimed by us as aforesaid, and to settle and determine the amount of such compensation to be paid by you the said company to us for damage which we have sustained and also for the damage which we may sustain for or by reason of such injuries as aforesaid or otherwise by reason of the said works having been executed by you as aforesaid, and to be an arbitrator by us on our part hereby nominated and appointed to act in the business of the said arbitration in all respects according to and in pursuance of the provisions of the said acts, in, about, and for the settlement and determination of all questions, disputes, and matters respecting the premises aforesaid; and we hereby request you the said company to nominate and appoint an arbitrator on your behalf to act in respect of the compensation, damage, matters, and premises aforesaid.

Dated the [] day of [], A. D. [].

C. P.
E. P.
J. G. P.

XXXVII.

Order of reference from a Court of Quarter Sessions, pursuant to stat. 12 & 13 Vict. c. 45.

At the General Quarter Sessions of the peace held by adjournment at Preston, in and for the county palatine of Lancaster, on the [] day of [], in the year of our Lord one thousand eight hundred and [], upon the appeal of J. L. against the rate or assessment made for the relief of the poor of the parish of S. in the said county at [] in the pound, on the [] day of [] last, and allowed on the [] day of [] last, in which appeal the churchwardens and overseers of the poor of the said parish were respondents, being brought before the court, it is ordered by the court, with the consent of the parties, that the matters of such appeal be referred to arbitration of J. F., of [], gentleman, appointed on behalf of the respondents, and to F. D., of [], land agent, appointed on behalf of the appellant, in the manner and on the terms following, that is to say, that before entering upon the reference the arbitrators shall appoint an umpire, and in case the said arbitrators cannot agree upon an award, then the matters shall be referred to the umpirage of such umpire, and that the costs of the appeal be in the discretion of the Court of Quarter Sessions, and the costs of the reference and award be in the discretion of the said arbitrators or umpire. And it is further ordered, by the like consent, that the

parties if examined, and the witnesses, shall be examined upon oath; and that the said parties shall produce before the said arbitrators all books, deeds, papers, and writings, relating to the matters in difference between them, as the arbitrators shall require (*q*).

X. Y.
Clerk of the Peace.

On the motion of Mr. H.
By the Court.

(*q*) See P. I. ch. 3, s. 7, d. 4, p. 97.

PROCEEDINGS DURING THE REFERENCE.

XXXVIII.

Appointment for a meeting in (*b*) the reference.

B. plaintiff, *v.* D. defendant. } (*a*) I appoint [*Monday*], the [*fifth*] day of [*September*] next, for proceeding in this reference, at the hour of [*eleven*] o'clock [*in the forenoon*], at [*the Guildhall Coffee House, King Street, Cheapside*] (*b*).

[*Aug.* 24, 189 .]

X. Y.
Arbitrator.

To Messrs. E. and F., solicitors for A. B.,
and to Mr. G. H., solicitor for C. D. (*c*).

XXXIX.

Appointment for two meetings.

B. plaintiff, *v.* D. defendant. } I appoint [*Monday*], the [*fifth*], and [*Wednesday*], the [*seventh*] days of [*September*] next, for proceeding in this reference, at [*my chambers, No. 5, Paper Buildings, Temple*], at the hour of [*eleven o'clock in the forenoon, on the Monday*], and of [*seven o'clock in the evening, on the Wednesday*].

[*Aug.* 24, 189 .]

X. Y.
Arbitrator.

To Messrs. E. and F., solicitors for A. B.,
and to Mr. G. H., solicitor for C. D.

XL.

Peremptory appointment.

B. plaintiff, *v.* D. defendant. } (*d*) I appoint [*Monday*], the [*fifth*] day of [*September*] next, peremptorily, for proceeding in this reference, at the hour of [*eleven o'clock in the forenoon*], at [*the Guildhall Coffee House, King Street, Cheapside*].

[*Aug.* 24, 189 .]

X. Y.
Arbitrator.

To Messrs. E. and F., solicitors for A. B.,
and to Mr. G. H., solicitor for C. D.

(*a*) Instead of heading the appointment thus, it may sometimes be convenient to entitle it, "In the matter of the arbitration between A. B. and C. D.," &c., especially when there are more parties to the reference than two.

(*b*) See P. II. ch. 4, s. 1, d. 2, p. 172, as to giving appointments.

(*c*) If a party do not appear by solicitor, but conduct his case personally, the notice should be addressed to the party himself.

(*d*) See P. II. ch. 4, s. 1, d. 10, p. 197, as to proceeding ex parte.

XLI.

In the Supreme Court of Judicature. [], 18 . No. .
Official Referee's Court.

Between A. B., Plaintiff,
and
C. D., Defendant.

Let all parties concerned attend me at [*state the place*], on the [] day of [], 18 , at [] of the clock in the [] noon, to proceed with the inquiry [*or* "the trial," *or* "the accounts"] directed by the order of reference bearing date the [] day of [], 18 .

Appointment for a meeting before official referee (*e*).

A. B.
Official Referee.

XLII.

In the High Court of Justice. [], 18 . No. .
Chancery Division.

Between A. B., Plaintiff,
and
C. D., Defendant.

I appoint the [] day of [], 18 , at [] of the clock in the [] noon, at my chambers, No. [], Old Square, Lincoln's Inn [*or other place, according to the fact*], to proceed with the inquiry [*or* "the trial," *or* "the accounts"] directed by the order of reference dated the [] day of [], 18 , and I direct all parties concerned to attend me accordingly.

Appointment for a meeting before special referee (*e*).

Dated the [] day of [], 18 .

X. Y.
Special Referee.

XLIII.

B. v. D. } I appoint [*Monday*], the [*third*] day of [*January*] next, for proceeding in this reference, at the hour of [*eleven o'clock in the forenoon*], at [*the Guildhall Coffee House, King Street, Cheapside*]: and I give notice that in case "either party" [*if one party only be delaying, say*, "you, A. B."] fail to attend without having previously shown to me good and sufficient cause "for his absenting himself" [*or* "for your

Appointment with notice, arbitrator will proceed ex parte.

(*e*) Either of these notices must be obtained by the party having the conduct of the reference, and must be served on the other parties thereto. Deacon's Chancery Forms, 3rd ed. p. 1020.

absenting yourself"], I shall, at the request of "the other party" [*or* "C. D."] if present, go on with the reference ex parte.

The [] day of [], A.D. [].

X. Y.

To Messrs. A. B. and C. D.
[*or* to Mr. A. B.]

XLIV.

Form of oath to be administered by the arbitrator.

The evidence which you shall give before me, the arbitrator, touching the matters in difference in this reference, shall be the truth, the whole truth, and nothing but the truth; so help you God.

XLV.

Another form of oath.

You shall true answers make to all such questions as shall be asked of you touching the matters in difference in this reference; so help you God.

XLVI.

Form of affirmation.

I, A. B., being [*or* "having been"] one of the people called Quakers [*or* "one of the united brethren called Moravians," *or* "being a Separatist"], do solemnly, sincerely, and truly affirm and declare,* that the evidence which I shall give before you, the arbitrator, touching the matters in difference in this reference, shall be the truth, the whole truth, and nothing but the truth.

XLVII.

Another form of affirmation.

I solemnly promise and declare that the evidence given by me on this reference shall be the truth, the whole truth, and nothing but the truth.

XLVIII.

Another form of affirmation.

I solemnly, sincerely, and truly affirm and declare that I will true answers make to all such questions as shall be asked of me touching the matters in difference in this reference.

XLIX.

In the Matter of the Arbitration before A. B., C. D., and E. F.

Sir,

In pursuance of the power given to me by the "order of reference" [*or other submission, as the case may be*], I require you to produce before me, on Monday, the third day of January next, at the hour of eleven o'clock in the forenoon, at my chambers, Farrar's Buildings, Inner Temple, the following documents relating to the matters in this reference, that is to say [*here enumerate the books, deeds, papers, and writings demanded, specifying and describing each with a reasonable degree of particularity as far as is practicable. It may often also be advisable to add,* " and also all other books, deeds, papers, and writings, concerning the matters in difference referred to my decision "](*f*). Demand by arbitrator of production of documents.

Dec. 22, 1847. X. Y.

To Mr. A. B. (*g*). Arbitrator.

L.

Gentlemen,

In order that in forming my award I may not omit duly to estimate every matter which is deemed of importance, I request you respectively to furnish me with a statement in writing of the particular matters (other than those included in the cause referred) which you desire me to take into my consideration as matters in difference in this reference (*h*). Request by arbitrator of a written statement of the matters in difference.

The [] day of [], A.D. [].

Yours truly,

X. Y.

To Mr. A. B. [*or* "Mr. G. H., solicitor to Mr. A. B."], and to Mr. C. D. [*or* "Mr. I. K., solicitor to Mr. C. D."].

LI.

Sir,

We hereby give you notice that we cannot and shall not be able to agree in making an award, but have finally disagreed about the same, Notice by arbitrators to umpire of final disagreement.

(*f*) See P. II. ch. 4, s. 1, d. 8, p. 190, as to the arbitrator's power to call for documents.

(*g*) A copy of this notice should be served personally, as in the case of a demand of performance of an award, whenever there is any doubt of the party's willingness to comply with it; for the courts, it is presumed, would not enforce obedience by attachment, unless there were a personal service, with the requisite formalities.

(*h*) See P. II. ch. 4, s. 1, d. 14, p. 205, as to requiring statement in writing of matters in difference.

and that you are at liberty to proceed as umpire to consider and award upon the matters referred (*i*).

The [] day of [], A. D. [].

U. V.
X. Y. } Arbitrators.

To Q. R., Esq., umpire.

LII.

Enlargement of time by arbitrator.

I enlarge the time for making my award respecting the matters referred to me by the (*if the enlargement of time is to be indorsed on the submission, say,* "within order of reference" [*or other submission*], *if it is to be written at the foot of the submission, say,* "above order of reference" [*or other submission*]), until the [] day of [], A.D. [](*k*).

The [] day of [], A.D. [].

Witness, X. Y.
O. P.

LIII.

Enlargement of time by the parties.

[*Enlargement indorsed on the submission.*]—We, the within-named A. B. and C. D., do hereby agree to give and allow to the within-named arbitrator a further time for making his award, namely, until the [] day of [], A.D. []; and we further declare and agree that all the provisions of the within-contained "agreement of reference" [*or* "bond of submission," *or* "order of Nisi Prius,"] shall continue of full force and effect; except that the same shall be construed and read as if the day hereby given and allowed had been given and allowed for the making of the award by the "within-contained agreement of reference" [*or* "bond of submission," *or* "order of Nisi Prius"].

In witness whereof we have hereunto set "our hands" [*if the submission be by bond or deed, say,* "our hands and seals,"] this [] day of [], A.D. [](*l*).

Witness, A. B.
O. P. C. D.

(*i*) See P. II. ch. 4, s. 4, d. 4, p. 234, as to commencement of the umpire's authority.

(*k*) See P. II. ch. 3, s. 2, p. 143, as to enlargement by the arbitrator.

(*l*) See P. II. ch. 3, s. 2, d. 2, p. 147, as to enlargement of time by the parties.

LIV.

In the High Court of Justice. [], 18 . No. .
Queen's Bench Division.
Master in Chambers.

Between A. B., Plaintiff,
and
C. D., Defendant.

B. v. D. } Upon reading [], and upon hearing [], and by consent of the parties; it is ordered that the time limited for the arbitrator making his award between the parties be enlarged until the [] day of []. Rule for enlargement by consent.

By the Court.

LV.

In the High Court of Justice.
Chancery Division. [], 18 . No. .
Master of the Rolls.

Between A. B., Plaintiff,
and
C. D., Defendant.

Upon motion this day made unto this court by Mr. E., of counsel for the plaintiff, it was alleged that by an order dated the [] day of [], it was, by consent, ordered that all matters in difference should be referred to the arbitration, award, and final determination of X. Y., Esq., barrister-at-law, who was to make his award on or before the [] day of []; (*if the time has been enlarged before, insert the following clause,* "that by an order dated the [] day of [], it was ordered that the time for the said arbitrator to make his award shall be enlarged until the [] day of []"); that the said arbitrator has not yet been able to make his award; and therefore it was prayed that the time for the said arbitrator to make his award may be [*if the order be for a second enlargement, say* "further"] enlarged to the [] day of []. Order of Chancery Division for enlargement by consent.

Which is ordered accordingly; Mr. F., of counsel for the defendant consenting thereto.

LVI.

In the High Court of Justice. [], 18 . No. .
[] Division.

Master in Chambers.

Between A. B., Plaintiff,
and
C. D., Defendant.

Summons for enlargement by a judge.

Let all parties concerned attend the judge [*or* master] in Chambers at the Royal Courts of Justice, Strand, London, on the [] day of [], at [] of the clock in the "forenoon" [*or* "afternoon"] upon the hearing of an application on the part of []* that the time limited for the arbitrator's making his award between the parties should be enlarged until the [].

Dated the [] day of [], A.D. [](*m*).

This summons was taken out by [], of [], solicitor for [].

To [].

LVII.

Judge's order for enlargement.

B. *v.* D. [*or* "In the matter of an arbitration between A. B. and C. D."] Upon hearing [], and upon reading the affidavits of G. H. and I. K., it is ordered * that the time limited for the arbitrator making his award between the parties "in this action" [*or* "in this matter"] be enlarged until [] next, on the grounds that [].

Dated the [] day of [].

LVIII.

Summons for leave to revoke.

[*Commence the summons as in Form LVI., as far as the asterisk, and continue*]—"the plaintiff" [*or* "the said A. B."] should be at liberty to revoke and make void the power and authority of the arbitrator to make his award in the reference herein. [*Conclude as in the Form LVI.* (*n*).]

LIX.

Judge's order for leave to revoke.

[*Commence the order as in Form LVII., as far as the asterisk, and continue*]—that "the plaintiff" [*or* "the said A. B."] be at liberty to revoke and make void the power and authority of the arbitrator to make his award in the reference herein. [*Conclude as in Form LVII.*]

(*m*) See P. II. ch. 3, s. 2, d. 3, p. 149, as to enlargement of time by the courts.

(*n*) See P. II. ch. 3, s. 3, d. 2, p. 155, as to revocation by leave of court.

LX.

Revocation of submission by a party.

Know all men by these presents, that I, A. B., of [], have revoked, annulled, and made void, and by these presents do revoke, annul, and make void, all the power and authority which by [*recite the submission, for instance*], a certain agreement of reference in writing, made the [] day of [], A.D. [], between me, the said A. B., and C. D., of [], were conferred upon X. Y., of [], the arbitrator thereby appointed to award and determine on certain matters in difference between me and the said C. D.; and I do hereby discharge and prohibit the said X. Y. from making any award, or from any further proceeding in the said arbitration.

As witness my "hand" [*if the submission be by bond or deed, say* "hand and seal"], this [] day of [], A.D. [](*o*).

Witness, A. B. [*if by deed, L.S.*]

O. P.

LXI.

Notice of revocation to arbitrator.

Sir,

I hereby give you notice that by a writing under my hand and seal, made on the [] day of [], A.D. [], I have revoked, annulled, and made void your authority as arbitrator; and I hereby discharge and prohibit you from further proceeding in the matters of the arbitration between me and C. D.

Dated the [] day of [], A.D. [].

To X. Y., Esq. A. B.

LXII.

Notice to parties of award made.

Gentlemen,

I hereby give you notice that I have made and published my award in writing respecting the matters in difference between Mr. A. B. and Mr. C. D. referred to me, and that it lies at "my chambers" [*or other place specified*] ready to be delivered.

The charges amount to £[](*p*).

Yours truly,

X. Y.

The [] day of [], A.D. [].

To Mr. A. B., and Mr. G. H., solicitor for Mr. A. B., and to Mr. C. D., and Mr. I. K., solicitor for Mr. C. D.

(*o*) See P. II. ch. 3, s. 3, d. 1, p. 152, as to revocation by a party.

(*p*) See P. II. ch. 5, s. 1, dd. 2, 3, pp. 249, 250, as to publishing and delivering the award. Also P. III. ch. 9, s. 2, d. 1, p. 656, as to effect of notice on the parties.

AWARDS.

LXIII.

Award on a reference by order of Nisi Prius on the usual terms.

[*See order of Nisi Prius on the usual terms, Form XVIII.*]—(*a*) Whereas at the assizes held at [], in and for the county of [], on [], the [] day of [], A.D. 1890, before the Right Honourable John Dale Lord Coleridge, Chief Justice of England, and others his fellows, justices of our said Lady the Queen, appointed to take the assizes for the said county of [], according to the form of the statute in that case made and provided:

Recital of order.

on the trial of an action in which A. B. was plaintiff and C. D. defendant, it was ordered by the court, with the consent of the parties, their counsel, and solicitors, that a verdict should be entered for the plaintiff, damages the amount in the statement of claim in the above cause mentioned, costs 40*s.*; but that such verdict should be subject to the

Of power to the arbitrator over the verdict.

award, order, arbitrament, final end, and determination of me, X. Y., Esq., barrister-at-law; who was by the same order empowered to direct, that a verdict should be entered for the plaintiff or for the

Of cause and all matters referred.

defendant, as I should think proper; and to whom the above-mentioned cause, and all matters in difference between the parties, were thereby referred: so as that I the said arbitrator should make and

Of manner in which award to be made.

publish my award in writing respecting the matters referred, ready to be delivered to the said parties, or to either of them; or if they, or either of them, should be dead before the making of the award, to their

Of power to the arbitrator to enlarge the time.

respective personal representatives who should require the same; on or before the fourth day of the then next Easter Term, or on or before any other day, to which I the said arbitrator should, by any writing under my hand to be indorsed on the said order, from time to time enlarge the time for making my award.

Of power to the arbitrator over costs.

And whereas it was also ordered that the costs of the said cause to be taxed should abide the event of the said award, and that the costs of the reference and of my award, to be taxed, should be in the discretion of me the said arbitrator, who might direct and award to and by whom, and in what manner, the same should be paid.

Of enlargement of time by the arbitrator.

And whereas I the said arbitrator, on the [] day of [], A.D. [], did, by writing under my hand, indorsed on the said order, enlarge the time for making my award until the [] day of [] then next.

(*a*) See P. II. ch. 5, s. 2, p. 256, as to the form of the award.

FORM LXIII.

And whereas I the said arbitrator, on the [] day of July, A.D. [], did, by writing under my hand, indorsed on the said order, further enlarge the time for making my award until the [] day of [], A.D. []. — Of further enlargement of time.

Now I the said arbitrator having taken upon myself the burthen of this reference, and having duly weighed and considered the several allegations of the said parties, and also the proofs, vouchers, and documents which have been given in evidence before me, do hereby make and publish my award in writing of and concerning the matters above referred to me (*b*), in manner following, that is to say:— — Award of and concerning the premises.

As to the issue joined in the said action in respect of the contract (*c*), I award and adjudge that the defendant did contract in manner and form, as the plaintiff has in his statement of claim in the said action alleged against him. — On issue as to contract.

And as to the issue joined in the said action in respect of payment, I award and adjudge that the defendant did not pay to the plaintiff, nor did the plaintiff accept of and from the defendant the sums in the statement of defence of the defendant in the said cause mentioned, or any part of them, in full satisfaction and discharge of all or of any of the causes and rights of action in the statement of claim mentioned, in manner and form, as the defendant has alleged. — On issue as to payment.

And I further award and adjudge that the plaintiff has sustained damages, by reason of the non-performance by the defendant of the contract in the statement of claim mentioned, to the amount of [] [*it is better to state the sum in words than in figures*] pounds, which sum I award and direct the defendant to pay to the plaintiff (*d*). — Award of damages in the cause. — Direction to pay.

And I further award and direct that the verdict which has been entered for the plaintiff do stand; but that the entry of damages be reduced to the sum of £ [] above-mentioned (*e*). — Verdict to stand, but for reduced damages.

And I further award and adjudge that there are no matters in difference between the parties other than those in the said action. [*Or*, "And as to the matters in difference between the parties other than those in the said action, I award, adjudge, and direct, that the defendant do pay to the plaintiff the sum of [] pounds, in full satisfaction and discharge of all claims and demands by the plaintiff against the defendant in respect of the same (*f*)." *Or*, "And I further award and adjudge that the defendant has no claim or demand against the plaintiff in respect of any matters in difference between them (*g*)."] — Award as to other matters in difference.

And I further award and direct that the defendant do pay to the plaintiff his costs of and incidental to the reference and the costs — Award, defendant to pay plaintiff's costs of reference and award.

(*b*) See P. II. ch. 5, s. 4, p. 261, as to awarding of and concerning the premises.

(*c*) See P. II. ch. 6, s. 2, d. 4, p. 342, as to awarding on the issues.

(*d*) See P. II. ch. 6, s. 4, p. 356, as to awarding damages.

(*e*) See P. II. ch. 6, s. 3, p. 350, as to awarding a verdict.

(*f*) See P. II. ch. 5, s. 4, d. 2, p. 266, as to awarding a gross sum.

(*g*) See P. II. ch. 5, s. 4, d. 7, p. 274, as to negativing groundless claim.

FORM LXIII.

of the award, and that the defendant do bear his own costs of the same (*h*).

In witness whereof I have hereunto set my hand this [] day of [], A.D. [].

Signed and published the [] day of [], in the presence of O. P. X. Y.

CLAUSES IN AWARDS (*i*).

Commencement of award reciting submission by agreement or deed.

1. Whereas by a certain "agreement in writing" [*or* "indenture"], bearing date the [] day of [], A.D. [], made between A. B., of [], ["of the first part,"] and C. D., of [], ["of the second part,"] reciting that [*here recite so much of the matters in difference as will explain and justify the subsequent directions of the award*] it was agreed that "the same" [*or* "that all matters in difference,"] [*state the terms of reference as the case may be*] should be referred to the award and final determination of me, X. Y., of []. And whereas it was further agreed that [*here set forth such of the several powers and provisions in the submission as warrant the following directions of the award*]. Now I the said arbitrator, &c.

Commencement of award reciting a submission by bond.

2. To all to whom these presents shall come, we, U. V., of [], and X. Y., of [], send greeting.

Whereas A. B., of [], did by his bond, bearing date this [] day of [], A.D. [], become bound to C. D., of [], in the penal sum of £ []; and the said C. D., by his bond, also bearing date the day and year aforesaid, became bound to the said A. B. in the like penal sum of £ [].* Which bonds respectively recite that [*here set out so much of the recital in the bonds as suffices to show what is referred and to explain the rest of the award*]. Under which bonds conditions were respectively written for making the same void, if the said A. B. and C. D. respectively, and their respective heirs, executors, and administrators, should observe, perform, and keep the award, which we the said arbitrators should make "of and concerning the said matters referred" [*according to the bonds*]; so as we the said arbitrators, should make and publish our award in writing, &c., &c. [*as in Form VII., altering the person and tense, as far as the commencement of the provision respecting the umpire.*] Now we the said arbitrators, &c.

(*h*) See P. II. ch. 7, s. 1, p. 373, as to awarding costs.

(*i*) In the following clauses, appended to the first form of an award, an endeavour has been made to collect under one head a variety of forms of the parts of awards most wanted in ordinary practice; of modes of adjudicating on matters which most frequently arise for decision; and of directions often necessarily or beneficially inserted in an award. An arbitrator, selecting from these clauses, such as suit the subject of reference before him, and are within the powers conferred on him by the submission, will find, it is hoped, little difficulty in adapting the above form, or some of the other forms of awards, to his own particular purpose.

FORM LXIII.

Commencement of award on submission by bond.

3. [*Award, on submission by bond, between parties. Commence as in the preceding clause, as far as the asterisk.*]—Under which bonds conditions were respectively written, that the said A. B. and C. D. respectively, and their respective heirs, executors, and administrators, should in all things well and truly stand to, obey, abide by [*continue as in the submission, to the end of the recital of the matters referred*]; so as I the said arbitrator should make and publish my award [*here follow the provision of the bonds, as to the delivery of the award, the time for making it, and the power of enlargement, changing the person and tense.*] Now I the said arbitrator, &c.

Commencement of award—on a submission by deeds poll;

4. Whereas by a certain deed poll, made and executed by A. B., of [], on the [] day of [], A.D. [], and by a certain other deed poll, made and executed by C. D., of [], on the day and year last aforesaid, after reciting that [*here recite such portions of the recital in the deeds poll as are material to explain the award*], it was agreed that [*matters referred*] should be referred to the award of me, X. Y., of [], &c., &c.

on a submission by a judge's order;

5. Whereas by an order of reference made by the Honourable Sir T. C., one of the judges of Her Majesty's High Court of Justice, all matters in difference in a certain action then pending in the said court, between A. B., plaintiff, and C. D., defendant, were referred to me, X. Y., Esq., barrister-at-law, in manner and form as by the said order, reference being thereto had, will more fully and at large appear.

on an order of Nisi Prius;

6. Whereas by an order made at the sittings of Nisi Prius, held "at [], in and for the county of []," [*or* "at the Guildhall, in and for the city of London"], on the [] day of [], A.D. [], before the Right Honourable John Dale, Lord Coleridge, Chief Justice of England [*or before any other judge, as in the order of reference*]; in a certain action, &c.

on a submission by rule of court.

7. Whereas by a rule of the Queen's Bench Division of Her Majesty's High Court of Justice, made the [] day of [], A.D. [], in an action wherein A. B. was plaintiff, and C. D. defendant, it was, by consent, ordered that all matters in dispute between the said parties should be referred to the award of me, X. Y., of [].

Recital in award by umpire.

8. [*Recite the submission, as to the appointment of the arbitrators, and the provision for appointing an umpire, and such other parts as may be necessary, and proceed.*]—And whereas the said U. V. and X. Y. did, by a writing under their hands, bearing date the [] day of [], indorsed on the said order of reference [*or as the case may be*], appoint me, A. Z., of [], to be the umpire, pursuant to the said order. "And whereas the said U. V. and X. Y. did not make any award of and concerning the premises before the [] day of []," [*the limit of the arbitrator's authority.*] [*Where there is no limit, say instead,* "And whereas the said U. V. and X. Y. have not

Appointment of umpire.

Arbitrators not made award.

FORM LXIII.

made any award concerning the matters referred, but have finally and altogether disagreed respecting the same."] Now I, the said A. Z., having taken upon myself the charge of this reference, and having heard, examined, and considered the allegations, witnesses, and evidence of both the said parties concerning the premises; do make this my umpirage in writing of and concerning the premises, in the manner following: that is to say:—I award and adjudge, &c., &c.

Award plaintiff good cause of action on part of claim.

9. [*Form of adjudication on an action referred before issue joined.*]—I award that the plaintiff has good cause of action against the defendant on the first and second paragraphs in his statement of claim for the sum of £ [], which sum I direct the defendant to pay to the plaintiff; and I further award that the plaintiff has no cause of action against the defendant on the other paragraphs in the statement of claim (*k*).

Defendant to pay in full of all demands.

10. [*Action referred before statement of defence, the following is a sufficient determination.*]—I award that the defendant shall pay to the plaintiff, £ [], in full of all demands in the above-mentioned action.

Award on various issues.

11. [*Action referred after issue joined.*]—And as to the issues raised on the first, second, and fourth paragraphs in the statement of claim joined in this action, I award and find for the plaintiff; and as to the issues raised on the third and fifth paragraphs joined in the action, I award and find for the defendant.

Award for plaintiff on all the issues.

12. [*Action referred and verdict taken.*]—I award that the plaintiff has good cause of action against the defendant in the said action, and is entitled to a verdict on each and every of the issues joined in the said action. And I award and direct the verdict so found as aforesaid to stand.

Award for plaintiff on some issues, and for defendant on others.

13. [*Action referred and verdict taken.*]—I award that the verdict so entered as aforesaid be vacated, and that instead thereof, a verdict be entered for the plaintiff on the issues joined in the said action on the first and second paragraphs of the defendant's statement of defence, and that a verdict be entered for the defendant on the issues joined in the said action on the third and fourth paragraphs of the said statement of defence.

Award of damages in a cause.

14. I find that the plaintiffs have sustained damages from the defendants, occasioned by the causes of action for which the said action was brought, to the amount of [] pounds, [] shillings, and [] pence; and I assess the plaintiffs' damages at the said sum of [] pounds, [] shillings, and [] pence, and award and direct the defendants to pay the same to the plaintiffs (*l*).

[*This form, it is to be observed, does not decide on which paragraph or issues plaintiff is entitled to recover.*]

(*k*) See P. II. ch. 6, s. 2, d. 3, p. 339, as to awarding on the cause before issue joined.

(*l*) See P. II. ch. 6, s. 4, p. 356, as to damages.

FORM LXIII.

15. [*Action and all matters in difference referred, set-off pleaded.*]—I award and adjudge that the plaintiff has good cause of action against the defendant for the matter in the statement of claim alleged. Award for defendant of balance of set-off.

And I assess the damages sustained by the plaintiff in respect of the causes of action alleged in the statement of claim at the sum of fifty pounds.

And I further award and adjudge, that the plaintiff was and is indebted to the defendant in manner and form as the defendant has in his second paragraph of his statement of defence alleged.

And I further award and adjudge, that the plaintiff was and is indebted to the defendant in respect of the causes in the said statement of defence alleged in the sum of eighty pounds.

And I further award and direct, that the sum of fifty pounds assessed for the plaintiff be allowed out of, and deducted from the sum of eighty pounds found due to the defendant; and that the plaintiff pay to the defendant the sum of thirty pounds, the balance (*m*).

16. [*Action and all matters referred.*]—I award that the plaintiff had not at the time of the commencement of the said action, nor at any time since, any cause of action against the defendant, and that the plaintiff is not entitled to recover anything in the said action, and I further award that the plaintiff was at the time of the commencement of the said action and still is indebted to the defendant in the sum of £[], which sum I direct the plaintiff to pay to the defendant forthwith. Award for defendant.

17. I award that the action shall cease, and be no further prosecuted (*n*). Award of a stet processus.

18. I award that the verdict entered for the plaintiff do stand, but that the damages be reduced to £[](*o*). [*When the arbitrator is empowered, and thinks fit to order speedy execution.*]—And I further award and certify, that, in my opinion, execution ought to issue in this action for the said damages [*or* for £[], parcel of the said damages] "forthwith" [*or* "at any time not sooner than the [] day of [] next"]. Award of verdict for plaintiff, with certificate for speedy execution.

19. I award that the verdict which has been entered for the plaintiff be set aside, and instead thereof "that a nonsuit be entered" (*p*), [*or* "that a verdict be entered for the defendant on all the issues"]. Award of nonsuit or verdict for defendant.

20. I award and adjudge that the "statement of claim" [*or other pleading*]—"is" [*or* "is not"] sufficient in law. [*If for the plaintiff, add*]—"and that the plaintiff is entitled to recover from the defendant £[] in respect of his claims in the said action." Award on the pleadings.

(*m*) See P. II. ch. 5, s. 4, d. 2, p. 267; P. II. ch. 6, s. 4, p. 361, as to awarding balance to defendant.

(*n*) See P. II. ch. 6, s. 1, p. 337, as to the sufficiency of an award of a stet processus.

(*o*) See P. II. ch. 6, s. 3, p. 350, as to awarding a verdict.

(*p*) See P. II. ch. 6, s. 1, p. 337, as to award of a nonsuit.

FORM LXIII.

Award of entry of judgment.

21. [*When arbitrator empowered to award that judgment be entered.*] —And I further award and direct that judgment be entered for the plaintiff [*or* "defendant"] in the said action (*q*).

Award of judgment by default.

22. Whereas it was agreed [*or* "ordered"] that I should be at liberty to direct judgment by default to be entered against the defendants:— I award, order, and direct, that judgment by default be entered against the defendants in the said action.

Award that an action in Chancery be dismissed.

23. As to the above-mentioned action in the Chancery Division, I award and adjudge, that the plaintiff has no title to the relief prayed by statement of claim; and I direct that the said action be dismissed (*r*); [*or* "I award and direct that the plaintiff do apply to the said Chancery Division to have the said action dismissed"].

Award in action to recover land.

24. [*Action to recover possession of land referred.*]—I award and adjudge, that the plaintiff in this action is entitled to the possession of a certain parcel of the lands sought to be recovered in this action; that is to say [*here set out the part by boundaries or full description*]; which said parcel is marked out and coloured red in the map annexed to this my award. And I award and assess the plaintiff's damages as to the matters stated in the first paragraph of the statement of claim at one shilling.

And I further award and adjudge, as to the land mentioned in the second paragraph of the statement of claim, that the plaintiff is entitled to the possession of a certain other parcel of the lands sought to be recovered in this action; that is to say [*here set out this other portion by boundaries or full description*]; which said last-mentioned parcel is marked out and coloured green in the above-mentioned map. And I award and assess the plaintiff's damages as to the matters stated in the second paragraph of his statement of claim at one shilling.

And I further award and adjudge that the residue of the lands sought to be recovered in this action consists of [*here set out the residue by boundaries or full description*]; which said residue is marked out and coloured yellow in the above-mentioned map. And I further award and adjudge that the plaintiff is not entitled to the possession of the said residue of the said lands; but that the defendant, as between plaintiff and defendant, is entitled to the possession of the same.

Map to be part of award.

And I direct that the map above referred to be taken and considered as part of this my award.

Award on costs of cause.

25. I award that the costs of the action be paid by the defendant to the plaintiff (*s*).

Each party to bear his own costs.

26. I award that each party bear his own costs of the action.

(*q*) See P. II. ch. 6, s. 5, p. 362, as to awarding entry of judgment.
(*r*) See P. II. ch. 6, s. 6, p. 366, as to awarding on a suit in equity.
(*s*) See P. II. ch. 7, s. 1, p. 373, as to awarding costs.

FORM LXIII.

27. I award and direct that the defendant do pay to the plaintiff the costs incurred by the plaintiff of, and incidental to, the reference and award [*when the arbitrator is to ascertain the amount, add the following words*]: "and I assess the amount of the said costs of the plaintiff at £ [], and the costs of my award at £ []." Defendant to pay costs of reference and award.

28. And I further award and direct that the plaintiff and defendant do each bear his own costs of the reference, and pay one-half the costs of the award; and that if either party shall in the first instance pay the whole or more than half of the costs of the award, the other party shall repay him so much of the amount as shall exceed the half of the said costs. Each to bear costs of reference and half costs of award.

29. I award and direct that one moiety of the costs of the reference and award be borne and paid by A. B. and the other moiety by C. D. Each to pay half costs.

30. And I award and certify that this action was proper to be tried before a judge of the superior courts, and not before the sheriff, or judge of an inferior court (*t*). Certificate for trial.

31. I further award and certify that the action was proper to be tried before a special jury. Certificate for special jury.

32. And I award and certify that the action was brought to try a right, other than the mere right to recover damages. Certificate action to try a right.

33. And I further award and adjudge, that the said A. B. and C. D. shall each, on the requisition of the other of them [*sometimes it may be as well to insert*, "such other having first performed the award"], and at the costs and charges of the party requiring the same, sign, seal, and as his respective act and deed, deliver unto the other of them, "mutual releases of all claims and demands in respect of the matters in difference referred" [*or more generally*, "mutual general releases in writing of all and all manner of actions and suits, causes of action and suit, bills, bonds, covenants, debts, rent, specialties, controversies, trespasses, claims, and demands whatsoever, from the beginning of the world until the time of the making of the aforesaid order of reference"], [*or* "arbitration bonds," &c., *as the case may be*] (*u*).—[*It may be sometimes advisable to add*, "excepting anything by the award provided to be done or suffered."] Award of mutual releases.

34. And I award, order, and determine, that the said damages and the said several sums of money awarded to be paid, and the several matters and things awarded and directed to be done by, or with regard to, the parties to this reference respectively as aforesaid, shall respectively be paid, received, done, accepted, and taken, as and for full satisfaction and discharge, and as a final end and determination "of Award sums, &c., awarded to be in full satisfaction.

(*t*) See P. II. ch. 7, s. 3, p. 380, as to certifying for costs.
(*u*) See P. II. ch. 5, s. 4, d. 3, p. 269; P. II. ch. 8, s. 1, d. 6, p. 437, as to effect of an award of mutual releases.

FORM LXIII.

the several matters aforesaid, and in difference between the parties referred to me" [*or* "of all matters in difference between the parties up to the time of the submission to arbitration."]

Award against executor.

35. [*Submission to arbitration between A. B. and C. D. executor of E. F.*]—I award and adjudge, that the said E. F., deceased, at the time of his death was indebted to the said A. B. in the sum of £100, and that the said C. D., the executor of the said E. F., at the date of this submission to arbitration, had in his hands goods and chattels which were of the said E. F. to be administered of the value of £80: and I direct the said C. D. to pay to the said A. B. the sum of £80 in part satisfaction of the said sum of £100 found due to the said A. B. (*x*).

Award on partnership accounts.

36. [*Reference by A., B. and C., partners, disputes having arisen respecting the accounts and as to the amount to be paid to A., the retiring partner, as his share, B. and C. still carrying on the business.*]

Award on amount of debts due to the firm.

I award and adjudge as between the parties to this reference, that the amount of debts due to the said firm is £10,000, which sum is made up "in the following manner," viz.:

Of £ [], due from G. H. of [],
Of £ [], due from I. K. of [],
ditto ditto

[*or if the amounts are set out in the schedule, say* "of the particular items set forth in the schedule of debts due to the firm, appended to this award"].

Value of partnership property.

And I further award and adjudge, that the value of the effects, stock in trade, money securities, and property of the said firm of every kind and sort other than the said debts, is £20,000.

Amount of debts due to creditors of the firm.

And I further award and adjudge as between the said partners, that the amount of debts due from the said firm to others than the said partners is £4,000, which last-mentioned sum is made up in the following manner, that is to say—

Of £ [] due to L. M. of [],
Of £ [] due to O. P. of []

[*or say*, "is made up of the particular items set forth in the schedule of debts due from the said firm, appended to this award"].

Account of capital of each partner.

And I further award and adjudge, that there is due from the said firm, for capital and interest on the same to the date of the reference: to A. the sum of £8,000; to B. the sum of £6,000; to C. the sum of £5,000.

Deduction to be made for bad and doubtful debts.

And I further find, that in estimating the amount to be divided as profits, it is reasonable to deduct from the said sum of £10,000, the amount of debts due to the firm, the sum of £1,000 for bad and doubtful debts; and I award that the same be deducted.

(*x*) See P. I. ch. 2, s. 2, d. 4, p. 29; P. II. ch. 8, s. 1, d. 2, p. 417, as to awarding against executors.

And I further award and find, that on a balance of the above-mentioned sums, there remains the sum of £5,000 in favour of the firm. Balance remaining.

And as it had been agreed between the said partners that B. and C., who intend to carry on the said business in partnership, shall be at the sole trouble and expense of collecting in the money due to the firm, and paying the creditors of the same; I award and adjudge, that the sum of £500 be deducted from the last-mentioned sum of £5,000, and be retained by them in equal moieties, as a compensation for such trouble and expense. Deduction for trouble and expense.

I therefore further award, that the sum of £4,500 remains to be divided as profits. Amount to be divided.

And I further award and adjudge, that A. is entitled to one half of the profits of the said firm, and B. and C. each to one quarter of the said profits. Share of each.

And I further award and adjudge, that, adding the share of the profits to the amount of the capital of each, there is, on the whole, due to A. the sum of £10,250; to B. the sum of £7,375; and to C. the sum of £6,375. Amount due to each.

And I further award and direct, that B. and C. shall pay to A. one moiety of the said sum of £10,250 on or before the [] day of [] next, and the remaining moiety of the said sum within one year from the last-mentioned day. Direction to pay retiring partner.

And I further award, that A. shall receive the said sum of £10,250 in full satisfaction of all his claims and interest in the said firm, or in anywise relating thereto, and shall not be entitled to any increase, or liable to any deduction, in case the amounts of the debt or credits of the said firm hereafter prove to be different from the sums at which they are estimated in this my award, but that the benefit or burthen of such difference be borne wholly by B. and C. in equal proportions (*y*). Variation in value not to affect retiring partner.

37. [*Reference to settle terms of dissolution of partnership between A. B. and C. D.*]—I do make this my award of and concerning the matters so referred to me as aforesaid, in the manner following, that is to say:—First, I do award, order, and adjudge, that the said partnership shall be deemed and taken to have ended and been determined on and from the [] day of []. Award of dissolution of partnership.

Secondly, I do award, order, and direct, that the said A. B., his executors or administrators, shall and may have, demand, and receive to his, her, or their own use, without interference of the said C. D., all debts due and owing to the said partnership from any person whomsoever. A. B. to have debts due to firm.

And shall and may use the name of the said C. D. either alone or jointly, in any action or suit to be commenced for the recovery of any such debt or demand (*z*). A. B. to use C. D.'s name.

(*y*) See P. II. ch. 8, s. 1, d. 4, p. 421, as to awarding on partnership matters.

(*z*) See P. II. ch. 8, s. 1, d. 4, p. 424, as to awarding right to sue in partner's name.

FORM LXIII.

A. B. to pay all debts due from the firm.

Thirdly, I do award, order, and direct, that the said A. B., his executors or administrators, shall and do bear, pay, and discharge all debts, demands, damages, and claims whatsoever, due or owing by the said partnership, or which any person hath or can make against the said copartnership, or the said C. D. in respect thereof.

To indemnify C. D.

And shall and do indemnify and keep harmless the said C. D. from and against all such debts, demands, damages, and claims; and from and against any loss and damages that may be incurred or sustained by the said C. D. by reason of his name being used in any such action or suit so to be commenced as aforesaid, in pursuance of the authority hereby given to the said A. B., his executors and administrators; and that the said A. B. shall seal, execute, and deliver his bond to the said C. D., in the penal sum of £ [], conditioned to indemnify and keep harmless the said C. D. from and against the above-mentioned debts, demands, damages, claims, and loss (*a*).

A. B. to execute bond of indemnity.

C. D. to deliver up all books of the firm.

Fourthly, I do award, order, and direct, that the said C. D. shall and do, at any time or times, upon the request of the said A. B., his executors or administrators, deliver up to the said A. B., his executors or administrators, all and every the books, papers, and writings, which may be in the custody, power, or possession of him the said C. D. in any wise relating to or concerning the said business of the said copartnership.

A. B. to pay C. D. sum of money in full of all demands.

Fifthly, I do award, order, and direct, that the said A. B. shall and do on the [] day of [] next, at the house of the said C. D. as aforesaid, pay unto the said C. D., his executors or administrators, the sum of £ []; and that the said C. D. shall and do accept and receive the same sum in full satisfaction and discharge of all demands against the said A. B. until the day of the date of the said submission.

Award between partners.

38. [*On a submission between A. B. and C. D., partners, when the amount owing to the firm is unascertained, the following provision may be made.*]—And whereas it cannot be ascertained what sums of money are due and owing to the said firm, I further award and direct that the said A. B. shall use his utmost endeavours to ascertain, collect, and receive the debts due to the said firm as aforesaid, and that the said C. D. shall permit and suffer the said A. B. to collect and receive the same. [*A clause may be added, empowering A. B. to use C. D.'s name to recover the debts, on an indemnity being given as in clause* 37; *and then proceed.*]

One to collect debts due to the firm.

And pay to the other a moiety of each debt as received.

And I further award and direct that the said A. B. shall, from time to time, give to the said C. D. an account in writing of his proceedings in the ascertainment and recovery of the said debts within six weeks after a request in writing so to do shall have been served upon the said A. B. on the part of the said C. D.; and shall also from time to time, as the said debts shall be respectively received, pay to the said C. D. one moiety thereof, after having first deducted all necessary expenses incurred touching the ascertaining, collecting, and recovering the same.

(*a*) See P. II. ch. 8, s. 1, d. 5, p. 424, as to awarding indemnity to be given.

FORM LXIII.

39. I award and direct the said C. D., at the costs and charges of the said A. B., to execute to the said A. B., his executors and administrators, a good and valid assignment of all that [*here describe the leasehold premises to be assigned*]; and I further award and direct the said C. D., at the like costs and charges of the said A. B., to execute to the said A. B., his heirs, executors, administrators, and assigns, a release of all the right, title, and interest of him, the said C. D., or his heirs, executors, or administrators, unto and in [*here describe the premises*]. Award of assignment and release.

40. And I further award and direct that the said C. D. shall, within one calendar month from the date of this award, deliver into the hands of A. B., or his heirs, all deeds and other writings in the custody, possession, or control of the said C. D., relating to, or in any way affecting the said freehold house, with the appurtenances, known by the name of []. Award to deliver up deeds.

41. And I further award and direct that the said C. D. shall, within one calendar month from the date hereof, convey, by a good and sufficient conveyance, by lease and release, the freehold house, with the appurtenances, known by the name of [], [*or describe the premises particularly as in the intended conveyance*], unto the said A. B., his heir or heirs, in fee simple; and that the said A. B. shall, at his own cost, prepare and tender for execution, by the said C. D., the said lease and release (*b*). Award of conveyance of fee. Costs of preparing deeds.

42. [*Arbitrator empowered to direct what shall be done, being desirous to have as many hatches as possible removed from a river, but it being doubtful whether third parties are not interested in some of them.*]—And I further award and direct that the defendant shall remove from the said river the said hatches at [], in the said river, and the said hatches at [], lower down in the said river, provided always that these directions shall refer only to such interest as the defendant shall have in the said hatches (*c*). Award to remove hatches as far as defendant can.

43. [*See the direction to prostrate an embankment, Form LXV.*] Award to prostrate an embankment.

44. [*Reference between A. B. and C. D. Arbitrator empowered to order what he shall think fit to be done.*]—I further award and direct that for the future convenience of the said A. B. and others, having occasion to pass along the said road, the said C. D. shall, at his own expense, put up and fix a good and sufficient foot-bridge across the said stream, at the spot where the said road crosses the said stream, provided that E. F. of [], the owner of the land where the said bridge is so directed to be put up, give his consent thereto. Award of bridge to be erected on stranger's land, provided he consent.

(*b*) See P. II. ch. 8, s. 1, d. 7, p. 428, as to awarding conveyances.

(*c*) See P. II. ch. 8, s. 4, d. 3, p. 449, as to awarding concerning a stranger's property.

LXIV.

Certificate of arbitrator finding for the plaintiff.

[*When a verdict has been taken on a reference at Nisi Prius subject to the certificate of the arbitrator.*]

In the High Court of Justice.

Queen's Bench Division.

Between A. B., Plaintiff,
and
C. D., Defendant.

Pursuant to the power conferred on me by an order of Nisi Prius made in this action, I, X. Y., of [], barrister-at-law, do hereby certify that the verdict which has been entered for the plaintiff do stand, but that the damages be reduced to £ [].

[*As in an award, the certificate should find on each issue. Directions as to the costs, so far as the arbitrator has power over them, may follow here; but quære whether the certificate does not become an award and require a stamp as such, if the arbitrator decide on any other matters than those on which the jury could give their verdict*] (*d*). X. Y.

To R. D., Esq. [*the associate or clerk of Nisi Prius.*]

LXV.

Award on an indictment referred, directing prostration of nuisance.

To all to whom these presents shall come, I, X. Y., of [], barrister-at-law, send greeting.

Recital of order of Nisi Prius.

Whereas by a certain order of court, made at the assizes holden at Maidstone, in and for the county of Kent, on Monday, the [] day of March, A.D. [], before Mr. Justice A. B., a judge of Her Majesty's High Court of Justice, appointed to take the assizes for the county of Kent; in a certain indictment then pending in the said court, wherein the Queen, on the prosecution of A. B., C. D., and E. F., was the prosecutrix, and Sir R. D., Knight, G. H., and I. K., were defendants; after reciting that the said defendants had consented to a verdict of guilty against them, upon condition that the prosecutors of the said indictment should enter into and be bound by the said order; it was ordered by the said court, with the consent of the said prosecutors and the said defendants, that I, the said X. Y., should be empowered, and I was thereby empowered, to direct and order the prostration of the whole or any part of the embankment in the said indictment mentioned, which I should think fit; such directions and orders to be conditional upon, and subject to the opinion of the Queen's Bench Division of the High Court of Justice, with respect to any point or points of law that might arise to be stated as therein and hereinafter mentioned: so as I, the said arbitrator, should make and publish my award in writing concerning the matters referred,

Verdict of guilty subject to reference.

Power to arbitrator to order prostration of the embankment indicted as a nuisance.

Subject to the opinion of the Queen's Bench Division on any point of law.

(*d*) See P. II. ch. 5, s. 1, p. 259, as to a certificate.

ready to be delivered to the said parties, or to either of them; or if they or either of them should be dead before the making of the said award, to their respective personal representatives who should require the same; on or before the fourth day of the then and now next Michaelmas Sitting, or on or before any other day to which I should by any writing under my hand, to be indorsed thereon, from time to time enlarge the time for making my said award; and that I, the said arbitrator, should state for the opinion of the Queen's Bench Division, at the request of the said prosecutors or defendants, or of or either of them, any point or points of law that might be raised before me touching the matters referred to me by the said order. And it was thereby also ordered that the costs of the said reference and award, to be taxed, should be in the discretion of me, the said arbitrator, who might direct and award, to, and by whom, and in what manner the same should be paid; and that I, the said arbitrator, should have the same power to amend the record and to certify, as a judge sitting at Nisi Prius would have had upon a trial of the said indictment. And it was thereby also ordered, by and with such consent as aforesaid, that it should be in the judgment of me, the said arbitrator, to examine the said prosecutors and the said defendants, or any or either of them, who, together with their respective witnesses, should be examined upon oath; as by the said order, reference being thereunto had, will, among other things, more fully appear.

Arbitrator to state points of law, if requested.

Costs in discretion of arbitrator.

Power to amend the record and to certify.

And whereas by a certain other order afterwards made in this indictment by the Honourable Sir A. B., one of the judges of her Majesty's High Court of Justice, and purporting to bear date the [] day of July, [], the said last-mentioned judge did, upon hearing the solicitors on both sides and by consent, thereby order that the arbitrator, to whom this indictment stood referred, should be at liberty to order the verdict of guilty already entered against the defendants to be set aside, and a verdict of not guilty to be entered instead thereof on behalf of all or any of the defendants; as by the said last-mentioned order, reference being had thereto, will more fully appear.

Recital of judge's order empowering arbitrator to alter verdict of guilty.

And whereas I, the said arbitrator, did, directly after the making of said first-mentioned order, take upon myself the burthen of the said arbitration, and have been attended by the counsel, solicitors, and agents of the said prosecutors and the said defendants, and have examined upon oath all the witnesses which have been produced before me by each of the said parties, touching the matters so referred to me as aforesaid; and have also viewed and inspected the said embankment in the said indictment mentioned; and have heard and maturely considered all the evidence which has been adduced before me, touching the matters so referred to me as aforesaid; and have not been called upon or requested during the said reference, by either the said prosecutors or defendants, or any or either of them, to state for the opinion of the said Queen's Bench Division any point or points of law that were raised before me touching the matters so referred to me

Award de præmissis.

Arbitrator not requested to raise point of law.

as aforesaid, or to amend the record of the said indictment;—I, the said arbitrator, do therefore make this my award in writing, of and concerning the matters so referred to me as aforesaid, in manner following, that is to say,

Award verdict of guilty as to some defendants.

I do order, that the verdict of guilty already entered against the defendants be set aside, and instead thereof that a verdict of guilty be entered against the defendants, Sir R. D. and G. H., and a verdict of not guilty against the defendant, I. K.

Direction to prostrate embankment.

And I do award, direct, and order, that the whole of the embankment in the said indictment mentioned shall with all reasonable speed, after the making and publishing of this my award, be prostrated by and at the expense of the said defendants, Sir R. D. and G. H.; and the materials thereof be taken and carried away; and the bed and soil of the river Thames, wherein the said embankment was erected, raised and placed, be restored and made by them, at their expense, in the same state in which the same was before the said embankment was begun to be erected, raised and placed.

Certificate for special jury.

And I do hereby certify that the said indictment so referred to me was a proper indictment to be removed by certiorari, and to be tried by a special jury.

Award defendants to pay costs of reference.

And I do hereby further award, order, and direct that the costs of this reference and of this my award, when taxed, be paid on demand by the above-named defendants, Sir R. D. and G. H.

In witness whereof, I, the said above-named X. Y., have hereunto set my hand, this [] day of []. X. Y.

Signed and published the [] day of [], in the presence of O. P.

LXVI.

Award of compensation by umpire for lands taken under the Lands Clauses Consolidation Act.

To all to whom these presents shall come, I, A. L. B., of [] in the county of Lancaster, mine agent, send greeting.

Recital company authorised to take land.

Whereas by virtue of the North Staffordshire Railway (Pottery Line) Act, 1846, and The North Staffordshire Railway (Churnet Valley Line) Act, 1846, and of certain other acts of parliament, incorporated with the above acts, the North Staffordshire Railway Company were authorised to take, for the purposes of a certain railway about to be constructed by them, the piece or parcel of land and buildings, part of a coal wharf and buildings; which part is hereinafter particularly mentioned in the schedule signed by me hereunder written and described on the plan signed by me hereto annexed, and coloured red on the said plan.

Notice by company land required.

And whereas, on or about the sixth day of January now last past, the said company duly gave notice in writing to J. H., S. B., and J. G., of [], in the parish of [], in the county of Stafford, coal masters and copartners, the tenants or lessees of the said

land and buildings so described in the said schedule, and coloured red in the said plan; that they required and intended to take the same for the purposes of the said railway; and that they were willing to treat for the purchase of the interest of the said J. H., S. B., and J. G., therein, and as to the compensation to be made to them for the damage that might be sustained by them by reason of the execution of the works of the said railway; and in and by the said notice the said company required the said J. H., S. B., and J. G. to deliver a statement in writing of the particulars of their estate and interest in the said land and buildings, and of the claim made by them, in respect thereof.

Demand of particulars of interest and claim.

And whereas, in pursuance of the said last-mentioned notice, the said J. H., S. B., and J. G., on or about the 26th day of January last past, by a statement in writing, informed the said company that they the said J. H., S. B., and J. G. were lessees of the said land and buildings for a term of twenty-one years, from the 24th day of June, 1879, under a lease from J. A., Esq., of L——, aforesaid: and that they claimed the sum of £3380 as a compensation for the value of their said land and buildings so as to be taken as aforesaid, and for the damage which would be sustained by them by reason of the execution of the works of the said railway, and of the severing of such land and buildings from their other lands and buildings.

Particulars of interest and claim for compensation.

And whereas the said railway company offered to pay to the said J. H., S. B., and J. G., the sum of £600 as and for the compensation for the value of the said land and buildings, and for such damage as aforesaid, and have not offered to pay any other or larger sum whatever in respect of the same.

Compensation offered by the company.

And whereas the said J. H., S. B., and J. G., and the said railway company, did not agree as to the amount of compensation to be paid as aforesaid, but a dispute arose between them as to the same.

Difference as to amount.

And whereas the said J. H., S. B., and J. G., by a notice in writing under their hands, dated on or about the 18th day of August last, and delivered to the said company before the said company had issued their warrant to the sheriff to summon a jury in respect of the said land and buildings, signified their desire to the said company to have the amount of compensation settled by arbitration; and in the said notice stated the interest in respect of which they claimed compensation and the amount of compensation claimed by them, and the dispute respecting such amount which they required to be settled by arbitration.

Demand of arbitration by landowner.

And whereas the said J. H., S. B., and J. G., and the said company, did not concur in the appointment of a single arbitrator.

And whereas, by the notice last aforesaid, the said J. H., S. B., and J. G. required the said company to nominate and appoint an arbitrator on their part to whom the said dispute respecting the said compensation should be referred.

Notice to company to appoint arbitrator.

And whereas the said J. H., S. B., and J. G., on or about the 30th day of August last, duly nominated and appointed, by writing, under their hands, J. H. B., of L——, aforesaid, auctioneer and surveyor, to be an arbitrator, to whom the question of such compensation as afore-

Appointment of arbitrator by landowner.

FORM LXVI.

said should be referred, and delivered the said appointment to the said J. H. B.

Appointment of arbitrator by the company.

And whereas, pursuant to the said notice, the said company, on or about the 13th day of September last, duly nominated and appointed, in writing under their hands of two of the directors of the said company, G. M'D., of C.——, in the said county of Stafford, surveyor, to be an arbitrator, to whom the question of such compensation as aforesaid should be referred, and delivered the said appointment to the said G. M'D.

Arbitrators subscribed declaration.

And whereas the said arbitrators, before they entered into the consideration of any of the matters so referred to them as aforesaid, respectively duly made and subscribed in the presence of a justice duly authorised in that behalf, the declaration required by the before-mentioned acts.

Arbitrators appointed umpire.

And whereas the said arbitrators, before they entered upon the matters so referred to them, did, on the 18th day of September last, in pursuance of the said statutes, by writing under their hands, duly nominate and appoint me, the before-mentioned A. L. B., to be the umpire in the matter of the said arbitration.

Arbitrators undertook the reference.

And whereas the said arbitrators took upon themselves the burthen of the reference, and duly heard and considered the allegations and proofs of the said J. H., S. B., and J. G., and of the said company respectively, concerning the amount of the said compensation.

Arbitrators enlarged the time.

And whereas the said arbitrators, on or about the 1st day of October last, and within twenty-one days after the appointment of the last of the said arbitrators, by writing under their hands, duly appointed an extended time for the making of their award, namely, until the 19th day of November instant.

Arbitrators disagreed, and made no award.

And whereas the said arbitrators disagreed and differed respecting the matters referred to them, and by reason of such differences between them failed to make their award either within twenty-one days after the day on which the last of the said arbitrators was appointed, or within the extended time for making their award so appointed as aforesaid; whereby the matters referred to the said arbitrators aforesaid duly came before me as umpire for determination.

Umpire undertook reference.

Now know ye that I, the said A. L. B., having taken upon myself the burthen of the reference; and having, before entering upon or taking into consideration any of the matters referred to me, duly made and subscribed, in the presence of a justice duly authorised in that behalf, the declaration required by the said acts, which said declaration is hereunto annexed: and having been attended by the parties and their witnesses, and having heard and considered the allegations and proofs of the respective parties, and having viewed the said lands and buildings; and having also in making this my award regarded not only the value of the interest of the said J. H., S. B., and J. G. in the land and buildings so to be taken by the said company as aforesaid, but also the damage to be sustained by the said J. H., S. B., and J. G. by reason of the severing of the land and buildings so to be taken from

Subscribed declaration annexed.

Considered value and consequential damage.

FORM LXVI.

the other lands of the said J. H., S. B., and J. G., and by the otherwise injuriously affecting such other lands by reason of the exercise by the said company of the powers contained in the said acts: do make this my award in writing, of and concerning the premises, in the manner following; that is to say,

Award.

I do award, settle, order, and determine, that there is due from the said railway company unto the said J. G., S. B., and J. G., the sum of £2805 as and for the purchase-money and compensation for the interest of the said J. H., S. B., and J. G. in the said land and buildings so intended to be taken as aforesaid; and for all damages to be sustained by the said J. H., S. B., and J. G. by reason of the severing of the said land and buildings from the other lands and buildings of the said J. H., S. B., and J. G.; and the otherwise injuriously affecting such other lands and premises by the exercise by the said railway company of the powers contained in the said acts.

Sum due as compensation.

For land taken, for severance, and other injuries.

And whereas the said sum of £2805, which I have above awarded as such compensation, is greater than the sum offered by the said railway company as such compensation, whereby the costs of and incident to this arbitration are to be borne and paid by the said railway company; I further award, adjudge, and settle the amount of the costs of this arbitration, and incident thereto, incurred by the said J. H., S. B., and J. G., at the sum of £ [], and the amount of the costs of and incident to the award, at the sum of £ [](e).

Recital company liable to costs.

Award assessment of costs.

Of party.

Of award.

As witness my hand this twenty-fourth day of November, A.D. 1881.

A. L. B.

Signed and published on the day and year last above mentioned, in the presence of J. F. S.

The Schedule above referred to.

Schedule.

Parish or place and county in which the lands and hereditaments required are situate.	Number on map or plan, and in the book of reference deposited with the clerk of the peace of the county of Stafford.	Description of the lands and hereditaments required.	Quantity of the lands and hereditaments required.		
			Acres.	Rods.	Per.
L. in the parish of S. in the county of Stafford.	109	Part of a coal wharf and buildings.	0	0	27

A. L. B.

Signed by the said A. L. B. on the day and year last above mentioned, in the presence of J. F. S.

[*Let the plan be annexed, signed, and attested.*]

(e) See P. II. ch. 9, p. 472, as to making a separate certificate for the costs.

Declaration subscribed and annexed.

I, A. L. B., do solemnly and sincerely declare, that I will faithfully and honestly, and to the best of my skill and ability, hear and determine the matters referred to me under the provisions of the act. [*Here recite the name of the special act or acts.*]

A. L. B.

Made and subscribed in the presence of [*name of the justice*],
the third day of November, A.D. 1881.

LXVII.

Award amended on reference back.

[*Award defective for a mistake in the Christian name of one of the parties, and for deciding a cause by directing a verdict to be entered without any authority so to direct. This may be endorsed on the award.*] Whereas by a rule of the Queen's Bench Division of the High Court of Justice, made the [] day of [] last, it was ordered that my award should be referred back to me to reconsider and amend the same if I should think fit; now I, the within-named arbitrator, having reconsidered this my award within written, do hereby declare and award that the same ought to be amended by substituting the name Joseph Howett for the name James Howett whenever such last-mentioned name occurs in the said award; and that the said award ought now to be read as if the name Joseph Howett had originally stood therein, instead of the name James Howett, in every instance where such last-mentioned name occurs; the name James Howett having been therein inserted by mistake, instead of the name Joseph Howett, and Joseph Howett being the person thereby meant and intended by me (*f*).

LXVIII.

Award confirmed by arbitrator on reference back.

Whereas by a certain order of Nisi Prius, made on the trial of a cause in which A. B. was the plaintiff, and C. D. the defendant, it was ordered among other things that the said action, and all matters in difference between the said parties, should be referred to the award of me, X. Y., of [], as by reference to the said order will more fully appear.

And whereas I, the said X. Y., did pursuant to the said order, on the [] day of [], make and publish my award in writing of and concerning the matters referred by the said order of Nisi Prius.

And whereas by a rule of the Queen's Bench Division of the High Court of Justice, made the [] day of [], A.D. [], it was ordered that it should be referred back to me, the said arbitrator, to reconsider the amount of the damages awarded by me to the plaintiff

(*f*) See P. II. ch. 10, s. 2, p. 488, as to referring back.

in the said action, and that the costs of the further reference and award should be in my discretion.

Now I, the said X. Y., having taken upon myself the burthen of this further reference, and having heard and duly considered the allegations and proofs further made and adduced by the said parties, and having, in pursuance of the said rule, reconsidered the amount of the said damages; do hereby award and declare, that I see no reason to alter the amount of the said damages, and I do therefore hereby confirm my former award, and direct it to stand as to the said damages.

And I further award and order, that the said C. D. shall pay and bear the costs of this my second award, and also pay to the said A. B. his costs of and incidental to this second reference.

In witness whereof, &c.

LXIX.

In the High Court of Justice. [], 18 . No. .
Queen's Bench Division.

Between A. B., Plaintiff,
and
C. D., Defendant.

Report of referee appointed to inquire and report.

Whereas by an order of reference hereunto annexed, made by [], bearing date the [] day of [], in a certain action pending between A. B., plaintiff, and C. D., defendant, it was ordered that the questions arising therein [*or* "the question whether," *as in the order of reference*] should be referred to me for inquiry and report, pursuant to the Arbitration Act, 1889, s. 13.

Now I, the said X. Y., having duly heard and considered the evidence given before me relating to the said questions [*if there has been a view, add,* "and having viewed the premises mentioned in the statement of claim,"] do hereby report to the judges of the aforesaid division of the High Court of Justice, as follows: [*Here set out the report on the particular matters referred*].

In witness whereof I have hereunto set my hand, this [] day of [], A.D. [].

X. Y.

Signed and published this [] day of [], in the presence of [].

LXX.

In the High Court of Justice. [], 18 . No. .
Queen's Bench Division.

Between A. B., Plaintiff,
and
C. D., Defendant.

Report of referee appointed to try.

[*Commence as in the preceding form down to* "it was ordered,"]—that the issues of fact and account in this action [*or* "the following questions of 'fact' or 'account,' viz.," *here state the questions as in the order of reference, or* "the whole cause"] should be tried before me, pursuant to s. 14 of the Arbitration Act, 1889.

Now I, the said X. Y., having duly heard and considered the evidence given before me relating to the said questions [*or* "cause"], and having tried the said questions [*or* "issues of fact," *or* "cause"], do hereby report. [*Here set out findings on each question and issue referred.*]

In witness whereof I have hereunto set my hand, this [] day of []. A.D. [].

X. Y.

Signed and published this [] day of [], in the presence of [].

PROCEEDINGS ON THE AWARD.

LXXI.

In the High Court of Justice.
Queen's Bench [*or* Chancery] Division.

I, O. P., of [], make oath and say:—

Affidavit of execution of bond of submission.

1. On the [] day of [], A.D. [], I was present and did then see C. D. duly execute the bond or obligation hereunto annexed; and the said C. D. did then sign, and as his act and deed deliver, the said bond or obligation in the presence of me, this deponent; and the name C. D. at the foot thereof is of the proper handwriting of the said C. D.; and the name O. P. subscribed to the said bond as the witness thereof is of the proper handwriting of me, this deponent.

O. P.

Sworn, &c.

This affidavit is filed on behalf of [].

LXXII.

In the High Court of Justice. [*Year, letter, and number, if any.*]
Queen's Bench Division.

Between A. B., Plaintiff,
and
C. D., Defendant.

[*When there is no cause in court omit all title of the parties, or say,* "In the matter of the arbitration between A. B. and C. D."]

I, O. P., of [], make oath and say:—

Affidavit of execution of an award.

1. I, this deponent, did, on the [] day of [], A.D. [], see X. Y. "sign and publish" [*or* "sign, seal, and publish," *as the case may be*], "the award in writing hereto annexed" [*or* "his award in writing, between A. B., of [], and C. D., of [], bearing date the day and year aforesaid"].

2. The name X. Y. set and subscribed to the said award as the party executing the same is of the proper handwriting of the said X. Y.

3. The name O. P., set and subscribed thereto as witness attesting the execution of the said award, is of the proper handwriting of me, this deponent (*g*).

O. P.

Sworn, &c.

This affidavit is filed on behalf of [].

LXXIII.

In the High Court of Justice. [*Year, letter, and number*].
Queen's Bench [*or* Chancery] Division.

Between W. B., Plaintiff,
and
The C. D. Railway Company, Defendants.

Affidavit verifying copy of award on motion to set aside award.

I, W. H., of [], solicitor for the above W. B., make oath and say:—

1. I, on the [] day of [], received from M. T., the solicitor for the above-named company, a copy of the award made by M. P., in the matter above-mentioned, and which said copy of the said award is hereunto annexed, and which said award was taken up, and is now in the possession of the said M. T. as such solicitor as aforesaid, or of the said company, as I, this deponent, verily believe (*h*).

W. H.

Sworn in court this [] day of [], 1855.

This affidavit is filed on behalf of [].

LXXIV.

[*Commence as in the previous Forms.*]

Affidavit of enlargement of time and of publication of award.

2. The time for making the said award was, on the [] day of [], A.D. [], duly enlarged to the [] day of [], A.D. [], by the writing under the hand of the said X. Y. indorsed on the said bond [*or other submission, as the case may be*].

3. The name of the said X. Y. set and subscribed to the said indorsement is of the proper handwriting of the said X. Y.

4. The said award was made and published on the [] day of [], A.D. [], and within the enlarged time for making and publishing the same.

This affidavit is filed on behalf of [].

(*g*) See P. III. ch. 9, s. 4, d. 1, p. 677, as to verifying the award.

(*h*) See P. III. ch. 9, s. 4, d. 1, p. 677, as to sufficiently verifying the award.

LXXV.

In the High Court of Justice.
Queen's Bench Division.

The [] day of [], A.D. 1890.

In the matter of an arbitration between A. B. and C. D.

Upon reading the affidavit of [] and the agreement thereunto annexed, dated [], between [] and [].

Order making agreement of reference an order of court.

It is ordered that the said agreement be entered and made an order of the High Court of Justice, Queen's Bench Division, which said agreement is in the words following, to wit [*here copy the agreement verbatim*]. Upon the motion of Mr. [].

By the Court.

LXXVI.

In the High Court of Justice.
Queen's Bench Division.

Wednesday, the twenty-third day of November, A.D. 1890.

Lancashire.] It is ordered that an order made at the General Quarter Sessions of the Peace, held by adjournment at Preston, in and for the County Palatine of Lancaster, on the fifth day of April, 1890, be entered and made a rule of this court, which said order is as follows, that is to say.

Rule making order of reference by Quarter Sessions a rule of court.

[*Here set out the order of Sessions, referring the matters of appeal verbatim. See Form XXXVII.*]

LXXVII.

In the High Court of Justice.
Queen's Bench Division.

Monday, the [] day of July, A.D. 1890.

In the matter of the arbitration between the London and North-Western Railway Company under the Lands Clauses Consolidation Act, 1845, and O. P.

Upon reading the affidavit of K. L. [*verifying appointment of arbitrator by the company*], and the appointment of arbitrator or submission to arbitration on the part of the London and North-Western Railway Company, under the Lands Clauses Consolidation Act, 1845, and bearing date the [] day of [*date of appointment*], and duly executed "by A. B. and C. D., two of the directors of the said company" [*or* by "E. F., secretary to the said company"], thereto annexed, the affidavit of L. M. [*verifying appointment of arbitrator by the landowner*], and the appointment of arbitrator or submission to arbitration on the part of the said O. P., bearing date the [] day of [*date of appointment*], thereto annexed, it is ordered

Rule making submission under the Lands Clauses Consolidation Act rule of the Queen's Bench Division.

that the said two several appointments of arbitrators, or submissions to arbitration, be respectively entered and made a rule of this court: which two several appointments of arbitrators, or submissions to arbitration, are in the words following, to wit [*copy of the appointments verbatim*]. Upon the motion of Mr. [] (*i*).

By the Court.

LXXVIII.

In the High Court of Justice.
Chancery Division.

Mr. Justice [].

Wednesday, the [] day of November, [].

Order making a submission under the Lands Clauses Consolidation Act an order of the Chancery Division.

In the matter of the submission to arbitration of B. V. E., of Plymouth, in the county of Devon, gentleman, and the South D. Railway Company.

And in the matter of the South D. Railway Act, and of the Lands Clauses Consolidation Act, 1845.

Upon motion this day made unto this court by Mr. Palmer, of counsel for B. V. E., and upon producing a submission to arbitration, bearing date the [] day of July, [], and signed by William Carr, secretary to the said South D. Railway Company, as by affidavit appears; and a submission to arbitration, bearing date, Plymouth [], and signed by B. V. E., as by affidavit also appears; it was prayed that the said two several submissions to arbitration may be made an order of this court, and be observed and performed by all parties thereto, according to the tenor and true meaning thereof: which is ordered accordingly (*k*).

LXXIX.

In the High Court of Justice. [*Year, letter, and number.*]
Chancery Division.

Master of Rolls.

Wednesday, the [] day of [], A.D. 1881.

Between A. B., Plaintiff,
and
C. D., Defendant.

Order making award order of Chancery Division by consent.

Upon motion this day made unto this court by Mr. E., of counsel for the plaintiff, it was prayed that the writing of award, bearing date the [] day of [], under the respective hands and seals of X. Y. and U. V., Esquires, and by them sealed and delivered, being first duly stamped, in the presence of [], may be made an order

(*i*) See P. III. ch. 5, s. 2, p. 584, as to making a submission under the Lands Clauses Act a rule of court.

(*k*) See Reg. Lib. A. 1847, fol. 70, E. D. C.

of this court: Whereupon, and upon hearing Mr. F., of counsel for the defendant, who consented thereto:—This court doth order, that the said award be made an order of this court; and that the same be observed and performed by all parties thereto, according to the tenor and true meaning thereof (*l*).

LXXX.

In the High Court of Justice.
Chancery Division.

Mr. Justice [].

Tuesday, the [] day of [] A.D., [].

In the matter of the arbitration between A. B. and C. D.
And in the matter of the Arbitration Act, 1889.

Upon motion this day made unto this court by Mr. E., of counsel for the said A. B., it was prayed that the writing of award, bearing date the [] day of [], under the hand of X. Y., Esq., barrister-at-law, and by him signed and delivered to the said A. B., in the presence of [], may be made an order of this court: Whereupon, and upon hearing an affidavit of notice of this motion to the said A. B. read:—This court doth order, that the said award be made an order of this court; and that the same be observed and performed by all parties thereto, according to the tenor and true meaning thereof.

Order making award order of Chancery Division on affidavit of service of notice of motion.

LXXXI.

[*Entitle the affidavit as an affidavit of an execution of an award, Form LXXII.*]—I, A. B. of [], one of the parties to the said arbitration, make oath and say:—

1. A submission of me and of C. D., of [], to the award of X. Y., was made in writing on the [] day of [], A.D. [].

2. I personally served the said C. D. with a true copy of the said submission, and of the master's allocatur given for costs, taxed pursuant to the said award, and also with a true copy of the award of the said X. Y. hereto annexed; and at the same time showed the said C. D. the said original submission, allocatur, and award, and demanded of him the payment of the sum of £ [], awarded to me by the said award; and also the sum of £ [], allowed by the master for costs, pursuant to the said award; but the said C. D. did

Affidavit of service of submission, allocatur and award, and demand of sum and costs awarded.

(*l*) In the case of *Stanley* v. *Blundell*, V.-C. E., 21st Dec., 1846; and *Fradley* v. *Haslam*, M. R., 19 Ap. 1847, the awards were made orders on similar forms.

not then, or at any time afterwards, pay the said sums, or either of them, or any part of either of them, to me or to any person on my behalf; and both the said sums now remain wholly due and owing to me.

Notice of enlargement.

3. At the time of making the demand of the said sums, the said C. D. had notice, and I then gave him notice, that the time for making the said award had been duly enlarged, and that the same award had been made and published within the said enlarged time (*n*).

This affidavit is filed on behalf of [].

LXXXII.

Power of attorney to demand money and costs awarded.

Know all men by these presents, that I, A. B., of [], for divers good causes and considerations me hereunto moving, have made, ordained, authorized, constituted, and appointed, and by these presents do make, ordain, authorize, constitute, and appoint, E. F., of [], gentleman, my true and lawful attorney, for me, and in my name, and to my use, to ask, demand, and receive, of and from C. D. of [], the sum of £ [], awarded to be paid to me by the award of X. Y., made under the submission between me and the said C. D., dated the [] day of [], A.D. [], and also the sum of £ [], for costs, allowed to me by the allocatur of the master, pursuant to the said award, and under and by virtue of an order of the Queen's Bench Division of the High Court of Justice, bearing date the [] day of [], A.D. []; and on payment thereof, acquittances, or other sufficient discharges for the same for me, and in my name, to make, seal, and deliver, and to do all other lawful acts and things whatsoever concerning the premises, as fully in every respect as I myself might or could do, if I were personally present. And I hereby ratify, confirm, and allow all and whatsoever my said attorney shall in my name lawfully do, in and about the said premises, by virtue of these presents. In witness whereof I have hereunto set my hand and seal this [] day of [], A.D. [] (*o*).

A. B. (L.S.)

Sealed, signed, and delivered, in the presence of O. P.

(*n*) See P. III. ch. 6, s. 2, p. 595, as to the proceedings for an attachment; P. III. ch. 7, s. 2, p. 623, as to the proceedings for a rule to pay the sum awarded.

(*o*) See P. III. ch. 6, s. 2, p. 595, as to the demand necessary before an attachment.

LXXXIII.

In the High Court of Justice. [*Year, letter, and number of*
Queen's Bench Division. *cause, if any.*]
Mr. Justice [].

[*If the reference is in a cause, say* "Between A. B., Plaintiff, and C. D., Defendant." *If there is no cause, say*, "In the matter of the arbitration between A. B. and C. D."]

Judge's order for payment of sum awarded.

Upon hearing the solicitors or agents [*or* counsel] on both sides, and upon reading the affidavits of G. H. and I. K., it is ordered that the defendant [*or* the said C. D.] do pay to the plaintiff [*or* to the said A. B.] the several sums of £ [] [*the sum awarded*] and £ [] [*the amount of taxed costs*], pursuant to [the order made in this cause *or* "the submission"], on [*date of order of reference or of the submission*], the award made between the parties, and the allocatur of E. F., one of the masters of the Supreme Court, and that the defendant [*or* the said C. D.] do pay to the plaintiff [*or* to the said A. B.] the costs of and occasioned by this application.

Dated the [] day of [], A.D. [].

LXXXIV.

In the High Court of Justice. [], 1881. No. [*here put*
Queen's Bench Division. *the letter and number.*]
Between A. B., Plaintiff,
and
C. D., Defendant.
Wednesday, 30th November, A.D. 1881.

Judgment after trial by a referee.

The action having on the 27th November, 1881, been tried before X. Y., Esq., an official [*or* "special"] referee, and the said X. Y. having found [*state substance of referee's certificate*], [*or* having ordered that judgment be entered for], it is this day adjudged that [](*p*).

LXXXV.

In the High Court of Justice. [], 18 . No. .
[] Division.
Between [], Plaintiff,
and
[], Defendant.
[], the [] day of [], A.D. 18 .

Judgment after trial of questions of

The questions of account in this action having been referred to [], and he having found that there is due from the [] to

(*p*) See the Rules of the Supreme Court, Appendix F 8.

account by a referee.

the [] the sum of £ [], and directed that the [] do pay the costs of the reference.

It is this day adjudged that the [] recover against the said [] £ [], and costs to be taxed.

The above costs have been taxed and allowed at £ [], as appears by a taxing officer's certificate, dated the [] day of [], 18 (*q*).

LXXXVI.

Notice of motion for adoption and enforcement of report.

[*Commence the notice of motion as in Form XIII.*]—on the part of the plaintiff [*or* "defendant"], that the report, dated [] day of [] of X. Y., Esq., the official referee [*or* "special referee"] in this action [*or* "matter"], may be adopted [*if it is desired that part only of the report be adopted, continue,* "so far as the same reports that the sum of £ [] is due from the defendant to the plaintiff," *or as the case may be*], and that the defendant may be ordered to pay to the plaintiff the sum of £ [], mentioned in the said report, together with the plaintiff's costs of this action to be taxed.

LXXXVII.

In the High Court of Justice.

[] Division.

In the matter of an arbitration between A. B. and C. D.

Notice of motion to set aside award.

Take notice that the court will be moved on Tuesday the [] day of December, 1891, at 10.30 o'clock in the forenoon, or so soon after as counsel can be heard by [] on behalf of A. B., that the award made between the parties by X. Y. may be set aside on the following grounds:—1st [*here state the grounds, e.g.* (1) that the arbitrator misconducted himself in that no proper judicial investigation of the matters in dispute was held by him in the presence of the parties; (2) that no evidence was taken by the arbitrator, nor any opportunity given to the applicant of calling witnesses or cross examining the said C. D. or his witnesses, although the applicant was anxious to do so].

And take notice that the said A. B. will in support of such motion read the following affidavits filed in this matter, namely, the affidavit of W. K. sworn on the [] day of [], and filed on the same day, the affidavit of C. F. sworn on the [] day of December, and filed on the [] day of December, copies of which affidavits are served herewith.

Dated this [] day of December, 1891.

Solicitors to A. B.

To the above C. D.

(*q*) Rules of the Supreme Court, Appendix F. 9.

LXXXVIII.

In the High Court of Justice.
Queen's Bench Division.

Thursday, the [] day of [], A. D. [].

In the matter of the arbitration between A. B. and C. D.

Order setting aside an award.

Upon reading the affidavit of L. M. and the affidavit of N. O. filed in this matter [*the affidavits in answer, if any*], and upon hearing Mr. [], of counsel for "the said C. D.," and Mr. [], of counsel for "the said A. B.":—It is ordered that the award made between the parties be set aside (*r*), and the costs of this application be

By the Court.

LXXXIX.

In the High Court of Justice. [*Year, letter, and number of cause, if any.*]

[*If there be a cause, say,* "Between A. B., Plaintiff, and C. D., Defendant." *If the reference be not in a cause, say,* "In the matter of the arbitration between A. B. and C. D."]

[], the [] day of [], A. D. [].

Order remitting award to arbitrator.

[*Commence as in Form LXXXVIII.*]—It is ordered, that "the matters of the said award" [*or some special matter*] be referred back and remitted to the said arbitrator for his reconsideration and determination [*if the award needs amendment say, instead,* "that the award of the said arbitrator be referred back to the said arbitrator, to reconsider and amend the same if he shall think fit"] (*s*).

XC.

Notice of motion to refer back report to the referee.

[*Commence the notice of motion as in Form LXXXVII.*]—on the part of the plaintiff [*or as the case may be*], that the report dated the [] day of [], 1891, of X. Y., Esquire, the official referee [*or* "Mr. A. B., the special referee"] in this action [*or* "matter"], may be set aside [*if it be wished to set aside part only of the report, specify what part*], and that the question by the order made in this action [*or* "matter"], and dated the [] day of [], referred to the official referee in rotation [*or as in the order of reference*] to inquire and report [*or* "directed to be tried before the official referee in rotation," *or* "by Mr. A. B., the special referee"], may be remitted to the said X. Y. [*or* "A. B."] for reconsideration.

(*r*) See P. III. ch. 9, s. 5, p. 685, as to setting aside an award.

(*s*) See P. II. ch. 10, p. 479, as to referring the award back.

XCI.

In the High Court of Justice. [], 18 . No. .
Queen's Bench Division.

Writ issued [] day of [].

Between A. B., Plaintiff,
and
C. D., Defendant.

Statement of Claim.

Statement of claim in an action on an award.

1. By an order bearing date the [] day of [], it was by consent of the now plaintiff and the now defendant ordered by the Honourable Mr. Justice ———, one of the judges of Her Majesty's High Court of Justice, that a cause then pending in the said court between the now plaintiff as plaintiff, and the now defendant as defendant, and all matters in difference between them should be referred to the award, arbitrament, final end, and determination of X. Y. of [], so as that he should make and publish his award in writing of and concerning the said matters referred, ready to be delivered to the said parties, or such of them as should require the same, on or before the [] day of [], or on or before such further day as he the said X. Y. should appoint, and signify in writing under his hand, to be endorsed on the said order at any time, and it was thereby further ordered, with the like consent, that the costs of the said cause should abide the event, and that the costs of the reference and of the award should be in the discretion of the said arbitrator.

2. The said X. Y. having taken upon himself the burthen of the said reference did, in the manner above mentioned, duly enlarge the time for the making and publishing his award until the [] day of [].

3. The said X. Y. on the [] day of [], duly made and published his award in writing of and concerning the said matters so referred to him, which said award, so far as is material, was as follows:—

"I, the said X. Y. award, adjudge and direct that the defendant do pay to the plaintiff the sum of £ [], in full satisfaction and discharge of all claims and demands made by the plaintiff against the defendant in respect of the matters referred to me. And I further award and direct that the defendant do pay to the plaintiff his costs of this reference, and the costs of this my award, and that the defendant do bear his own costs of the same, and I do further find all the issues in the said cause in favour of the plaintiff, and do find and award that the defendant has no just claim against the plaintiff, and that the plaintiff does owe nothing to the defendant."

4. The costs of the plaintiff of the said cause, and of the said reference, and of the said award, were afterwards taxed and amounted to £ [].

5. The plaintiff has applied to the defendant for payment of the said sums of £ [] (*sum awarded*) and £ [] (*amount of taxed costs*), but the defendant has not paid the same, or any part thereof, and the same are still due and payable from the defendant to the plaintiff.

The plaintiff claims £ [].

Place of trial [].

Signed [] Counsel for the Plaintiff.

Delivered the [] day of [] 189 .

CONTENTS OF THE APPENDIX OF STATUTES

RELATING TO ARBITRATION.

ARBITRATION. PAGE

Arbitration Act, 1889 (52 & 53 Vict. c. 49) 795

Rules of the Supreme Court—

Order XXXVI. rr. 7 a, 45, 46, 47, 47 a, 47 b, 48, 49, 50, 51, 52, 52 a, 53, 54, 55, 55 b, 55 c 799

XL. rr. 2, 6, 6 a, 7 801

XLII. r. 31 a 801

LII. rr. 2, 4 801

LIV. r. 12 a 801

LIX. r. 3 801

LXI. r. 15 a 802

LXIII. r. 16 802

LXIV. rr. 14, 14 a 802

Order as to Supreme Court Fees (1884), rr. 88—91 802

(1887) 802

9 & 10 Will. III. c. 15, ss. 1, 2 (Arbitration) 803

3 & 4 Will. IV. c. 42, ss. 39—41 (Amendment of the law) 804

17 & 18 Vict. c. 125 (Common Law Procedure Act), ss. 3—17 805

36 & 37 Vict. c. 66 (Judicature Act, 1873), ss. 45, 56—59, 83 808

47 & 48 Vict. c. 61 (Judicature Act, 1884), ss. 8—11 809

RAILWAYS.

1 & 2 Vict. c. 98, ss. 16—18 (Conveyance of Mails) 809

8 & 9 Vict. c. 20, ss. 126—137 (Railways Clauses) 810

22 & 23 Vict. c. 59, ss. 1—29 (Arbitration) 812

26 & 27 Vict. c. 92 (Railways Clauses Act, 1863), s. 44 815

36 & 37 Vict. c. 48, ss. 1, 8, 9, 19 (Railway and Canal Traffic) 815

37 & 38 Vict. c. 40, ss. 3, 4 (Board of Trade Arbitration) 816

LANDS CLAUSES CONSOLIDATION ACTS.

8 & 9 Vict. c. 18, ss. 23, 37, 63—68, 124, 125, 130 817

32 & 33 Vict. c. 18, s. 1 821

JOINT STOCK COMPANIES.

8 & 9 Vict. c. 16, ss. 128—134 821

QUARTER SESSIONS.

12 & 13 Vict. c. 45, ss. 12—15 822

EXPLOSIVES. PAGE
38 & 39 Vict. c. 17, s. 25, and Sched. II. 824

PUBLIC HEALTH ACT, 1875.
38 & 39 Vict. c. 55, ss. 179, 180 825

BENEFIT BUILDING SOCIETIES ACT, 1884.
47 & 48 Vict. c. 41, s. 2 827

AGRICULTURAL HOLDINGS ACT, 1883.
46 & 47 Vict. c. 61, ss. 8—24, 34, 54 827

ALLOTMENTS AND COTTAGE GARDENS COMPENSATION FOR CROPS ACT, 1887.
50 & 51 Vict. c. 26 830

ALLOTMENTS ACT, 1887.
50 & 51 Vict. c. 48 832

HOUSING OF THE WORKING CLASSES ACT, 1890.
53 & 54 Vict. c. 70, ss. 20, 21, 38, Pt. II. s. 41, and Sched. 2..... 833

COAL MINES REGULATION ACT, 1887.
50 & 51 Vict. c. 58, s. 47 839

COUNTY COURTS ACT, 1888.
51 & 52 Vict. c. 43, ss. 14, 104 840
County Court Order XX. 1889 841

APPENDIX OF STATUTES

RELATING TO ARBITRATION.

ARBITRATION.

52 & 53 Vict. c. 49.

An Act for amending and consolidating the Enactments relating to Arbitration. [26th August, 1889.

52 & 53 Vict. c. 49.

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

References by Consent out of Court.

Submission to be irrevocable, and to have effect as an order of court.

S. 1. A submission, unless a contrary intention is expressed therein, shall be irrevocable, except by leave of the court or a judge, and shall have the same effect in all respects as if it had been made an order of court.

Provisions implied in submissions.

S. 2. A submission, unless a contrary intention is expressed therein, shall be deemed to include the provisions set forth in the First Schedule to this Act, so far as they are applicable to the reference under the submission.

Reference to official referee.

S. 3. Where a submission provides that the reference shall be to an official referee, any official referee to whom application is made shall, subject to any order of the court or a judge as to transfer or otherwise, hear and determine the matters agreed to be referred.

Power to stay proceedings where there is a submission.

S. 4. If any party to a submission, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay the proceedings, and that court or a judge thereof if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.

Power for the court in certain cases to appoint an arbitrator, umpire, or third arbitrator.

S. 5. In any of the following cases:—

(*a.*) Where a submission provides that the reference shall be to a single arbitrator, and all the parties do not after differences have arisen concur in the appointment of an arbitrator:

(*b.*) If an appointed arbitrator refuses to act, or is incapable of acting, or dies, and the submission does not show that it was intended that the vacancy should not be supplied, and the parties do not supply the vacancy:

(*c.*) Where the parties or two arbitrators are at liberty to appoint an umpire or third arbitrator and do not appoint him:

(*d.*) Where an appointed umpire or third arbitrator refuses to act, or is incapable of acting, or dies, and the submission does not show that it

was intended that the vacancy should not be supplied, and the parties or arbitrators do not supply the vacancy:

any party may serve the other parties or the arbitrators, as the case may be, with a written notice to appoint an arbitrator, umpire, or third arbitrator.

If the appointment is not made within seven clear days after the service of the notice, the court or a judge may, on application by the party who gave the notice, appoint an arbitrator, umpire, or third arbitrator, who shall have the like powers to act in the reference and make an award as if he had been appointed by consent of all parties.

Power for parties in certain cases to supply vacancy.

6. Where a submission provides that the reference shall be to two arbitrators, one to be appointed by each party, then, unless the submission expresses a contrary intention—

(*a.*) If either of the appointed arbitrators refuses to act, or is incapable of acting, or dies, the party who appointed him may appoint a new arbitrator in his place;

(*b.*) If, on such a reference, one party fails to appoint an arbitrator, either originally or by way of substitution as aforesaid, for seven clear days after the other party, having appointed his arbitrator, has served the party making default with notice to make the appointment, the party who has appointed an arbitrator may appoint that arbitrator to act as sole arbitrator in the reference, and his award shall be binding on both parties as if he had been appointed by consent.

Provided that the court or a judge may set aside any appointment made in pursuance of this section.

Powers of arbitrator.

S. 7. The arbitrators or umpire acting under a submission shall, unless the submission expresses a contrary intention, have power—

(*a.*) to administer oaths to or take the affirmations of the parties and witnesses appearing; and

(*b.*) to state an award as to the whole or part thereof in the form of a special case for the opinion of the court; and

(*c.*) to correct in an award any clerical mistake or error arising from any accidental slip or omission.

Witnesses may be summoned by subpœna.

S. 8. Any party to a submission may sue out a writ of subpœna ad testificandum, or a writ of subpœna duces tecum, but no person shall be compelled under any such writ to produce any document which he could not be compelled to produce on the trial of an action.

Power to enlarge time for making award.

S. 9. The time for making an award may from time to time be enlarged by order of the court or a judge, whether the time for making the award has expired or not.

Power to remit award.

S. 10.—(1.) In all cases of reference to arbitration the court or a judge may from time to time remit the matters referred, or any of them, to the reconsideration of the arbitrators or umpire.

(2.) Where an award is remitted, the arbitrators or umpire shall, unless the order otherwise directs, make their award within three months after the date of the order.

Power to set aside award.

S. 11.—(1.) Where an arbitrator or umpire has misconducted himself, the court may remove him.

(2.) Where an arbitrator or umpire has misconducted himself, or an arbitration or award has been improperly procured, the court may set the award aside.

Enforcing award.

S. 12. An award on a submission may, by leave of the court or a judge, be enforced in the same manner as a judgment or order to the same effect.

References under Order of Court.

Reference for report.

S. 13.—(1.) Subject to rules of court, and to any right to have particular cases tried by a jury, the court or a judge may refer any question arising in any cause or matter (other than a criminal proceeding by the Crown) for inquiry or report to any official or special referee.

(2.) The report of an official or special referee may be adopted wholly or partially by the court or a judge, and if so adopted may be enforced as a judgment or order to the same effect.

Power to refer in certain cases.

S. 14. In any cause or matter (other than a criminal proceeding by the Crown),—

(*a.*) If all the parties interested who are not under disability consent: or

(*b.*) If the cause or matter requires any prolonged examination of docu-

ments or any scientific or local investigation which cannot in the opinion of the court or a judge conveniently be made before a jury or conducted by the court through its other ordinary officers: or

(*c.*) If the question in dispute consists wholly or in part of matters of account;

the court or a judge may at any time order the whole cause or matter, or any question or issue of fact arising therein, to be tried before a special referee or arbitrator respectively agreed on by the parties, or before an official referee or officer of the court.

Powers and remuneration of referees and arbitrators.

S. 15.—(1.) In all cases of reference to an official or special referee or arbitrator under an order of the court or a judge in any cause or matter, the official or special referee or arbitrator shall be deemed to be an officer of the court, and shall have such authority, and shall conduct the reference in such manner, as may be prescribed by rules of court, and subject thereto as the court or a judge may direct.

(2.) The report or award of any official or special referee or arbitrator on any such reference shall, unless set aside by the court or a judge, be equivalent to the verdict of a jury.

(3.) The remuneration to be paid to any special referee or arbitrator to whom any matter is referred under order of the court or a judge shall be determined by the court or a judge.

Court to have powers as in references by consent.

S. 16. The court or a judge shall, as to references under order of the court or a judge, have all the powers which are by this Act conferred on the court or a judge as to references by consent out of court.

Court of Appeal to have powers of court.

S. 17. Her Majesty's Court of Appeal shall have all the powers conferred by this Act on the Court or a judge thereof under the provisions relating to references under order of the court.

General.

Power to compel attendance of witness in any part of the United Kingdom, and to order habeas corpus to issue.

S. 18.—(1.) The court or a judge may order that a writ of subpœna ad testificandum or of subpœna duces tecum shall issue to compel the attendance before an official or special referee, or before any arbitrator or umpire, of a witness wherever he may be within the United Kingdom.

(2.) The court or a judge may also order that a writ of habeas corpus ad testificandum shall issue to bring up a prisoner for examination before an official or special referee, or before any arbitrator or umpire.

Statement of case pending arbitration.

S. 19. Any referee, arbitrator, or umpire may at any stage of the proceedings under a reference, and shall, if so directed by the court or a judge, state in the form of a special case for the opinion of the court any question of law arising in the course of the reference.

Costs.

S. 20. Any order made under this Act may be made on such terms as to costs, or otherwise, as the authority making the order thinks just.

Exercise of powers by masters and other officers.

S. 21. Provision may from time to time be made by rules of court for conferring on any master, or other officer of the Supreme Court, all or any of the jurisdiction conferred by this Act on the court or a judge.

Penalty for perjury.

S. 22. Any person who wilfully and corruptly gives false evidence before any referee, arbitrator, or umpire shall be guilty of perjury, as if the evidence had been given in open court, and may be dealt with, prosecuted, and punished accordingly.

Crown to be bound.

S. 23. This Act shall, except as in this Act expressly mentioned, apply to any arbitration to which her Majesty the Queen, either in right of the Crown, or of the Duchy of Lancaster or otherwise, or the Duke of Cornwall, is a party, but nothing in this Act shall empower the court or a judge to order any proceedings to which her Majesty or the Duke of Cornwall is a party, or any question or issue in any such proceedings, to be tried before any referee, arbitrator, or officer without the consent of her Majesty or the Duke of Cornwall, as the case may be, or shall affect the law as to costs payable by the Crown.

Application of Act to references under statutory powers.

S. 24. This Act shall apply to every arbitration under any Act passed before or after the commencement of this Act as if the arbitration were pursuant to a submission, except in so far as this Act is inconsistent with the Act regulating the arbitration or with any rules or procedure authorised or recognised by that Act.

Saving for pending arbitrations.

S. 25. This Act shall not affect any arbitration pending at the commencement of this Act, but shall apply to any arbitration commenced after the

52 & 53 Vict. c. 49.

commencement of this Act under any agreement or order made before the commencement of this Act.

Repeal.

S. 26.—(1.) The enactments described in the Second Schedule to this Act are hereby repealed to the extent therein mentioned, but this repeal shall not affect anything done or suffered, or any right acquired or duty imposed or liability incurred, before the commencement of this Act, or the institution or prosecution to its termination of any legal proceeding or other remedy for ascertaining or enforcing any such liability.

(2.) Any enactment or instrument referring to any enactment repealed by this Act shall be construed as referring to this Act.

Definitions.

S. 27. In this Act, unless the contrary intention appears,—

"Submission" means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not.

"Court" means her Majesty's High Court of Justice.

"Judge" means a judge of her Majesty's High Court of Justice.

"Rules of court" means the rules of the Supreme Court made by the proper authority under the Judicature Acts.

Extent.

S. 28. This Act shall not extend to Scotland or Ireland.

Commencement.

S. 29. This Act shall commence and come into operation on the first day of January one thousand eight hundred and ninety.

Short title.

S. 30. This Act may be cited as the Arbitration Act, 1889.

Schedules.

THE FIRST SCHEDULE.

Provisions to be implied in Submissions.

a. If no other mode of reference is provided, the reference shall be to a single arbitrator.

b. If the reference is to two arbitrators, the two arbitrators may appoint an umpire at any time within the period during which they have power to make an award.

c. The arbitrators shall make their award in writing within three months after entering on the reference, or after having been called on to act by notice in writing from any party to the submission, or on or before any later day to which the arbitrators, by any writing signed by them, may from time to time enlarge the time for making the award.

d. If the arbitrators have allowed their time or extended time to expire without making an award, or have delivered to any party to the submission, or to the umpire a notice in writing, stating that they cannot agree, the umpire may forthwith enter on the reference in lieu of the arbitrators.

e. The umpire shall make his award within one month after the original or extended time appointed for making the award of the arbitrators has expired, or on or before any later day to which the umpire by any writing signed by him may from time to time enlarge the time for making his award.

f. The parties to the reference, and all persons claiming through them respectively, shall, subject to any legal objection, submit to be examined by the arbitrators or umpire, on oath or affirmation, in relation to the matters in dispute, and shall, subject as aforesaid, produce before the arbitrators or umpire, all books, deeds, papers, accounts, writings, and documents within their possession or power respectively which may be required or called for, and do all other things which during the proceedings on the reference the arbitrators or umpire may require.

g. The witnesses on the reference shall, if the arbitrators or umpire thinks fit, be examined on oath or affirmation.

h. The award to be made by the arbitrators or umpire shall be final and binding on the parties and the persons claiming under them respectively.

i. The costs of the reference and award shall be in the discretion of the arbitrators or umpire, who may direct to and by whom and in what manner those costs or any part thereof shall be paid, and may tax or settle the amount of costs to be so paid or any part thereof, and may award costs to be paid as between solicitor and client.

THE SECOND SCHEDULE.

ENACTMENTS REPEALED.

Session and Chapter.	Title or Short Title.	Extent of Repeal.
9 Will. 3, c. 15.	An Act for determining differences by arbitration.	The whole Act.
3 & 4 Will. 4, c. 42.	An Act for the further amendment of the law and the better advancement of justice.	Sections thirty-nine to forty-one, both inclusive.
17 & 18 Vict. c. 125.	The Common Law Procedure Act, 1854.	Sections three to seventeen, both inclusive.
36 & 37 Vict. c. 66.	The Supreme Court of Judicature Act, 1873.	Section fifty-six, from "Subject to any Rules of Court" down to "as a judgment by the Court," both inclusive, and the words "special referees or." Sections fifty-seven to fifty-nine, both inclusive.
47 & 48 Vict. c. 61.	The Supreme Court of Judicature Act, 1884.	Sections nine to eleven, both inclusive.

THE RULES OF THE SUPREME COURT, 1883.

ORDER XXXVI.

Modes of trial.

RULE 7.—(*a*). In every cause or matter, unless under the provisions of Rule 6 of this Order a trial with a jury is ordered, or under Rule 2 of this Order, either party has signified a desire to have a trial with a jury, the mode of trial shall be by a judge without a jury, provided that in any such case the court or a judge may at any time order any cause, matter, or issue to be tried by a judge with a jury, or by a judge sitting with assessors, or by an official referee or special referee with or without assessors.

By Rules of the Supreme Court of December, 1888, r. 1, Order XXXVI., Rules 45, 46, and 47 of the Rules of the Supreme Court, 1883, are hereby annulled, and the following Rules 1 to 5 shall stand in lieu thereof.

Distribution of business among official referees.

RULE 45.—1. When an order is made referring any business to the official referees appointed under the principal Act, the order may refer such business to any one in particular of the referees: but if no particular referee is named in the order the business shall be distributed among the official referees by the clerk to the senior official referee, in rotation or in such other manner as the Lord Chancellor may from time to time direct.

RULE 46.—2. When an order shall have been made referring any business to the official referees, not naming any one of them in particular, the order, or a duplicate of it, shall be produced to the clerk in the last preceding Rule mentioned, who shall indorse on the order the name of the official referee to whom that business is to be referred, in accordance with the last preceding Rule, and the order so indorsed shall be sufficient authority for the official referee to proceed with the business so referred.

RULE 47.—3. When an order shall have been made referring any business to any one in particular of the official referees, the clerk, in making the distribution of the business as by these Rules directed, shall have regard to such reference.

R. S. C.

RULE 47a.—4. The senior official referee shall make a quarterly return to the Lord Chancellor of the state of the business pending before each referee, the first return to be made on the 11th day of January, 1889.

RULE 47b.—5. The Lord Chancellor and the Lord Chief Justice of England, or either of them, shall have power to order the transfer of any causes or matters from any one or more of the official referees to any other or others of them whenever in his opinion it shall be expedient so to do, having regard to the state of the business pending before the referees.

Sittings of referee.

RULE 48. Where any cause or matter, or any question in any cause or matter is referred to a referee, he may, subject to the order of the court or a judge, hold the trial at or adjourn it to any place which he may deem most convenient, and have any inspection or view, either by himself or with his assessors (if any), which he may deem expedient for the better disposal of the controversy before him. He shall, unless otherwise directed by the court or a judge, proceed with the trial de die in diem, in a similar manner as in actions tried with a jury (*a*).

Inspection or view.

Evidence at trial before referee.

RULE 49. Subject to any order to be made by the court or judge ordering the same, evidence shall be taken at any trial before a referee, and the attendance of witnesses may be enforced by subpœna, and every such trial shall be conducted in the same manner, as nearly as circumstances will admit, as trials are conducted before a judge.

Authority of referee.

RULE 50. Subject to any such order as last aforesaid, the referee shall have the same authority with respect to discovery and production of documents, and in the conduct of any reference or trial, and the same power to direct that judgment be entered for any or either party, as a judge of the high court.

Referee not to commit or attach.

RULE 51. Nothing in these rules contained shall authorize any referee to commit any person to prison or to enforce any order by attachment or otherwise.

Referee may submit question to the court.

RULE 52. The referee may, before the conclusion of any trial before him, or by his report under the reference made to him, submit any question arising therein for the decision of the court, or state any facts specially, with power to the court to draw inferences therefrom, and in any such case the order to be made on such submission or statement shall be entered as the court may direct; and the court shall have power to require any explanation or reasons from the referee, and to remit the cause or matter, or any part thereof, for re-trial or further consideration to the same or any other referee; or the court may decide the question referred to any referee on the evidence taken before him either with or without additional evidence as the court may direct.

Court may remit case to referee, or decide it.

Power as to questions or issues of fact.

RULE 52a (Dec. 1889). Rules 49 to 52 of Order XXXVI. shall apply where any cause or matter or any question or issue of fact is referred to an official referee.

Notice of referee's report.

RULE 53. Whenever a report shall be made by a referee, he shall on the same day cause notice thereof to be given to all the parties to the trial or the reference before him by prepaid post letter directed to the address for service of each party who shall in due course of post be deemed to have notice of such report.

Adoption or variation of report under sect. 13, where further consideration of cause adjourned.

RULE 54 (as amended by Rule 55 a, Dec. 1889). Where under section 13 of the Arbitration Act, 1889, the report of the referee has been made in a cause or matter, the further consideration of which has been adjourned, it shall be lawful for any party, on the hearing of such further consideration, without notice of motion or summons, to apply to the court or judge to adopt the report, or without leave of the court or a judge to give not less than four days' notice of motion, to come on with the further consideration to vary the report, or to remit the cause or matter or any part thereof for re-hearing or further consideration to the same or any other referee.

Same where further consideration of cause not adjourned.

RULE 55 (as amended by Order XXXVI. r. 55 a, Dec. 1889). Where, under section 13 of the Arbitration Act, 1889, the report of the referee has been made in a cause or matter, the further consideration of which has not been adjourned, it shall be lawful for any party, by an eight days' notice of motion, to apply to the court to adopt and carry into effect the report of the referee, or to vary the report, or to remit the cause or matter, or any part thereof, for re-hearing or further consideration to the same or any other referee.

(*a*) See post, rule 55 (c).

R. S. C.

Costs in discretion of official referee.

Rule 55b (Dec. 1889). Where the whole of any cause or matter is referred to an official referee under an order of court, he may, subject to any directions in the order, exercise the same discretion as to costs as the court or a judge could have exercised.

Arbitrator under an order to have the powers of an official referee.

Rule 55c (Dec. 1889). The provisions of rules 48 to 55 of Order XXXVI. and of rule 55b shall apply where any cause or matter or any question or issue of fact therein is referred to an officer of the court or to a special referee or arbitrator. Provided that where the arbitrator is appointed otherwise than by an order of the court, the provisions of Rule 48 as to sitting de die in diem shall not apply.

Order XL.

Where no judgment entered at trial.

Rule 2. Where at the trial the judge or referee abstains from directing any judgment to be entered, the plaintiff may set down a motion for judgment. If he does not set down such a motion, and give notice thereof to the other parties within ten days after the trial, any defendant may set down a motion for judgment, and give notice thereof to the other parties.

Setting aside judgment directed to be entered by referee.

Rule 6. Where at a trial by a referee he has directed that any judgment be entered, any party may move to set aside such judgment, and to enter any other judgment, on the ground that upon the finding as entered the judgment so directed is wrong: Provided that in the Queen's Bench Division such motion shall be made to a divisional court.

Rules 2 and 6 applied.

Rule 6a (Dec. 1889). Rules 2 and 6 of Order XL. shall apply to a reference to any officer of the court or special referee or arbitrator under an order of the court.

Setting down motion for judgment where issues have been directed and tried.

Rule 7. Where issues have been ordered to be tried, or issues or questions of fact to be determined in any manner, the plaintiff may set down a motion for judgment as soon as such issues or questions have been determined. If he does not set down such a motion, and give notice thereof to the other parties within ten days after his right so to do has arisen, then after the expiration of such ten days any defendant may set down a motion for judgment, and give notice thereof to the other parties.

Order XLII.

Enforcing award.

Rule 31a (Dec. 1889). An award may, with the leave of the court or a judge, and on such terms as may be just, be enforced at any time, though the time for moving to set it aside has not elapsed.

Order LII.

Application by motion.

Rule 2. No motion or application for a rule nisi or order to show cause shall hereafter be made in any action, or (a) to set aside, remit, or enforce an award, or (b) for attachment, or (c) to answer the matters in an affidavit, or (d) to strike off the rolls, or (e) against a sheriff to pay money levied under an execution.

Restriction on rules nisi, and orders to show cause.

Rule 4. Every notice of motion to set aside, remit, or enforce an award, or for attachment, or to strike off the rolls, shall state in general terms the grounds of the application, and, where any such motion is founded on evidence by affidavit, a copy of any affidavit intended to be used shall be served with the notice of motion.

Order LIV.

Powers of master.

Rule 12a (Dec. 1889). A master of the Supreme Court may exercise all the jurisdiction and powers conferred upon the court or a judge by the Arbitration Act, 1889.

Order LIX.

Appeal from award or certificate of arbitrator or referee made on compulsory reference.

Rule 3. Where a compulsory reference to arbitration has been ordered, any party to such reference may appeal from the award or certificate of the arbitrator or referee upon any question of law; and on the application of any party the court may set aside the award on any ground on which the court might set aside the verdict of a jury. Such appeal shall be to a divisional court, who shall have power to set aside the award or certificate,

R. S. C.

or to remit all or any part of the matter in dispute to the arbitrator or referee, or to make any order with respect to the award or certificate, or all or any of the matters in dispute, that may be just (*a*).

ORDER LXI.

Amendment of Order LXI. Rule 15.

RULE 15a (Dec. 1889). In Rule 15 of Order LXI., the words "and no order to make a submission to arbitration, or an award, an order of the court," and the words "submission to arbitration or award," are repealed.

ORDER LXIII.

Sittings of official referee.

RULE 16. The official referees shall sit at least from 10 a.m. to 4 p.m. on every day during the Michaelmas, Hilary, Easter, and Trinity Sittings of the High Court of Justice, except on Saturdays during such sittings, when they shall sit at least from 10 a.m. to 1 p.m.; but nothing in this rule shall prevent their sitting on any other days.

ORDER LXIV.

Time for application to set aside award.

RULE 14. An application to set aside an award may be made at any time before the last day of the sittings next after such award has been made and published to the parties.

Enlarging time for award.

RULE 14a (Dec. 1889). Where the time for making an award is enlarged, the enlargement shall be deemed to be for one month, unless a different time is specified in the order.

ORDER AS TO SUPREME COURT FEES, 1884.

Proceedings before an Official Referee.

	£	s.	d.
88. On every reference. (But see Order of December, 1887, infra.)	5	0	0
89. And for every hour or part of an hour he is occupied beyond two full days	0	10	0
90. On every sitting elsewhere than in London or Middlesex, a further fee for every night the official referee shall be absent from London	1	11	6
91. And for his clerk	0	15	0

The fees Nos. 82 to 91, inclusive, shall become due and payable by the party conducting the proceedings on the report of the result of the reference, or otherwise as hereinafter provided where no such report is made.

The above-mentioned fees Nos. 69 to 80, and 82 to 91, inclusive, shall be due and payable, when no certificate, report, or order is made, by the party conducting the proceedings on the completion of such proceedings, or if not completed, a due proportion shall be payable on so much of the proceedings as shall have taken place, the amount to be fixed by the officer.

In these cases the fees shall be paid by stamps impressed upon or affixed to a memorandum stating on what account such fees are paid.

A deposit of stamps on account of the fees applicable to any proceeding may be required before such proceeding is commenced, or at any time during the course thereof, and in Admiralty actions, when Order LVI. r. 4, applies, such stamps shall be affixed as therein provided, and in all other cases a memorandum of the amount deposited shall be delivered to the party making the deposit.

ORDER, DECEMBER, 1887.

In proceedings before an official referee in London or Middlesex, the fee on every reference, in lieu of the fee of £5 prescribed by the Order as to Supreme Court Fees, 1884, shall be for every hour or part of an hour the referee is occupied, including examination of witnesses, if any, 10*s*.

(See ante, No. 88.)

(*a*) See Judicature Acts, 1884, s. 8, making decision of Divisional Court final unless leave to appeal is given.

9 & 10 Will. III. c. 15.

[Repealed by the Arbitration Act, 1889.]

An Act for determining differences by Arbitration.

9 & 10 Will. III. c. 15.

[S. 1. Whereas it hath been found by experience, that references made by rule of court have contributed much to the ease of the subject, in the determining of controversies, because the parties become thereby obliged to submit to the award of the arbitrators, under the penalty of imprisonment for their contempt, in case they refuse submission: now for promoting trade, and rendering the award of arbitrators the more effectual in all cases for the final determination of controversies referred to them by merchants and traders, or others, concerning matters of account or trade, or other matters, be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in Parliament assembled, and by authority of the same: that from and after the 11th day of May, which shall be in the year of our Lord, 1698, it shall and may be lawful for all merchants and traders, and others desiring to end any controversy, suit, or quarrel, controversies, suits, or quarrels, for which there is no other remedy but by personal action, or suit in equity, by arbitration, to agree that their submission of their suit to the award or umpirage of any person or persons should be made a rule of any of his Majesty's courts of record, which the parties shall choose; and to insert such their agreement in their submission, or the condition of the bond or promise, whereby they oblige themselves respectively to submit to the award or umpirage of any person or persons; which agreement being so made and inserted in their submission or promise, or condition of their respective bonds, shall or may, upon producing an affidavit thereof, made by the witnesses thereunto, or any one of them, in the court of which the same is agreed to be made a rule, and reading and filing the said affidavit in court, be entered of record in such court: and a rule shall thereupon be made by the said court, that the parties shall submit to, and finally be concluded by, the arbitration or umpirage which shall be made concerning them by the arbitrators or umpire pursuant to such submission: and in case of disobedience to such arbitration or umpirage, the party neglecting or refusing to perform and execute the same, or any part thereof, shall be subject to all the penalties of contemning a rule of court, when he is a suitor or defendant in such court: and the court on motion shall issue process accordingly; which process shall not be stopped or delayed in its execution by any order, rule, command, or process of any other court, either of law or equity; unless it shall be made appear on oath to such court, that the arbitrators or umpire misbehaved themselves, and that such award, arbitration, or umpirage, was procured by corruption, or other undue means.

Merchants and traders, &c., desiring to end controversies by arbitration may agree their submission of the suit to the award of any person.

Agreement so made to be inserted in their submission, &c.

Parties to be finally concluded by such arbitration.

In case of disobedience party neglecting subject to penalty, &c., unless arbitrators misbehaved themselves.

[S. 2. And be it further enacted, by the authority aforesaid, that any arbitration or umpirage procured by corruption, or undue means, shall be judged and esteemed void, and of none effect, and accordingly be set aside by any court of law or equity: so as complaint of such corruption or undue practice be made in the court, where the rule is made for submission to such arbitration or umpirage, before the last day of the next term after such arbitration or umpirage made and published to the parties; anything in this Act contained to the contrary notwithstanding.]

Corrupt arbitration void, and may be set aside, &c.

AMENDMENT OF THE LAW.

[Repealed by the Arbitration Act, 1889.]

3 & 4 WILL. IV. c. 42.

3 & 4 WILL. IV. c. 42.

An Act for the further amendment of the Law, and the better advancement of Justice (*a*). [14*th August*, 1833.]

Submission to arbitration by rule of court, &c., not to be revocable without leave of the court.

[S. 39. And whereas it is expedient to render references to arbitration more effectual; be it further enacted, That the power and authority of any arbitrator or umpire appointed by or in pursuance of any rule of court, or judge's order, or order of Nisi Prius, in any action now brought, or which shall be hereafter brought, or by or in pursuance of any submission to reference containing an agreement that such submission shall be made a rule of any of his Majesty's courts of record, shall not be revocable by any party to such reference without the leave of the court by which such rule or order shall be made, or which shall be mentioned in such submission, or by leave of a judge; and the arbitrator or umpire shall and may and is hereby required to proceed with the reference notwithstanding any such revocation, and to make such award, although the person making such revocation shall not afterwards attend the reference; and that the court, or any judge thereof, may from time to time enlarge the time for any such arbitrator making his award.

Power to compel the attendance of witnesses.

[S. 40. And be it further enacted, That when any reference shall have been made by any such rule or order as aforesaid, or by any submission containing such agreement as aforesaid, it shall be lawful for the court by which such rule or order shall be made, or which shall be mentioned in such agreement, or for any judge, by rule or order to be made for that purpose, to command the attendance and examination of any person to be named, or the production of any documents to be mentioned in such rule or order; and the disobedience to any such rule or order shall be deemed a contempt of court, if, in addition to the service of such rule or order, an appointment of the time and place of attendance in obedience thereto, signed by one at least of the arbitrators, or by the umpire, before whom the attendance is required, shall also be served either together with or after the service of such rule or order: provided always, that every person whose attendance shall be so required shall be entitled to the like conduct money, and payment of expenses and for loss of time, as for and upon attendance at any trial: provided also, that the application made to such court or judge for such rule or order shall set forth the county where such witness is residing at the time, or satisfy such court or judge that such person cannot be found: provided also, that no person shall be compelled to produce under any such rule or order any writing or other document that he would not be compelled to produce at a trial, or to attend at more than two consecutive days to be named in such order.

Power for the arbitrators, under a rule of court, to administer an oath.

[S. 41. And be it further enacted, That when in any rule or order of reference, or in any submission to arbitration containing an agreement that the submission shall be made a rule of court, it shall be ordered or agreed that the witnesses upon such reference shall be examined upon oath, it shall be lawful for the arbitrators or umpire, or any one arbitrator, and he or they are hereby authorised and required, to administer an oath to such witnesses, or to take their affirmation in cases where affirmation is allowed by law instead of oath; and if upon such oath or affirmation any person making the same shall wilfully and corruptly give any false evidence, every person so offending shall be deemed and taken to be guilty of perjury, and shall be prosecuted and punished accordingly.]

(*a*) The Irish Act (the 3 & 4 Vict. c. 105) has sections 63, 64, and 65, corresponding to sections 39, 40, and 41 of the 3 & 4 Will. IV. c. 42.

COMMON LAW PROCEDURE.

[Repealed by the Arbitration Act, 1889.]

17 & 18 VICT. c. 125.

An Act for the further amendment of the process, practice, and mode of pleading in and enlarging the jurisdiction of the Superior Courts of Common Law at Westminster, and of the Superior Courts of Common Law of the Counties Palatine of Lancaster and Durham.

17 & 18 VICT. c. 125.

[12*th August*, 1854.]

[*The Common Law Procedure Act*, 1854.]

Power to court or judge to direct arbitration before trial.

S. 3. If it be made appear at any time after the issuing of the writ, to the satisfaction of the court or a judge, upon the application of either party, that the matter in dispute consists wholly or in part of matters of mere account which cannot conveniently be tried in the ordinary way, it shall be lawful for such court or judge, upon such application, if they or he think fit, to decide such matter in a summary manner, or to order that such matter, either wholly or in part, be referred to an arbitrator appointed by the parties, or to an officer of the court, or in country causes, to the judge of any county court (*a*), upon such terms as to costs and otherwise as such court or judge shall think reasonable; and the decision or order of such court or judge, or the award or certificate of such referee, shall be enforceable by the same process as the finding of a jury upon the matter referred.

Special case may be stated, and question of fact tried.

[S. 4. If it shall appear to the court or judge that the allowance or disallowance of any particular item in such account depends upon a question of law fit to be decided by the court, or upon a question of fact fit to be decided by a jury, or by a judge, upon the consent of both parties as hereinbefore provided, it shall be lawful for such court or judge to direct a case to be stated, or an issue or issues to be tried; and the decision of the court upon such case, and the finding of the jury or judge upon such issue or issues, shall be taken and acted upon by the arbitrator as conclusive.

Arbitrator may state special case.

[S. 5. It shall be lawful for the arbitrator, upon any compulsory reference under this Act, or upon any reference by consent of parties where the submission is or may be made a rule or order of any of the superior courts of law or equity at Westminster, if he shall think fit, and if it is not provided to the contrary, to state his award, as to the whole or any part thereof, in the form of a special case for the opinion of the court, and when an action is referred, judgment, if so ordered, may be entered according to the opinion of the court.

Power to judge to direct arbitration at time of trial when issues of fact left to his decision.

[S. 6. If, upon the trial of any issue of fact by a judge under this Act, it shall appear to the judge that the questions arising thereon involve matter of account which cannot conveniently be tried before him, it shall be lawful for him, at his discretion, to order that such matter of account be referred to an arbitrator appointed by the parties, or to an officer of the court, or, in country causes, to a judge of any county court (*a*), upon such terms as to costs, and otherwise, as such judge shall think reasonable; and the award or certificate of such referee shall have the same effect as hereinbefore provided as to the award or certificate of a referee before trial; and it shall be competent for the judge to proceed to try and dispose of any other matters in question not referred, in like manner as if no reference had been made.

Proceedings before and power of such arbitrator.

[S. 7. The proceedings upon any such arbitration as aforesaid shall, except otherwise directed hereby or by the submission or document authorising the reference, be conducted in like manner and subject to the same rules and enactments, as to the power of the arbitrator and of the court, the attendance of witnesses, the production of documents, enforcing or setting aside the award, and otherwise, as upon a reference made by consent under a rule of court or judge's order (*b*).

Power to

[S. 8. In any case where reference shall be made to arbitration as aforesaid,

(*a*) Repealed as to county court judges by the stat. 21 & 22 Vict. c. 74, s. 5.

(*b*) Hogg *v.* Burgess, 3 H. & N. 293, S. C. 27 L. J. Ex. 318.

the court or a judge shall have power at any time, and from time to time, to remit the matters referred, or any or either of them, to the re-consideration and re-determination of the said arbitrator, upon such terms, as to costs and otherwise, as to the said court or judge may seem proper (*a*).

send back to arbitrator.

Application to set aside the award.

[S. 9. All applications to set aside any award made on a compulsory reference under this Act shall and may be made within the first seven days of the term next following the publication of the award to the parties, whether made in vacation or term; and if no such application is made, or if no rule is granted thereon, or if any rule granted thereon is afterwards discharged, such award shall be final between the parties.

Enforcing of awards within period for setting them aside.

[S. 10. Any award made on a compulsory reference under this Act may, by authority of a judge, on such terms as to him may seem reasonable, be enforced at any time after seven days from the time of publication, notwithstanding that the time for moving to set it aside has not elapsed.

If action commenced by one party after all have agreed to arbitration, court or judge may stay proceedings.

[S. 11. Whenever the parties to any deed or instrument in writing to be hereafter made or executed, or any of them, shall agree that any then existing or future differences between them or any of them shall be referred to arbitration, and any one or more of the parties so agreeing, or any person or persons claiming through or under him or them, shall nevertheless commence any action at law or suit in equity against the other party or parties, or any of them, or against any person or persons claiming through or under him or them in respect of the matters so agreed to be referred, or any of them, it shall be lawful for the court in which the action or suit is brought, or a judge thereof, on application by the defendant or defendants, or any of them, after appearance, and before plea or answer, upon being satisfied that no sufficient reason exists why such matters cannot be or ought not to be referred to arbitration according to such agreement as aforesaid, and that the defendant was at the time of the bringing of such action or suit and still is ready and willing to join and concur in all acts necessary and proper for causing such matters so to be decided by arbitration, to make a rule or order staying all proceedings in such action or suit, on such terms as to costs and otherwise as to such court or judge may seem fit: Provided always, that any such rule or order may at any time afterwards be discharged or varied as justice may require.

On failure of parties or arbitrators, judge may appoint single arbitrator or umpire.

[S. 12. If in any case of arbitration the document authorising the reference provide that the reference shall be to a single arbitrator, and all the parties do not, after differences have arisen, concur in the appointment of an arbitrator; or if any appointed arbitrator refuse to act, or become incapable of acting, or die, and the terms of such document do not show that it was intended that such vacancy should not be supplied, and the parties do not concur in appointing a new one; or if, where the parties or two arbitrators are at liberty to appoint an umpire or third arbitrator, such parties or arbitrators do not appoint an umpire or third arbitrator; or if any appointed umpire or third arbitrator refuse to act, or become incapable of acting, or die, and the terms of the document authorising the reference do not show that it was intended such a vacancy should not be supplied, and the parties or arbitrators respectively do not appoint a new one: then in every such instance any party may serve the remaining parties or the arbitrators, as the case may be, with a written notice to appoint an arbitrator, umpire, or third arbitrator respectively; and if within seven clear days after such notice shall have been served no arbitrator, umpire, or third arbitrator be appointed, it shall be lawful for any judge of any of the superior courts of law or equity at Westminster, upon summonses to be taken out by the party having served such notice as aforesaid, to appoint an arbitrator, umpire, or third arbitrator, as the case may be, and such arbitrator, umpire, and third arbitrator respectively shall have the like power to act in the reference and make an award as if he had been appointed by consent of all parties.

When reference is to two arbitrators and one party fail to appoint, other party

[S. 13. When the reference is or is intended to be to two arbitrators, one appointed by each party, it shall be lawful for either party, in the case of the death, refusal to act, or incapacity of any arbitrator appointed by him, to substitute a new arbitrator, unless the document authorising the reference show that it was intended that the vacancy should not be supplied; and if on such a reference one party fail to appoint an arbitrator, either originally

(*a*) Morris *v.* Morris, 6 E. & B. 383, S. C. 25 L. J. Q. B. 261.

or by way of substitution as aforesaid, for seven clear days after the other party shall have appointed an arbitrator, and shall have served the party so failing to appoint with notice in writing to make the appointment, the party who has appointed an arbitrator may appoint such arbitrator to act as sole arbitrator in the reference, and an award made by him shall be binding on both parties, as if the appointment had been by consent; provided, however, that the court or a judge may revoke such appointment on such terms as shall seem just.

may appoint arbitrator to act alone.

[S. 14. When the reference is to two arbitrators, and the terms of the document authorising it do not show that it was intended that there should not be an umpire, or provide otherwise for the appointment of an umpire, the two arbitrators may appoint an umpire at any time within the period during which they have power to make an award, unless they be called upon by notice as aforesaid to make the appointment sooner.

Two arbitrators may appoint umpire.

[S. 15. The arbitrator acting under any such document or compulsory order of reference as aforesaid, or under any order referring the award back, shall make his award under his hand, and (unless such document or order respectively shall contain a different limit of time) within three months after he shall have been appointed, and shall have entered on the reference, or shall have been called upon to act by a notice in writing from any party; but the parties may by consent in writing enlarge the term for making the award; and it shall be lawful for the superior court of which such submission, document, or order is or may be made a rule or order, or for any judge thereof, for good cause to be stated in the rule or order for enlargement, from time to time to enlarge the term for making the award; and if no period be stated for the enlargement in such consent or order for enlargement, it shall be deemed to be an enlargement for one month; and in any case where an umpire shall have been appointed it shall be lawful for him to enter on the reference in lieu of the arbitrators, if the latter shall have allowed their time or their extended time to expire without making an award, or shall have delivered to any party or to the umpire a notice in writing stating that they cannot agree.

Award to be made in three months, unless parties or court enlarge time.

[S. 16. When any award made on any such submission, document, or order of reference as aforesaid directs that possession of any lands or tenements capable of being the subject of an action of ejectment shall be delivered to any party either forthwith or at any future time, or that any such party is entitled to the possession of any such lands or tenements, it shall be lawful for the court of which the document authorising the reference is or is made a rule or order, to order any party to the reference who shall be in possession of any such lands or tenements, or any person in possession of the same claiming under or put in possession by him since the making of the document authorising the reference, to deliver possession of the same to the party entitled thereto, pursuant to the award, and such rule or order to deliver possession shall have the effect of a judgment in ejectment against every such party or person named in it, and execution may issue, and possession shall be delivered by the sheriff as on a judgment in ejectment.

Rule to deliver possession of land pursuant to award to be enforced as a judgment in ejectment.

[S. 17. Every agreement or submission to arbitration by consent, whether by deed or instrument in writing not under seal, may be made a rule of any one of the superior courts of law or equity at Westminster, on the application of any party thereto, unless such agreement or submission contain words purporting that the parties intend that it should not be made a rule of court; and if in any such agreement or submission it is provided that the same shall or may be made a rule of one in particular of such superior courts, it may be made a rule of that court only; and if, when there is no such provision, a case be stated in the award for the opinion of one of the superior courts, and such court be specified in the award, and the document authorising the reference have not, before the publication of the award to the parties, been made a rule of court, such document may be made a rule only of the court specified in the award; and when in any case the document authorising the reference is or has been made a rule or order of any one of such superior courts, no other of such courts shall have any jurisdiction to entertain any motion respecting the arbitration or award.]

Agreement or submission in writing may be made rule of court, unless a contrary intention appear.

THE JUDICATURE ACTS.

[Parts in brackets repealed by Arbitration Act, 1889.]

36 & 37 VICT. c. 66.

36 & 37 VICT. c. 66.

An Act for the constitution of a Supreme Court, and for other purposes. [*5th August*, 1873.]

S. 45, dealing with appeals from inferior courts, provides that they may be heard and determined by divisional courts of the High Court of Justice. "The determination of such appeals respectively by such divisional courts shall be final, unless special leave to appeal from the same to the Court of Appeal shall be given by the divisional court by which any such appeal from an inferior court shall have been heard."

PART. IV.

Trial and Procedure.

References and assessors.

S. 56. [Subject to any rules of court and to such right as may now exist to have particular cases submitted to the verdict of a jury, any question arising in any cause or matter (other than a criminal proceeding by the Crown) before the High Court of Justice, or before the Court of Appeal, may be referred by the court, or by any divisional court or judge before whom such cause or matter may be pending, for inquiry and report to any official or special referee, and the report of any such referee may be adopted wholly or partially by the court, and may (if so adopted) be enforced as a judgment by the court.] The High Court or the Court of Appeal may also, in any such cause or matter as aforesaid in which it may think it expedient so to do, call in the aid of one or more assessors specially qualified, and try and hear such cause or matter wholly or partially with the assistance of such assessors. The remuneration, if any, to be paid to such [special referees or] assessors shall be determined by the court.

Power to direct trials before referees.

[S. 57. In any cause or matter (other than a criminal proceeding by the Crown) before the said High Court in which all parties interested who are under no disability consent thereto, and also without such consent in any such cause or matter requiring any prolonged examination of documents or accounts, or any scientific or local investigation which cannot in the opinion of the court or a judge conveniently be made before a jury, or conducted by the court through its ordinary officers, the court or a judge may, at any time, on such terms as may be thought proper, order any question or issue of fact or any question of account arising thereon to be tried either before an official referee, to be appointed as hereinafter provided, or before a special referee to be agreed on between the parties: and any such special referee so agreed on shall have the same powers and duties and proceed in the same manner as an official referee. All such trials before referees shall be conducted in such manner as may be prescribed by rules of court, and subject thereto in such manner as the court) or judge ordering the same shall direct.]

Powers of referees and effect of their findings.

[S. 58. In all cases of any reference to or trial by referees under this Act, the referees shall be deemed to be officers of the court, and shall have such authority for the purpose of such reference or trial as shall be prescribed by rules of court, or (subject to such rules) by the court or judge ordering such reference or trial; and the report of any referee upon any question of fact on any such trial shall (unless set aside by the court) be equivalent to the verdict of a jury.]

Powers of court with respect to proceedings before referees.

[S. 59. With respect to all such proceedings before referees and their reports, the court or such judge as aforesaid shall have, in addition to any other powers, the same or the like powers as are given to any court whose jurisdiction is hereby transferred to the said High Court with respect to references to arbitration and proceedings before arbitrators and their awards respectively by the Common Law Procedure Act, 1854.]

Official referees to be appointed.

S. 83. There shall be attached to the Supreme Court permanent officers to be called official referees, for the trial of such questions as shall, under the provisions of this Act, be directed to be tried by such referees. The number

and the qualifications of the persons to be so appointed from time to time, and the tenure of their offices, shall be determined by the Lord Chancellor with the concurrence of the Presidents of the Divisions of the High Court of Justice, or a majority of them (of which majority the Lord Chief Justice of England shall be one), and with the sanction of the Treasury. Such official referees shall perform the duties entrusted to them in such places, whether in London or in the country, as may from time to time be directed or authorised by any order of the said High Court, or of the Court of Appeal; and all proper and reasonable travelling expenses incurred by them in the discharge of their duties shall be paid by the Treasury out of the moneys to be provided by Parliament. 36 & 37 Vict. c. 66.

JUDICATURE ACT, 1884.

(Parts in brackets repealed by the Arbitration Act, 1889.)

47 & 48 Vict. c. 61.

S. 8. The provisions of section forty-five of the Supreme Court of Judicature Act, 1873, as to certain appeals therein mentioned shall extend and apply to all appeals brought after the commencement of this Act from any award or certificate of a referee or arbitrator when there has been a compulsory reference to arbitration in any cause or matter in the Queen's Bench Division of the High Court of Justice.

[S. 9. In any cause or matter (other than a criminal proceeding by the Crown) now pending or hereafter commenced before the High Court of Justice or Court of Appeal in which all parties who are under no disability consent thereto, the court or a judge may at any time, on such terms as may be thought proper, order the whole cause or matter to be tried before an official referee who shall have power to direct in what manner the judgment of the court shall be entered, and to exercise the same discretion as to costs as the court or judge could have exercised.

[S. 10. In all cases in which the court or a judge may, under sections three, six, or twelve of the Common Law Procedure Act, 1854, direct any matter to be ascertained by a master or referred to an arbitrator, or to an officer of the court, or appoint an arbitrator, such court or judge may direct such matter to be ascertained by or referred to an official referee, who shall in that case perform all such duties and exercise all such powers as would have been performed or could have been exercised by such master, arbitrator, or officer.

[S. 11. Whenever the parties to any deed or instrument in writing, made or executed after the commencement of this Act, or any of them, shall agree that any existing or future difference between them, or any of them, shall be referred to an official referee, it shall be the duty of any one of the official referees to whom application shall be made for the purpose, subject to any order which may be made by the court or a judge for the transfer of the matter to any other official referee, or otherwise, to hear and determine any difference so agreed to be referred, and every such agreement shall be deemed to be an agreement to refer to arbitration within the meaning of sections eleven and seventeen of the Common Law Procedure Act, 1854.]

RAILWAYS.

1 & 2 Vict. c. 98.

An Act to provide for the conveyance of the Mails by Railways. [14*th August*, 1838.] 1 & 2 Vict. c. 98.

S. 16. And be it enacted, That in all cases in which the Postmaster-General and any company of proprietors of any railway shall not be able to For settling differences

1 & 2 Vict. c. 98.

between Postmaster-General and railway companies in certain cases.

agree on the amount of remuneration or compensation to be paid by the Postmaster-General to such company of proprietors for any services performed or to be performed by them as hereinbefore mentioned, the same shall be referred to the award of two persons, one to be named by the Postmaster-General and the other by such company; and if such two persons cannot agree on the amount of such remuneration or compensation, then to the umpirage of some third person, to be appointed by such two first-named persons, previously to their entering upon the inquiry: and the said award or umpirage, as the case may be, shall be binding and conclusive on the said parties, and their respective successors and assigns.

Railway companies, after contracts have existed for a certain period, may refer them to arbitrators to decide as to their continuance.

S. 17. And be it enacted, That after any contract entered into, or award made under the authority of this Act, shall have continued in operation for a period of three years, it shall be competent for any railway company who may consider themselves aggrieved by the terms of remuneration fixed by such contract or award, by notice under their common seal, to require that it shall be referred to arbitrators to determine whether any and what alteration ought to be made therein; and thereupon such arbitrators or umpire to be appointed as hereinbefore mentioned, shall proceed to inquire into the circumstances, and make their awards therein, as in the case of an original agreement: Provided always, that the services performed by such railway company for the post office shall in nowise be interrupted or impeded thereby.

Nomination of arbitrators to be within a limited time after application for references made.

S. 18. And be it enacted, That in all references to be made under the authority of this Act the Postmaster-General or the railway company, as the case may be, shall nominate his or their arbitrator within fourteen days after notice from the other party, or in default it shall be lawful for the arbitrator appointed by the party giving notice to name the other arbitrator; and such arbitrators shall proceed forthwith in the reference, and make their award therein within twenty-eight days after their appointment, or otherwise the matter shall be left to be determined by the umpire; and if such umpire shall refuse or neglect to proceed and make his award for the space of twenty-eight days after the matter shall have been referred to him, then a new umpire shall be appointed by the two first-named arbitrators, who shall in like manner proceed and make his award within twenty-eight days, or in default be superseded, and so *toties quoties*.

8 & 9 Vict. c. 20.

8 & 9 Vict. c. 20.

An Act for consolidating in one Act certain provisions usually inserted in Acts authorising the making of Railways (*a*). [*8th May*, 1845.]

[*By s.* 4, *the Act may be cited as* "The Railways Clauses Consolidation Act, 1845." *By ss.* 6, 44, *the compensation for land taken or used for the purposes of the railway, or injuriously affected by its construction, and for damages in respect of such land, shall be ascertained and determined in the manner provided in the Lands Clauses Consolidation Act*, 1845, *in respect of lands purchased or taken under its provisions.*]

Arbitration.

And with respect to the settlement of disputes by arbitration, be it enacted as follows:

Appointment of arbitrators when questions are to be determined by arbitration.

S. 126. When any dispute authorised or directed by this or the special Act, or any Act incorporated therewith, to be settled by arbitration, shall have arisen, then, unless both parties shall concur in the appointment of a single arbitrator, each party, on the request of the other party, shall nominate and appoint an arbitrator to whom such dispute shall be referred; and every appointment of an arbitrator shall be made on the part of the company, under the hand of the secretary or any two of the directors of the company, and on the part of any other party, under the hand of such party, or if such party be a corporation aggregate, under the common seal of such corporation, and such appointment shall be delivered to the arbitrators, and shall be deemed a submission to arbitration on the part of the party by whom the same shall be made; and after any such appointment shall have been made neither party

(*a*) The Railways Clauses Consolidation (Scotland) Act, 1845, is the 8 & 9 Vict. c. 33.

shall have power to revoke the same without the consent of the other, nor shall the death of either party operate as a revocation; and if for the space of fourteen days after any such dispute shall have arisen, and after a request in writing, in which shall be stated the matters so required to be referred to arbitration, shall have been served by the one party on the other party to appoint an arbitrator, such last-mentioned party fail to appoint such arbitrator, then upon such failure the party making the request, and having himself appointed an arbitrator, may appoint such arbitrator to act on behalf of both parties; and such arbitrator may proceed to hear and determine the matters which shall be in dispute; and in such case the award or determination of such single arbitrator shall be final.

Vacancy of arbitrator to be supplied.

S. 127. If before the matters so referred shall be determined any arbitrator appointed by either party die, or become incapable to act, the party by whom such arbitrator was appointed may nominate and appoint in writing some other person to act in his place, and if for the space of seven days after notice in writing from the other party for that purpose he fail to do so, the remaining or other arbitrator may proceed *ex parte;* and every arbitrator so to be substituted as aforesaid shall have the same powers and authorities as were vested in the former arbitrator at the time of such his death or incapacity as aforesaid.

Appointment of umpire.

S. 128. Where more than one arbitrator shall have been appointed, such arbitrators shall, before they enter upon the matters referred to them, nominate and appoint by writing under their hands an umpire to decide on any such matters on which they shall differ, or which shall be referred to him under this or the special Act; and if such umpire shall die, or become incapable to act, they shall forthwith after such death or incapacity appoint another umpire in his place; and the decision of every such umpire on the matters so referred to him shall be final.

Board of Trade empowered to appoint an umpire, on neglect of the arbitrators.

S. 129. If in either of the cases aforesaid, the said arbitrators shall refuse, or shall for seven days after request of either party to such arbitration neglect to appoint an umpire, the Board of Trade shall, on the application of either party to such arbitration, appoint an umpire; and the decision of such umpire on the matters on which the arbitrators shall differ, or which shall be referred to him under this or the special Act, shall be final (*a*).

In case of death of single arbitrator the matter to begin de novo.

S. 130. If, where a single arbitrator shall have been appointed, such arbitrator die, or become incapable to act, before he shall have made his award, the matters referred to him shall be determined by arbitration, under the provisions of this or the special Act, in the same manner as if such arbitrator had not been appointed.

If either arbitrator refuse to act the other to proceed ex parte.

S. 131. If, where more than one arbitrator shall have been appointed, either of the arbitrators refuse, or for seven days neglect to act, the other arbitrator may proceed *ex parte*, and the decision of such other arbitrator shall be as effectual as if he had been the single arbitrator appointed by both parties.

If arbitrators fail to make award within 21 days, the matter to go to the umpire.

S. 132. If, where more than one arbitrator shall have been appointed, and where neither of them shall refuse or neglect to act as aforesaid, such arbitrators shall fail to make their award within twenty-one days after the day on which the last of such arbitrators shall have been appointed, or within such extended time, if any, as shall have been appointed for that purpose by both such arbitrators under their hands, the matter referred to them shall be determined by the umpire to be appointed as aforesaid.

Power for arbitrators to call for books, &c.

S. 133. The said arbitrators or their umpire may call for the production of any documents in the possession or power of either party which they or he may think necessary for determining the question in dispute, and may examine the parties or their witnesses on oath, and administer the oaths necessary for that purpose.

Arbitrator and umpire to make declaration.

S. 134. Before any arbitrator or umpire shall enter into the consideration of any matters referred to him, he shall, in the presence of a justice, make and subscribe to the following declaration; that is to say,

"I, A. B., do solemnly and sincerely declare, that I will faithfully and

(*a*) The powers of the Board of Trade as to railways were transferred to the Commissioners of Railways by the stat. 9 & 10 Vict. c. 105, s. 2; but have been re-transferred to the Board of Trade by the stat. 14 & 15 Vict. c. 64.

8 & 9 Vict. c. 20.

honestly, and to the best of my skill and ability, hear and determine the matters referred to me, under the provisions of the Act [*naming the special Act*].

"A. B.

"Made and subscribed in the presence of []."

And such declaration shall be annexed to the award when made; and if any arbitrator or umpire, having made such declaration, shall wilfully act contrary thereto, he shall be guilty of a misdemeanour.

Costs in discretion of arbitrators.

S. 135. Except where by this or the special Act, or any Act incorporated therewith, it shall be otherwise provided, the costs of and attending every such arbitration, to be determined by the arbitrators, shall be in the discretion of the arbitrators.

Submission a rule of court.

S. 136. The submission to any such arbitration may be made a rule of any of the superior courts, on application of either of the parties.

Award not void for error in form.

S. 137. No award made with respect to any question referred to arbitration under the provision of this or the special Act shall be set aside for irregularity or error in matter of form.

22 & 23 Vict. c. 59.

22 & 23 Vict. c. 59.

An Act to enable Railway Companies to settle their differences with other Companies by Arbitration. [13*th August*, 1859.]

For the better providing for the settlement by arbitration of matters in which railway companies in the United Kingdom are mutually interested, be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows; that is to say,

Short title.

S. 1. This Act may for all purposes be cited as "Railway Companies Arbitration Act, 1859;" and the expression "Railway Companies" in this Act extends to and includes all persons being the owners or lessees of, and all contractors working any railway upon which steam power is used.

"Railway Companies."

Power for railway companies to refer matters to arbitration.

S. 2. Any two or more railway companies, whether already or hereafter incorporated (in this Act called "the Companies"), from time to time, by writing under their respective common seals, may agree to refer and may refer to arbitration, in accordance with this Act, any then existing or future differences, questions, or other matters whatsoever in which they then are or thereafter shall be mutually interested, and which they might lawfully settle or dispose of by agreement between themselves, and may delegate to the person or persons to whom the reference is made any power to determine all or any of the terms of any contract to be made between the companies which the directors of the companies respectively might lawfully delegate to any committees of themselves respectively (*a*).

Power to alter or revoke agreements for reference.

S. 3. The companies jointly, but not otherwise, from time to time, by writing under their respective common seals, may add to, alter, or revoke any agreement for reference in accordance with this Act theretofore entered into between the companies, or any of the terms, conditions, or stipulations thereof.

Agreements to be carried into effect.

S. 4. Every reference or agreement in accordance with this Act, except so far as it is from time to time revoked or modified in accordance with this Act, shall bind the companies, and may and shall be carried into full effect (*b*).

Reference to a single arbitrator.

S. 5. Where the companies agree, the reference shall be made to a single arbitrator.

(*a*) See Great Western Ry. Co. *v.* Waterford Ry. Co., L. R. 17 Ch. D. 493.

(*b*) London, Chatham and Dover Ry. Co. *v.* South Eastern Ry. Co., 40 Ch. D. 100; Caledonian Ry. Co. *v.* Greenock and Wemyss Ry. Co., L. R. 2 Scotch App. 347.

S. 6. Except where the companies agree that the reference shall be made to a single arbitrator, the reference shall be made as follows; to wit,

Where there are two companies the reference shall be made to two arbitrators:

Where there are three or more companies the reference shall be made to so many arbitrators as there are companies.

Reference to two or more arbitrators.

S. 7. Where there are to be two or more arbitrators, every company shall by writing under their common seal appoint one of the arbitrators, and shall give notice in writing thereof to the other company or companies.

Appointment of arbitrators by companies.

S. 8. Where there are to be two or more arbitrators, if any of the companies fail to appoint an arbitrator within fourteen days after being thereunto requested in writing by the other company, or by the other companies or any of them, then, on the application of the companies or any of them, the Board of Trade, instead of the company so failing to appoint an arbitrator, may appoint an arbitrator; and the arbitrator so appointed shall for the purposes of this Act be deemed to be appointed by the company so failing.

Appointment of arbitrators by Board of Trade.

S. 9. When the reference is made to two or more arbitrators, if before the matters referred to them are determined, any arbitrator dies, or becomes incapable or unfit, or for seven consecutive days fails to act as arbitrator, the company by which he was appointed shall by writing under their common seal appoint an arbitrator in his place.

Appointment of arbitrators by companies to supply vacancies.

S. 10. Where the company by which an arbitrator ought to be appointed in the place of the arbitrator so deceased, incapable, unfit, or failing to act, fail to make the appointment within fourteen days after being thereunto requested in writing by the other company, or by the other companies or any of them, then on the application of the companies or any of them, the Board of Trade may appoint an arbitrator; and the arbitrator so appointed by the Board of Trade shall for the purposes of this Act be deemed to be appointed by the company so failing.

Appointment of arbitrators by Board of Trade to supply vacancies.

S. 11. When any appointment of an arbitrator is made, the company making the appointment shall have no power to revoke the appointment, without the previous consent in writing of the other company, or every other company in writing under their common seal.

Appointment of arbitrator not revocable.

S. 12. Where two or more arbitrators are appointed, they shall, before entering on the business of the reference, appoint by writing under their hands an impartial and qualified person to be their umpire.

Appointment of umpire by arbitrators.

S. 13. If the arbitrators do not appoint an umpire within seven days after the reference is made to the arbitrators, then, on the application of the companies or any of them, the Board of Trade may appoint an umpire; and the umpire so appointed shall for the purposes of this Act be deemed to be appointed by the arbitrators.

Appointment of umpire by Board of Trade.

S. 14. Where two or more arbitrators are appointed, if before the matters referred to them are determined, their umpire dies, or becomes incapable or unfit, or for seven consecutive days fails to act as umpire, the arbitrators shall by writing under their hands appoint an impartial and qualified person to be their umpire in his place.

Appointment of umpire by arbitrators to supply vacancy.

S. 15. If the arbitrators fail to appoint an umpire within seven days after notice in writing to them of the decease, incapacity, unfitness, or failure to act of their umpire, then, on the application of the companies, or any of them, the Board of Trade may appoint an umpire; and the umpire so appointed shall for the purposes of this Act be deemed to be appointed by the arbitrators so failing.

Appointment of umpire by Board of Trade to supply vacancy.

S. 16. Every arbitrator appointed in the place of a preceding arbitrator, and every umpire appointed in the place of a preceding umpire, shall respectively have the like powers and authorities as his respective predecessor.

Succeeding arbitrators and umpires to have powers of predecessors.

S. 17. Where there are two or more arbitrators, if they do not, within such a time as the companies agree on, or failing such agreement, within thirty days next after the reference is made to the arbitrators, agree on their award thereon, then the matters referred to them, or such of those matters as are not then determined, shall stand referred to their umpire.

Reference to umpire.

S. 18. The arbitrator, and the arbitrators, and the umpire respectively, may call for the production of any documents or evidence in the possession or power of the companies respectively, or which they respectively can produce, and which the arbitrator, or the arbitrators, or the umpire shall think

Power for arbitrators, &c., to call for books, &c., and administer oath.

22 & 23 Vict. c. 59.

necessary for determining the matters referred, and may examine the witnesses of the companies respectively on oath, and may administer the requisite oath; and in Scotland may grant diligence for the recovery of the documents or evidence, and for citing witnesses; and on application to the Lord Ordinary he may issue letters of supplement or other necessary writs in support of the diligence.

Procedure in the arbitration.

S. 19. Except where and as the companies otherwise agree, the arbitrator, and the arbitrators, and the umpire respectively, may proceed in the business of the reference in such manner as he and they respectively shall think fit.

Arbitration may proceed in absence of companies.

S. 20. The arbitrator, and the arbitrators, and the umpire respectively, may proceed in the absence of all or any of the companies in every case in which, after giving notice in that behalf to the companies respectively, the arbitrator or the arbitrators, or the umpire shall think fit so to proceed.

Several awards may be made.

S. 21. The arbitrator, and the arbitrators, and the umpire respectively may, if he and they respectively think fit, make several awards, each on part of the matters referred, instead of one award on all the matters referred; and every such award on the part of the matters shall for such time as shall be stated in the award, the same being such as shall have been specified in the agreement for arbitration, or in the event of no time having been so specified, for any time which the arbitrator may be legally entitled to fix, be binding as to all the matters to which it extends, and as if the matters awarded on were all the matters referred, and that notwithstanding the other matters or any of them be not then or thereafter awarded on.

Awards made in due time to bind all parties.

S. 22. The award of the arbitrator, or of the arbitrators, or of the umpire, if made in writing under his or their respective hand or hands, and ready to be delivered to the companies within such a time as the companies agree on, or, failing such agreement, within thirty days next after the matters in difference are referred to (as the case may be), the arbitrator, or the arbitrators, or the umpire, shall be binding and conclusive on all the companies.

Power for umpire to extend period for making his award.

S. 23. Provided always, that (except where and as the companies otherwise agree) the umpire, from time to time by writing under his hand, may extend the period within which his award is to be made; and if it be made and ready to be delivered within the extended time, it shall be as valid and effectual as if made within the prescribed period.

Awards not to be set aside for informality.

S. 24. No award made on any arbitration in accordance with this Act shall be set aside for any irregularity or informality.

Awards to be obeyed.

S. 25. Except only so far as the companies bound by any award in accordance with this Act from time to time otherwise agree, all things by every award in accordance with this Act lawfully required to be done, omitted, or suffered, shall be done, omitted, or suffered accordingly.

Agreements, arbitrations, and awards to have effect.

S. 26. Full effect shall be given by all the superior courts of law and equity in the United Kingdom, according to their respective jurisdiction, and by the companies respectively, and otherwise, to all agreements, references, arbitrations, and awards in accordance with this Act; and the performance or observance thereof may, where the courts think fit, be compelled by distress infinite on the property of the companies respectively, or by any other process against the companies respectively or their respective property that the courts or any judge thereof shall direct, and where requisite frame for the purpose.

Costs of arbitration and award.

S. 27. Except where and as the companies otherwise agree, the costs of and attending the arbitration and the award shall be in the discretion of the arbitrator, and the arbitrators, and the umpire respectively.

Payment of costs.

S. 28. Except where and as the companies otherwise agree, and if and so far as the award does not otherwise determine, the costs of and attending the arbitration and the award shall be borne and paid by the companies in equal shares, and in other respects the companies shall bear their own respective costs.

Submission to arbitration to be made a rule of court.

S. 29. The submission to any arbitration in accordance with this Act may at any time be made a rule of any of her Majesty's superior courts of record at Westminster, or as the case may be, at Dublin, on the application of any party interested; and the court may remit the matter to the arbitrator, or to the arbitrators, or to the umpire, with any directions the court think fit.

26 & 27 Vict. c. 92.

An Act for Consolidating in one Act certain Provisions frequently inserted in Acts relating to Railways. [28*th July*, 1863.] 26 & 27 Vict. c. 92.

[*By s.* 1, *the Act may be cited as* "The Railway Clauses Act, 1863."]

Part V. Amalgamation.

Submission and awards not affected by amalgamation.

S. 44. No submission to arbitration of any matter in dispute between the dissolved company and any other company, or any person, under which any reference is pending and incomplete at the time of amalgamation, and the award theretofore made and then remaining in force, shall be revoked or prejudicially affected by anything in the amalgamating Act, or in this part of this Act contained; but every such arbitration and award shall be as valid and effectual for or against the amalgamated company as it would have been for or against the dissolved company.

36 & 37 Vict. c. 48.

An Act to make better provision for carrying into effect the Railway and Canal Traffic Act, 1854, *and for other purposes connected therewith.* [21*st July*, 1873.] 36 & 37 Vict. c. 48.

S. 1. [*Short title*, "The Regulation of Railways Act, 1873."]

Differences between railway and canal companies to be referred to commissioners.

S. 8. Where any difference between railway companies, or between canal companies, or between a railway company and a canal company, is, under the provisions of any general or special Act, passed either before or after the passing of this Act, required or authorised to be referred to arbitration, such difference shall at the instance of any company party to the difference and with the consent of the commissioners be referred to the commissioners for their decision in lieu of being referred to arbitration: Provided, that the power of compelling a reference to the commissioners in this section contained shall not apply to any case in which any arbitrator has in any general or special Act been designated by his name, or by the name of his office, or in which, a standing arbitrator having been appointed under any general or special Act, the commissioners are of opinion that the difference in question may more conveniently be referred to him.

Power to refer differences to commissioners.

S. 9. Any difference to which a railway company, or canal company, is a party may, on the application of the parties to the difference, and with the assent of the commissioners, be referred to them for their decision.

Remuneration for conveyance of mails.

S. 19. Every railway company shall be entitled to reasonable remuneration for any services performed by them in pursuance of this Act with respect to the conveyance of mails, and such remuneration shall be paid by the Postmaster-General.

Any difference between the Postmaster-General and any railway company as to the amount of such remuneration, or as to any other question arising under this Act, shall be decided by arbitration in manner provided by the Act of the session of the first and second years of the reign of her present Majesty, chapter ninety-eight, or at the option of such railway company, by the commissioners.

37 & 38 Vict. c. 40.

37 & 38 Vict. c. 40.

An Act to amend the powers of the Board of Trade with respect to inquiries, arbitrations, appointments, and other matters under special Acts, and to amend the Regulation of Railways Act, 1873, so far as regards the reference of differences to the Railway Commissioners in lieu of Arbitrators. [30*th July*, 1874.]

Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal and Commons in this present Parliament assembled, and by the authority of the same, as follows:

Preliminary.

[S. 1. *This Act may be cited as* "The Board of Trade Arbitrations, &c., Act, 1874."]

S. 3. Where application is made, in pursuance of any special Act passed either before or after the passing of this Act, to the Board of Trade to be arbitrators or to appoint any arbitrator, referee, engineer, or other person, or to hold any inquiry, or to sanction, approve, confirm, or determine any appointment, matter or thing, or to make any order, or to do any other act or thing, for the purposes of such special Act, all expenses incurred by the Board of Trade in relation to such application, and the proceedings consequent thereon, shall, to such amount as the Board of Trade may certify by their order to be due, be defrayed by the parties to such application; and (subject to any provision contained in the said special Act) shall be defrayed by such of the parties as the Board of Trade may by order direct, or if so directed by an order of the Board of Trade, shall be paid as costs of the arbitration or reference.

The Board of Trade may, if they think fit, on or at any time after the making of the application, by order require the parties to the application, or any of them, to pay to the Board of Trade such sum as the Board of Trade think requisite for or on account of those expenses, or to give security to the satisfaction of the Board of Trade for the payment of those expenses on demand; and if such payment or security is not made or given, may refuse to act in pursuance of the application.

All expenses directed by an order of the Board of Trade, or an award in pursuance of this section to be paid, may be recovered in any court of competent jurisdiction as a debt, and if payable to the Board of Trade, as a debt to the Crown, and an order of the Board of Trade shall be conclusive evidence of the amount of such expenses.

S. 4. In this part of this Act the term "special Act" means a local, or local and personal Act, or an Act of a local and personal nature, and includes a provisional order of the Board of Trade, confirmed by Act of Parliament, and a certificate granted by the Board of Trade under the Railways Construction Facilities Act, 1864.

An order of the Board of Trade for the purposes of this part of this Act, or of any such special Act as is referred to in this part of this Act, may be made by writing under the hand of the President or of one of the secretaries of the Board.

Part II.

Reference to Railway Commissioners.

S. 6. Where any difference to which a railway company or canal company is a party is required or authorised under the provisions of any general or special Act, passed either before or after the passing of this Act, to be referred to the arbitration of, or to be determined or settled by the Board of Trade, or some person or persons appointed by the Board of Trade, the Board of Trade may, if they think fit, by order in writing under the hand of the President, or one of the secretaries of the Board, refer the matter for the decision of the Railway Commissioners, and appoint them arbitrators or umpires as the case may be; and thereupon the Commissioners for the time being shall have the same powers as if the matter had been referred to their decision in pursuance of the Regulation of Railways Act, 1873, and also any further powers which

the Board of Trade, or an arbitrator or arbitrators or umpire appointed by the Board of Trade, would have had for the purpose of the arbitration, if the difference had not been referred to the commissioners: Provided always, that this section shall not apply to any case in which application is made to the Board of Trade for the appointment of an umpire, under the twenty-eighth section of "The Lands Clauses Consolidation Act, 1845." 37 & 38 Vict. c. 40.

S. 7. Where any difference is referred for the decision of the commissioners, in pursuance of the Regulation of Railways Act, 1873, as amended by this part of this Act, the commissioners shall have the same power by their decision of rescinding, varying, or adding to any award, or other decision previously made by any arbitrator or arbitrators (including therein the Board of Trade) with reference to the same subject-matter, as any arbitrator or arbitrators would have had if the difference had been referred to him or them.

LANDS TAKEN FOR A PUBLIC UNDERTAKING.

8 & 9 Vict. c. 18.

8 & 9 Vict. c. 18.

An Act for consolidating in one Act certain provisions usually inserted in Acts authorising the taking of Lands for undertakings of a public nature (c). [*8th May*, 1845.]

[*By s. 4, the Act may be cited as* "The Lands Clauses Consolidation Act, 1845."]

["With respect to the purchase and taking of lands otherwise than by agreement," *it is provided in the following words*:]—

Compensation exceeding 50*l.* to be settled by arbitration or jury, at the option of the party claiming compensation.

S. 23. If the compensation claimed or offered in any such case shall exceed fifty pounds, and if the party claiming compensation desire to have the same settled by arbitration, and signify such desire by notice in writing to the promoters of the undertaking, before they have issued their warrant to the sheriff to summon a jury in respect of such lands, under the provisions hereinafter contained, stating in such notice the nature of the interest in respect of which such party claims compensation, and the amount of the compensation so claimed, the same shall be so settled accordingly; but, unless the party claiming compensation shall as aforesaid signify his desire to have the question of such compensation settled by arbitration, or if when the matter shall have been referred to arbitration the arbitrators or their umpire shall for three months have failed to make their or his award, or if no final award shall be made, the question of such compensation shall be settled by the verdict of a jury, as hereinafter provided.

Appointment of arbitrator when questions are to be determined by arbitration.

S. 25. When any question of disputed compensation by this or the special Act, or any Act incorporated therewith, authorised or required to be settled by arbitration, shall have arisen, then, unless both parties shall concur in the appointment of a single arbitrator, each party, on the request of the other party, shall nominate and appoint an arbitrator, to whom such dispute shall be referred; and every appointment of an arbitrator shall be made on the part of the promoters of the undertaking, under the hands of the said promoters or any two of them, or of their secretary or clerk, and on the part of any other party under the hand of such party, or, if such party be a corporation aggregate, under the common seal of such corporation; and such appointment shall be delivered to the arbitrator, and shall be deemed a submission to arbitration on the part of the party by whom the same shall be made; and after any such appointment shall have been made, neither party shall have power to revoke the same without the consent of the other, nor shall the death of either party operate as a revocation; and if for the space of fourteen days after any such dispute shall have arisen, and after a request in writing, in which shall be stated the matter so required to be referred to

(c) The Lands Clauses Consolidation (Scotland) Act, 1845, is the 8 & 9 Vict. c. 19.

8 & 9 Vict. c. 18.

arbitration, shall have been served by the one party on the other party to appoint an arbitrator, such last-mentioned party fail to appoint such arbitrator, then upon such failure the party making the request, and having himself appointed an arbitrator, may appoint such arbitrator to act on behalf of both parties, and such arbitrator may proceed to hear and determine the matters which shall be in dispute, and in such case the award or determination of such single arbitrator shall be final.

Vacancy of arbitrator to be supplied.

S. 26. If, before the matters so referred shall be determined, any arbitrator appointed by either party die, or become incapable, the party by whom such arbitrator was appointed may nominate and appoint in writing some other person to act in his place, and if, for the space of seven days after notice in writing from the other party for that purpose, he fail to do so, the remaining or other arbitrator may proceed *ex parte;* and every arbitrator so to be substituted as aforesaid shall have the same powers and authorities as were vested in the former arbitrator at the time of such his death or disability as aforesaid.

Appointment of umpire.

S. 27. Where more than one arbitrator shall have been appointed such arbitrators shall, before they enter upon the matters referred to them, nominate and appoint, by writing under their hands, an umpire to decide on any such matters on which they shall differ, or which shall be referred to him under the provisions of this or the special Act, and if such umpire shall die, or become incapable to act, they shall forthwith after such death or incapacity, appoint another umpire in his place, and the decision of every such umpire on the matters so referred to him shall be final.

Appointment of umpire on neglect of the arbitrators, in case of railway companies.

S. 28. If in either of the cases aforesaid the said arbitrators shall refuse, or shall, for seven days after request of either party to such arbitration, neglect to appoint an umpire, the Board of Trade (*d*), in any case in which a railway company shall be one party to the arbitration, and two justices in any other case, shall, on the application of either party to such arbitration, appoint an umpire, and the decision of such umpire on the matters on which the arbitrators shall differ, or which shall be referred to him under this or the special Act, shall be final.

If single arbitrator die, matter to begin de novo.

S. 29. If, when a single arbitrator shall have been appointed, such arbitrator shall die, or become incapable to act before he shall have made his award, the matters referred to him shall be determined by arbitration under the provisions of this or the special Act in the same manner as if such arbitrator had not been appointed.

If either arbitrator refuse to act, the other to proceed ex parte.

S. 30. If, where more than one arbitrator shall have been appointed, either of the arbitrators refuse or for seven days neglect to act, the other arbitrator may proceed *ex parte*, and the decision of such other arbitrator shall be as effectual as if he had been the single arbitrator appointed by both parties.

If arbitrators fail to make their award within twenty-one days, the matter to go to the umpire.

S 31. If, where more than one arbitrator shall have been appointed, and where neither of them shall refuse or neglect to act as aforesaid, such arbitrators shall fail to make their award within twenty-one days after the day on which the last of such arbitrators shall have been appointed, or within such extended time (if any) as shall have been appointed for that purpose by both such arbitrators under their hands, the matters referred to them shall be determined by the umpire to be appointed as aforesaid.

Power of arbitrators to call for books, &c.

S. 32. The said arbitrators or their umpire may call for the production of any documents in the possession or power of either party which he or they may think necessary for determining the question in dispute, and may examine the parties or their witnesses on oath, and administer the oaths necessary for that purpose.

Arbitrator or umpire to make a declaration.

S. 33. Before any arbitrator or umpire shall enter into the consideration of any matters referred to him, he shall, in the presence of a justice, make and subscribe the following declaration; that is to say,

"I, A. B., do solemnly and sincerely declare, that I will faithfully and honestly, and to the best of my skill and ability, hear and determine the

(*d*) The powers of the Board of Trade as to railways were transferred to the Commissioners of Railways by the stat. 9 & 10 Vict. c. 105, s. 2; but have been re-transferred to the Board of Trade by the stat. 14 & 15 Vict. c. 64.

matters referred to me under the provisions of the Act [*naming the special Act*].

"A. B.

"Made and subscribed in the presence of []."

And such declaration shall be annexed to the award when made; and if any arbitrator or umpire having made such declaration shall wilfully act contrary thereto he shall be guilty of a misdemeanor.

Costs of arbitration, how to be borne.

S. 34. All the costs of any such arbitration, and incident thereto, to be settled by the arbitrators, shall be borne by the promoters of the undertaking, unless the arbitrators shall award the same or a less sum than shall have been offered by the promoters of the undertaking; in which case each party shall bear his own costs incident to the arbitration, and the costs of the arbitrators shall be borne by the parties in equal proportions (*e*).

Award to be delivered to the promoters of the undertaking.

S. 35. The arbitrators shall deliver their award in writing to the promoters of the undertaking, and the said promoters shall retain the same, and shall forthwith, on demand, at their own expense, furnish a copy thereof to the other party to the arbitration, and shall at all times, on demand, produce the said award, and allow the same to be inspected or examined by such party or any person appointed by him for that purpose.

Submission a rule of court.

S. 36. The submission to any such arbitration may be made a rule of any of the superior courts, on the application of either of the parties.

Award not void through error in form.

S. 37. No award made with respect to any question referred to arbitration under the provisions of this or the special Act shall be set aside for irregularity or error in matter or form.

Purchase-money and compensation, how to be estimated.

S. 63. In estimating the purchase-money or compensation to be paid by the promoters of the undertaking, in any of the cases aforesaid, regard shall be had by the justices, arbitrators, or surveyors, as the case may be, not only to the value of the land to be purchased or taken by the promoters of the undertaking, but also to the damage, if any, to be sustained by the owner of the lands by reason of the severing of the lands taken from the other lands of such owner, or otherwise injuriously affecting such other lands by the exercise of the powers of this or the special Act, or any Act incorporated therewith.

Where compensation to absent party has been determined by a surveyor, the party may have the same submitted to arbitration.

S. 64. When the compensation payable in respect of any lands, or any interest therein, shall have been ascertained by the valuation of a surveyor, and deposited in the bank under the provisions herein contained, by reason that the owner of or party entitled to convey such lands or such interest therein as aforesaid could not be found or was absent from the kingdom; if such owner or party shall be dissatisfied with such valuation it shall be lawful for him, before he shall have applied to the Court of Chancery for payment or investment of the moneys so deposited under the provisions herein contained, by notice in writing to the promoters of the undertaking, to require the question of such compensation to be submitted accordingly, in the same manner as in other cases of disputed compensation hereinbefore authorised or required to be submitted to arbitration.

Question to be submitted to the arbitrators.

S. 65. The question to be submitted to the arbitrators in the case last aforesaid shall be, whether the said sum so deposited as aforesaid by the promoters of the undertaking was a sufficient sum, or whether any and what further sum ought to be paid or deposited by them.

If further sum awarded, promoters to pay or deposit same within fourteen days.

S. 66. If the arbitrators shall award that a further sum ought to be paid or deposited by the promoters of the undertaking, they shall pay or deposit, as the case may require, such further sum within fourteen days after the making of such award, or in default thereof the same may be enforced by attachment, or recovered with costs by action or suit in any of the superior courts.

Costs of the arbitration.

S. 67. If the arbitrators shall determine that the sum so deposited was sufficient, the costs of and incident to such arbitration to be determined by the arbitrators, shall be in the discretion of the arbitrators; but if the arbitrators shall determine that a further sum ought to be paid or deposited by the promoters of the undertaking, all the costs of and incident to the arbitration shall be borne by the promoters of the undertaking.

(*e*) These costs are now to be settled by a master if either party requires it: stat. 32 & 33 Vict. c. 18, s. 1.

8 & 9 Vict. c. 18.

To be settled by arbitration or jury, at the option of the party claiming compensation.

S. 68. If any party shall be entitled to any compensation in respect of any lands, or of any interest therein, which shall have been taken for or injuriously affected by the execution of the works, and for which the promoters of the undertaking shall not have made satisfaction under the provisions of this or the special Act, or any Act incorporated therewith, and if the compensation claimed in such case shall exceed the sum of fifty pounds, such party may have the same settled either by arbitration or by the verdict of a jury, as he shall think fit; and if such party desire to have the same settled by arbitration, it shall be lawful for him to give notice in writing to the promoters of the undertaking of such his desire, stating in such notice the nature of the interest in such lands in respect of which he claims compensation, and the amount of the compensation so claimed therein; and unless the promoters of the undertaking be willing to pay the amount of compensation so claimed, and shall enter into a written agreement for that purpose within twenty-one days after the receipt of any such notice from any party so entitled, the same shall be settled by arbitration in the manner herein provided; or if the party so entitled as aforesaid desire to have such question of compensation settled by a jury, it shall be lawful for him to give notice in writing of such his desire to the promoters of the undertaking, stating such particulars as aforesaid, and unless the promoters of the undertaking be willing to pay the amount of compensation so claimed, and enter into a written agreement for that purpose, they shall, within twenty-one days after the receipt of such notice, issue their warrant to the sheriff to summon a jury for settling the same in the manner herein provided, and in default thereof they shall be liable to pay to the party so entitled as aforesaid the amount of compensation so claimed, and the same may be recovered by him with costs, by action in any of the superior courts.

[*By s.* 105, *amount of compensation in respect of common or waste lands, and by s.* 114, *as to paying off mortgages prematurely to be settled as in other cases of disputed compensation.*]

Interests omitted to be purchased.

And with respect to interests in lands which have by mistake been omitted to be purchased, be it enacted as follows:—

Promoters of the undertaking empowered to purchase interests in lands, the purchase whereof may have been omitted by mistake.

S. 124. If, at any time after the promoters of the undertaking shall have entered upon any lands which under the provisions of this or the special Act, or any Act incorporated therewith, they were authorised to purchase, and which shall be permanently required for the purposes of the special Act, any party shall appear to be entitled to any estate, right, or interest in or charge affecting such lands which the promoters of the undertaking shall through mistake or inadvertence have failed or omitted duly to purchase or to pay compensation for, then, whether the period allowed for the purchase of lands shall have expired or not, the promoters of the undertaking shall remain in the undisturbed possession of such lands, provided, within six months after notice of such estate, right, interest, or charge, in case the same shall not be disputed by the promoters of the undertaking, or in case the same shall be disputed, then within six months after the right thereto shall have been finally established by law in favour of the party claiming the same, the promoters of the undertaking shall purchase or pay compensation for the same, and shall also pay to such party, or to any other party who may establish a right thereto, full compensation for the mesne profits or interest which would have accrued to such parties respectively in respect thereof during the interval between the entry of the promoters of the undertaking thereon and the time of the payment of such purchase-money or compensation by the promoters of the undertaking, so far as such mesne profits or interest may be recoverable in law or equity; and such purchase-money or compensation shall be agreed on or awarded and paid in like manner as according to the provisions of this Act the same respectively would have been agreed on or awarded and paid in case the promoters of the undertaking had purchased such estate, right, interest, or charge before their entering upon such land, or as near thereto as circumstances will admit.

How value of such lands to be estimated.

S. 125. In estimating the compensation to be given for any such last-mentioned lands, or any estate or interest in the same, or for any mesne profits thereof, the jury, or arbitrators, or justices, as the case may be, shall assess the same according to what they shall find to have been the value of such lands, estate, or interest and profits, at the time such lands were entered

upon by the promoters of the undertaking, and without regard to any improvements or works made in the said lands by the promoters of the undertaking, and as though the works had not been constructed. 8 & 9 Vict. c. 18.

Sale of superfluous land.

And with respect to lands acquired by the promoters of the undertaking under the provisions of this or the special Act, or any Act incorporated therewith, but which shall not be required for the purposes thereof, be it enacted as follows:—

[SS. 127, 128, 129, *provide that they shall be sold, and that the offer of purchase shall first be made to the owner of the land from which they were originally taken, then to the owners of adjoining lands.*]

Differences as to price to be settled by arbitration.

S. 130. If any person entitled to such pre-emption be desirous of purchasing any such land, and such person and the promoters of the undertaking do not agree as to the price thereof, then such price shall be ascertained by arbitration, and the costs of such arbitration shall be in the discretion of the arbitrators.

32 & 33 Vict. c. 18.

An Act to amend the Lands Clauses Consolidation Act. [*24th June*, 1869.] 32 & 33 Vict. c. 18.

[*By section* 4, *the Act may be cited as* "The Lands Clauses Consolidation Act, 1869."]

Costs of arbitration where either party so requires to be settled by a master of superior courts.

S. 1. Where in England, under the Lands Clauses Consolidation Act, 1845, or any Act incorporating the same, any question of disputed compensation is determined by arbitration, the costs of and incidental to the arbitration and award shall, if either party so requires, be taxed and settled as between the parties by any one of the taxing masters of the superior courts of law.

JOINT STOCK COMPANIES.

8 & 9 Vict. c. 16.

An Act for consolidating in one Act certain provisions usually inserted in Acts with respect to the constitution of Companies incorporated for carrying on undertakings of a public nature (*b*). [*8th May*, 1845.] 8 & 9 Vict. c. 16.

[*By s.* 4, *the Act may be cited as* "The Companies Clauses Consolidation Act, 1845."]

Arbitration.

And with respect to the settlement of disputes by arbitration, be it enacted as follows:

Appointment of arbitrator when questions are to be determined by arbitration.

S. 128. When any dispute authorised or directed by this or the special Act, or any Act incorporated therewith, to be settled by arbitration, shall have arisen, then, unless both parties shall concur in the appointment of a single arbitrator, each party, on the request of the other party, shall by writing under his hand, nominate and appoint an arbitrator to whom such dispute shall be referred; and after any such appointment shall have been made neither party shall have power to revoke the same without the consent of the other, nor shall the death of either party operate as such revocation; and if for the space of fourteen days after any such dispute shall have arisen, and after a request in writing shall have been served by the one party on the other party to appoint an arbitrator, such last-mentioned party fail to appoint such arbitrator, then upon such failure the party making the request,

(*b*) The Companies Clauses Consolidation (Scotland) Act, 1845, is the 8 & 9 Vict. c. 17.

8 & 9 Vict. c. 16.

and having himself appointed an arbitrator, may appoint such arbitrator to act on behalf of both parties, and such arbitrator may proceed to hear and determine the matters which shall be in dispute, and in such case the award or determination of such single arbitrator shall be final.

Vacancy of arbitrator to be supplied.

S. 129. If before the matters so referred shall be determined, any arbitrator appointed by either party die, or become incapable, or refuse, or for seven days neglect to act as arbitrator, the party by whom such arbitrator was appointed may nominate and appoint in writing some other person to act in his place; and if for the space of seven days after notice in writing from the other party for that purpose he fail to do so, the remaining or other arbitrator may proceed *ex parte;* and every arbitrator so to be substituted as aforesaid shall have the same powers and authorities as were vested in the former arbitrator at the time of such his death, refusal, or disability as aforesaid.

Appointment of umpire.

S. 130. Where more than one arbitrator shall have been appointed, such arbitrators shall, before they enter upon the matters referred to them, nominate and appoint by writing under their hands an umpire to decide on any such matters on which they shall differ; and if such umpire shall die, or refuse, or for seven days neglect to act, they shall forthwith after such death, refusal, or neglect, appoint another umpire in his place; and the decision of any such umpire on the matters so referred to him shall be final.

Appointment on neglect of arbitrators in case of railway companies.

S. 131. If in either of the cases aforesaid the said arbitrators shall refuse, or shall, for seven days after request of either party to such arbitration, neglect to appoint an umpire, it shall be lawful for the Board of Trade, if they think fit, in any case in which a railway company shall be one party to the arbitration, on the application of either party to such arbitration, to appoint an umpire; and the decision of such umpire on the matters on which the arbitrators shall differ shall be final.

Power of arbitrators to call for books, &c

S. 132. The said arbitrators or their umpire may call for the production of any documents in the possession or power of either party which they or he may think necessary for determining the question in dispute, and may examine the parties or their witnesses on oath, and administer the oaths necessary for that purpose.

Costs in their discretion.

S. 133. Except where by this or the special Act, or any Act incorporated therewith, it shall be otherwise provided, the costs of and attending every such arbitration to be determined by the arbitrators shall be in the discretion of the arbitrators or their umpire, as the case may be.

Submission to arbitration a rule of court.

S. 134. The submission to any such arbitration may be made a rule of any of the superior courts, on the application of either of the parties.

QUARTER SESSIONS.

12 & 13 Vict. c. 45.

12 & 13 Vict. c. 45.

An Act to amend the procedure in Courts of General and Quarter Sessions of the Peace in England and Wales, and for the better advancement of Justice in Cases within the Jurisdiction of those Courts.

[28*th July*, 1849.]

Reference after notice of appeal to Quarter Sessions by judge's order on consent.

S. 12. And whereas, by a statute passed in the 10th year of King William III., intituled "An Act for determining differences by Arbitration," provision was made for rendering more effectual the awards of arbitrators in the case of controversies and disputes for which there is no other remedy but by personal action, or by suit in equity: and whereas it is expedient in like manner to facilitate and render more effectual references to arbitration of controversies and disputes for which the remedy is by appeal to a Court of General or Quarter Sessions of the Peace: Be it enacted, that at any time after notice given of appeal to any Court of General or Quarter Sessions of the Peace, against any order, rule, or other matter (except a summary conviction or an

order in bastardy, or any proceeding under or by virtue of any of the statutes relating to her Majesty's revenue of excise or customs, stamps, taxes, or post-office), for which the remedy is by such appeal; it shall be lawful for the parties by themselves or their attorneys, and by order of a judge of her Majesty's Court of Queen's Bench, to submit the matter or matters of such appeal to the award or umpirage of any person or persons, and to agree that such submission should be made a rule of the said Court of Queen's Bench, and to insert such agreement in their submission, or the condition of the bond or promise, whereby they oblige themselves respectively to submit to the award or umpirage of such person or persons; and thereupon such and the like proceedings in all respects shall and may be taken with regard to submissions under this Act, and to enforcing awards or umpirages thereupon, and to setting aside the same as are authorised by the said Act of King William III., with regard to the cases therein provided for; and every award or umpirage duly made under this Act shall be as binding and effectual to all intents as if the same had been a regular judgment of the said Court of General or Quarter Sessions, and shall and may, on the application of either party, be enrolled among the records of the said Court of Sessions.

Reference by order of Court of Sessions.

S. 13. And be it enacted, That it shall be lawful for any Court of General or Quarter Sessions of the Peace before which any appeal (except against a summary conviction, or an order in bastardy, or any proceeding under or by virtue of any of the statutes relating to her Majesty's revenue of excise or customs, stamps, taxes, or post-office) shall be brought, to order, with consent of the parties or their attorneys, that the matter or matters of such appeal be referred to arbitration to such person or persons, and in such manner and on such terms as the said court shall think reasonable and proper; and the award of the arbitrator or arbitrators, or umpirage of the umpire, may, on motion by either party at the sessions next or next but one after such award or umpirage shall have been finally made and published, or after the decision of the Court of Queen's Bench on any motion for setting aside the same, be entered as the judgment of the Court of General or Quarter Sessions in the appeal, and shall be as binding and effectual to all intents as if given by the said court: Provided always, that the Court of Queen's Bench may, if it think fit, on application within the term next after the making and publication of such award or umpirage, either refer the case back again to the said arbitrator, arbitrators, or umpire, or wholly set aside the award or umpirage already made, and may in the latter event order the Court of General or Quarter Sessions to enter continuances and hear the appeal.

Where reference abortive, Queen's Bench may order Sessions to hear appeal.

S. 14. And be it enacted, That if upon any reference to arbitration under this Act it shall be made to appear to the Court of Queen's Bench that either from the death of the arbitrator or arbitrators or umpire, or from any other cause, it has been impossible that an award or umpirage can be made, it shall be lawful for the said court to order the Court of General or Quarter Sessions of the Peace to enter continuances and hear the appeal.

3 & 4 Will. 4, c. 42, to be applicable to references under this Act.

S. 15. And be it enacted, That the several provisions relating to arbitrations contained in an Act of the fourth year of King William IV., intituled, "An Act for the further Amendment of the Law, and the better Advancement of Justice," shall be deemed and taken to be applicable to arbitrations under this Act; and in every such arbitration, the arbitrator or arbitrators or umpire shall have the same powers of amendment which the Court of General or Quarter Sessions of the Peace would have had on the trial of the appeal.

Arbitrators to have power of amendment.

EXPLOSIVES.

38 & 39 VICT. c. 17.

38 & 39 VICT. c. 17.

An Act to amend the law with respect to manufacturing, keeping, selling, carrying, and importing Gunpowder, Nitroglycerine, and other explosive substances. [14*th June*, 1875.]

S. 1. [*Short title*, "The Explosives Act, 1875."]

Regulations as to arbitration.

S. 25. An occupier authorised by this Act to require any matter to be referred to arbitration may, within one month after receiving the requisition, notice, or document relating to the matter to be so referred, send an objection thereto to the Secretary of State; and if the cause of such objection is not, within one month after such objection is received by the Secretary of State, removed by the Secretary of State waiving or varying the said requisition, notice, document, or matter, or otherwise (which the Secretary of State is hereby authorised to do), such occupier may, by notice sent within seven days after the expiration of the said month to the Secretary of State, require the matter to be referred to arbitration, and the date of the receipt by the Secretary of State of the last-mentioned notice shall be deemed to be the date of the reference.

Arbitrations under this Act shall be conducted in manner provided by the second schedule to this Act.

SCHEDULE II.

Arbitration.

With respect to arbitrations under this Act the following provisions shall have effect:

Provisions as to arbitrations.

(1.) The parties to the arbitration are in this section deemed to be the occupier of the factory, magazine, or store on the one hand, and on the other the government inspector (on behalf of the Secretary of State):

(2.) Each of the parties to the arbitration may, within twenty-one days after the date of the reference, appoint an arbitrator:

(3.) No person shall act as arbitrator or umpire under this Act who is employed in or in the management of or is directly or indirectly interested in the manufacture, trade, factory, magazine, store, business, or premises to which the arbitration relates, or is in any manner interested directly or indirectly in the matter to which the arbitration relates:

(4.) The appointment of an arbitrator under this section shall be in writing, and notice of the appointment shall be forthwith sent to the other party to the arbitration, and shall not be revoked without the consent of such other party:

(5.) The death, removal, or other change in any of the parties to the arbitration shall not affect the proceedings under this section:

(6.) If within the said twenty-one days either of the parties fail to appoint an arbitrator, the arbitrator appointed by the other party may proceed to hear and determine the matter in difference, and in such case the award of the single arbitrator shall be final:

(7.) If before an award has been made any arbitrator appointed by either party die or become incapable to act, or for fourteen days refuse or neglect to act, the party by whom such arbitrator was appointed may appoint some other person to act in his place; and if he fail to do so within fourteen days after notice in writing from the other party for that purpose, the remaining arbitrator may proceed to hear and determine the matters in difference, and in such case the award of such single arbitrator shall be final:

(8.) In either of the foregoing cases where an arbitrator is empowered to act singly, upon one of the parties failing to appoint, the party so failing may, before the single arbitrator has actually proceeded in the arbitration, appoint an arbitrator, who shall then act as if no failure had been made:

(9.) If the arbitrators fail to make their award within twenty-one days

after the day on which the last of them was appointed, or within such extended time (if any) as may have been appointed for that purpose by both arbitrators under their hands, the matter in difference shall be determined by the umpire appointed as hereinafter mentioned:

(10.) The arbitrators, before they enter upon the matters referred to them, shall appoint by writing under their hands an umpire to decide on points on which they may differ:

(11.) If the umpire die or become incapable to act before he has made, or refuses to make his award within a reasonable time after the matter has been brought within his cognisance, the persons or person who appointed such umpire shall forthwith appoint another umpire in his place:

(12.) If the arbitrators refuse or fail, or for seven days after the request of either party neglect to appoint an umpire, then, on the application of either party, an umpire shall be appointed by the chairman of the Quarter Sessions of the peace within the jurisdiction of which the factory, magazine, or store is situate:

(13.) The decision of every umpire on the matters referred to him shall be final:

(14.) If a single arbitrator fail to make his award within twenty-one days after the day on which he was appointed, the party who appointed him may appoint another arbitrator to act in his place:

The arbitrators and their umpire or any of them may examine the parties and their witnesses on oath; they may also consult any counsel, engineer, or scientific person whom they may think it expedient to consult:

(15.) The payment (if any) to be made to any arbitrator or umpire for his services shall be fixed by the Secretary of State, and together with the costs of the arbitration and award shall be paid by the parties, or one of them, according as the award may direct. Such costs may be taxed by a master of one of the superior courts, who, on the written application of either of the parties, shall ascertain and certify the proper amount of such costs. The amount (if any). payable by the Secretary of State, shall be paid as part of the expenses of inspectors under this Act. The amount (if any) payable by any other party may, in the event of non-payment, be recovered in the same manner as penalties under this Act.

PUBLIC HEALTH.

38 & 39 VICT. c. 55.

An Act for consolidating and amending the Acts relating to the Public Health in England. [11th *August*, 1875.]

S. 1. [*Short title*, "The Public Health Act 1875."]

Arbitration.

Mode of reference to arbitration.

S. 179. In case of a dispute as to the amount of any compensation to be made under the provisions of this Act (except where the mode of determining the same is specially provided for), and in case of any matter which by this Act is authorised or directed to be settled by arbitration, then, unless both parties concur in the appointment of a single arbitrator, each party shall appoint an arbitrator to whom the matter shall be referred.

Regulations as to arbitration.

S. 180. With respect to arbitrations under this Act, the following regulations shall be observed; that is to say,

(1.) Every appointment of an arbitrator under this Act, when made on behalf of the local authority, shall be under their common seal, and on behalf of any other party under his hand, or if such party be a corporation aggregate under their common seal:

(2.) Every such appointment shall be delivered to the arbitrators, and shall be deemed a submission to arbitration by the parties making the same:

38 & 39 Vict. c. 55.

(3.) After the making of any such appointment the same shall not be revoked without the consent of both parties, nor shall the death of either party operate as a revocation:

(4.) If for the space of fourteen days after any matter by this Act authorised or directed to be settled by arbitration has arisen, and notice in writing by one party who has duly appointed an arbitrator has been given to the other party, stating the matter to be referred, and accompanied by a copy of such appointment, the party to whom notice is given fails to appoint an arbitrator, the arbitrator appointed by the party giving the notice shall be deemed to be appointed by and shall act on behalf of both parties:

(5.) If before the determination of any matter so referred, any arbitrator dies or refuses or becomes incapable to act, the party by whom such arbitrator was appointed may appoint in writing another person in his stead; and if such party fails so to do for the space of seven days after notice in writing from the other party in that behalf, the remaining arbitrator may proceed *ex parte;* and every arbitrator so appointed shall have the same powers and authorities as were vested in the arbitrator in whose stead the appointment is made:

(6.) If a single arbitrator dies or becomes incapable to act before the making of his award within twenty-one days after his appointment, or within such extended time (if any) as may have been duly appointed by him for that purpose, the matters referred to him shall be again referred to arbitration under the provisions of this Act, as if no former reference had been made:

(7.) Where there is more than one arbitrator, the arbitrators shall, before they enter on the reference, appoint by writing under their hands an umpire, and if the person appointed to be umpire dies or becomes incapable to act, the arbitrators shall forthwith appoint another person in his stead; and if the arbitrators neglect or refuse to appoint an umpire for seven days after being requested so to do by any party to the arbitration, the Local Government Board shall, on the application of any such party, appoint an umpire:

(8.) If the arbitrators fail to make their award within twenty-one days after the day on which the last of them was appointed, or within such extended time (if any) as may have been duly appointed by them for that purpose, the matters referred shall be determined by the umpire:

(9.) The time for making an award by arbitrators under this Act, shall not in any case be extended beyond the period of two months from the date of the submission, and the time for making an award by an umpire under this Act shall not in any case be extended beyond the period of two months from the date of the reference of the matters to him:

(10.) Before any arbitrator or umpire enters on a reference under this Act he shall make and subscribe the following declaration before a justice of the peace; that is to say,

"I, A. B., do solemnly and sincerely declare that I will faithfully and honestly, and to the best of my skill and ability, hear and determine the matters referred to me under the Public Health Act, 1875.

"A. B."

(11.) Such declaration shall be annexed to the award when made; and any arbitrator or umpire who wilfully acts contrary to such declaration shall be guilty of a misdemeanour:

(12.) Any arbitrator, arbitrators, or umpire appointed by virtue of this Act may require the production of such documents in the possession or power of either party as they or he may think necessary for determining the matters referred, and may examine the parties or their witnesses on oath:

(13.) The costs of and consequent upon the reference shall be in the discretion of the arbitrator or arbitrators, or (in case the matters referred are determined by an umpire) of the umpire:

(14.) Any submission to arbitration under the provisions of this Act may be made a rule of any of the superior courts, on the application of any party thereto:

(15.) The award of arbitrators, or of an umpire, under this Act shall be final and binding on all parties to the reference.

THE BENEFIT BUILDING SOCIETIES ACT, 1884.

47 & 48 VICT. c. 41.

47 & 48 VICT. c. 41.

S. 2. The word "disputes" in the Building Societies Acts, or in the rules of any society thereunder, shall be deemed to refer only to disputes between the society and a member, or any representative of a member in his capacity of a member of the society, unless by the rules for the time being it shall be otherwise expressly provided; and in the absence of such express provision, shall not apply to any dispute between any such society and any member thereof, or other person whatever, as to the construction or effect of any mortgage deed, or any contract contained in any document, other than the rules of the society, and shall not prevent any society, or any member thereof, or any person claiming through or under him, from obtaining in the ordinary course of law any remedy in respect of any such mortgage or other contract to which he or the society would otherwise be by law entitled: Provided always, that nothing in this Act shall apply to any dispute pending at any time before the passing of this Act between any such society and any member thereof, or other person, which before the passing of this Act shall have been actually referred, or agreed to be referred, to arbitration, or as to which the jurisdiction of any court of law shall have been adjudged to be excluded by a decision of any court of competent jurisdiction in any action or suit between the society and any member thereof, or other person.

AGRICULTURAL HOLDINGS (ENGLAND) ACT, 1883.

46 & 47 VICT. c. 61.

46 & 47 VICT. c. 61.

S. 7. [*Notice of claim for compensation.*]

S. 8. The landlord and the tenant may agree on the amount and mode and time of payment of compensation to be paid under this Act.

Compensation agreed or settled by reference.

If in any case they do not so agree the difference shall be settled by a reference.

S. 9. Where there is a reference under this Act, a referee, or two referees and an umpire, shall be appointed as follows:—

Appointment of referee or referees and umpire.

(1.) If the parties concur, there may be a single referee appointed by them jointly:

(2.) If before award the single referee dies or becomes incapable of acting, or for seven days after notice from the parties, or either of them, requiring him to act, fails to act, the proceedings shall begin afresh, as if no referee had been appointed:

(3.) If the parties do not concur in the appointment of a single referee, each of them shall appoint a referee:

(4.) If before award one of two referees dies or becomes incapable of acting, or for seven days after notice from either party requiring him to act, fails to act, the party appointing him shall appoint another referee:

(5.) Notice of every appointment of a referee by either party shall be given to the other party:

(6.) If for fourteen days after notice by one party to the other to appoint a referee, or another referee, the other party fails to do so, then, on the application of the party giving notice, the county court shall within fourteen days appoint a competent and impartial person to be a referee:

(7.) Where two referees are appointed, then (subject to the provisions of this Act) they shall before they enter on the reference appoint an umpire:

(8.) If before award an umpire dies or becomes incapable of acting, the referees shall appoint another umpire:

46 & 47 Vict. c. 61.

(9.) If for seven days after request from either party the referees fail to appoint an umpire, or another umpire, then, on the application of either party, the county court shall within fourteen days appoint a competent and impartial person to be the umpire:

(10.) Every appointment, notice, and request under this section shall be in writing.

Requisition for appointment of umpire by Land Commissioners, &c.

S. 10. Provided that, where two referees are appointed, an umpire may be appointed as follows:

(1.) If either party, on appointing a referee, requires, by notice in writing to the other, that the umpire shall be appointed by the Land Commissioners for England, then the umpire, and any successor to him, shall be appointed, on the application of either party, by those commissioners:

(2.) In every other case, if either party on appointing a referee requires, by notice in writing to the other, that the umpire shall be appointed by the county court, then, unless the other party dissents by notice in writing therefrom, the umpire, and any successor to him, shall on the application of either party be so appointed, and in case of such dissent the umpire, and any successor to him, shall be appointed, on the application of either party, by the Land Commissioners for England.

Exercise of powers of county court.

S. 11. The powers of the county court under this Act relative to the appointment of a referee or umpire shall be exerciseable by the judge of the court having jurisdiction, whether he is without or within his district, and may, by consent of the parties, be exercised by the registrar of the court.

Mode of submission to reference.

S. 12. The delivery to a referee of his appointment shall be deemed a submission to a reference by the party delivering it; and neither party shall have power to revoke a submission, or the appointment of a referee, without the consent of the other.

Power for referee, &c., to require production of documents, administer oaths, &c.

S. 13. The referee or referees or umpire may call for the production of any sample, or voucher, or other document, or other evidence which is in the possession or power of either party, or which either party can produce, and which to the referee or referees or umpire seems necessary for determination of the matters referred, and may take the examination of the parties and witnesses on oath, and may administer oaths and take affirmations; and if any person so sworn or affirming wilfully and corruptly gives false evidence he shall be guilty of perjury.

Power to proceed in absence.

S. 14. The referee or referees or umpire may proceed in the absence of either party where the same appears to him or them expedient, after notice given to the parties.

Form of award.

S. 15. The award shall be in writing, signed by the referee or referees or umpire.

Time for award of referee or referees.

S. 16. A single referee shall make his award ready for delivery within twenty-eight days after his appointment.

Two referees shall make their award ready for delivery within twenty-eight days after the appointment of the last appointed of them, or within such extended time (if any) as they from time to time jointly fix by writing under their hands, so that they make their award ready for delivery within a time not exceeding in the whole forty-nine days after the appointment of the last appointed of them.

Award in respect of compensation under ss. 3, 4, and 5.

S. 17. In any case provided for by sections three, four, or five, if compensation is claimed under this Act, such compensation as under any of those sections is to be deemed to be substituted for compensation under this Act, if and so far as the same can, consistently with the terms of the agreement, if any, be ascertained by the referees or the umpire, shall be awarded in respect of any improvements thereby provided for, and the award shall, when necessary, distinguish such improvements and the amount awarded in respect thereof; and an award given under this section shall be subject to the appeal provided by this Act.

Reference to and award by umpire.

S. 18. Where two referees are appointed and act, if they fail to make their award ready for delivery within the time aforesaid, then, on the expiration of that time, their authority shall cease, and thereupon the matters referred to them shall stand referred to the umpire.

The umpire shall make his award ready for delivery within twenty-eight days after notice in writing given to him by either party or referee of the reference to him, or within such extended time (if any) as the registrar of

the county court from time to time appoints, on the application of the umpire or of either party, made before the expiration of the time appointed by or extended under this section.

Award to give particulars.

S. 19. The award shall not award a sum generally for compensation, but shall, so far as possible, specify—

(*a.*) The several improvements, acts, and things in respect whereof compensation is awarded, and the several matters and things taken into account under the provisions of this Act in reduction or augmentation of such compensation;

(*b.*) The time at which each improvement, act, or thing was executed, done, committed, or permitted;

(*c.*) The sum awarded in respect of each improvement, act, matter, and thing; and

(*d.*) Where the landlord desires to charge his estate with the amount of compensation found due to the tenant, the time at which, for the purposes of such charge, each improvement, act, or thing in respect of which compensation is awarded is to be deemed to be exhausted.

Costs of reference.

S. 20. The costs of and attending the reference, including the remuneration of the referee or referees and umpire, where the umpire has been required to act, and including other proper expenses, shall be borne and paid by the parties in such proportion as to the referee or referees or umpire appears just, regard being had to the reasonableness or unreasonableness of the claim of either party in respect of amount, or otherwise, and to all the circumstances of the case.

The award may direct the payment of the whole or any part of the costs aforesaid by the one party to the other.

The costs aforesaid shall be subject to taxation by the registrar of the county court, on the application of either party, but that taxation shall be subject to review by the judge of the county court.

Day for payment.

S. 21. The award shall fix a day, not sooner than one month after the delivery of the award, for the payment of money awarded for compensation, costs, or otherwise.

Submission not to be removable, &c.

S. 22. A submission or award shall not be made a rule of any court, or be removable by any process into any court, and an award shall not be questioned otherwise than as provided by this Act.

Appeal to county court.

S. 23. Where the sum claimed for compensation exceeds one hundred pounds, either party may, within seven days after delivery of the award, appeal against it to the judge of the county court on all or any of the following grounds:

1. That the award is invalid;
2. That the award proceeds wholly or in part upon an improper application of or upon the omission properly to apply the special provisions of section three, four, or five of this Act;
3. That compensation has been awarded for improvements, acts, or things, breaches of covenants or agreements, or for committing or permitting waste, in respect of which the party claiming was not entitled to compensation;
4. That compensation has not been awarded for improvements, acts, or things, breaches of covenants or agreements, or for committing or permitting waste, in respect of which the party claiming was entitled to compensation;

and the judge shall hear and determine the appeal, and may, in his discretion, remit the case to be reheard as to the whole or any part thereof by the referee or referees or umpire, with such directions as he may think fit.

If no appeal is so brought the award shall be final.

The decision of the judge of the county court on appeal shall be final, save that the judge shall, at the request of either party, state a special case on a question of law for the judgment of the High Court of Justice, and the decision of the High Court on the case, and respecting costs and any other matter connected therewith, shall be final, and the judge of the county court shall act thereon.

Recovery of compensation.

S. 24. Where any money agreed or awarded or ordered on appeal to be paid for compensation, costs, or otherwise, is not paid within fourteen days after the time when it is agreed or awarded or ordered to be paid, it shall be recoverable, upon order made by the judge of the county court, as money

46 & 47 Vict. c. 61.

ordered by a county court under its ordinary jurisdiction to be paid is recoverable.

S. 34. Where landlord keeps fixtures "any difference as to the value shall be settled by a reference under this Act as in case of compensation (but without appeal)."

S. 54. Nothing in this Act shall apply to a holding that is not either wholly agricultural or wholly pastoral, or in part agricultural and as to the residue pastoral, or in whole or in part cultivated as a market garden, or to any holding let to the tenant during his continuance in any office, appointment or employment held under the landlord.

ALLOTMENTS AND COTTAGE GARDENS COMPENSATION FOR CROPS ACT, 1887.

50 & 51 Vict. c. 26.

50 & 51 Vict. c. 26.

An Act to provide Compensation to the Occupiers of Allotments and Cottage Gardens for Crops left in the Ground at the end of their Tenancies.

[*8th August*, 1887.]

Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Short title. S. 1. This Act may be cited as the Allotments and Cottage Gardens Compensation for Crops Act, 1887.

Extent of Act. S. 2. This Act shall not extend to Scotland or Ireland or to the metropolis.

Commencement of Act. S. 3. This Act shall come into force on the first day of January, one thousand eight hundred and eighty-eight, which day is in this Act referred to as the commencement of this Act.

Definitions. S. 4. In this Act—

"The metropolis" means the city of London and all parishes and places mentioned in Schedules A, B, and C to the Metropolis Management Act, 1855. 18 & 19 Vict. c. 120.

"Allotment" means any parcel of land of not more than two acres in extent held by a tenant under a landlord and cultivated as a garden or as a farm, or partly as a garden and partly as a farm.

"Cottage garden" means an allotment attached to a cottage.

"Holding" means an allotment or cottage garden.

"Tenant" means the holder of a holding under a landlord for any term, and includes the legal personal representative of a deceased tenant.

"Landlord" means the person for the time being entitled to receive the rents and profits of any holding.

"Person" includes a body of persons and a corporation aggregate or sole.

"Contract of tenancy" means the letting of land for any term.

"Determination of tenancy" means the cesser of a contract of tenancy by effluxion of time or from any other cause.

The designations of landlord and tenant shall for the purposes of this Act continue to apply to the parties to a contract of tenancy until the conclusion of any proceedings taken under this Act on the determination of a tenancy.

Compensation. S. 5. Upon the determination of the tenancy of a holding after the commencement of this Act the tenant shall be entitled notwithstanding any agreement to the contrary to obtain from the landlord compensation in money for the following matters and things, that is to say:—

(*a.*) For crops, including fruit, growing upon the holding in the ordinary course of cultivation, and for fruit trees and fruit bushes growing thereon, which have been planted by the tenant with the previous consent in writing of the landlord.

(*b.*) For labour expended upon and for manure applied to the holding

since the taking of the last crop therefrom in anticipation of a future crop.

(c.) For drains and for any outbuildings, pigsties, fowlhouses, or other structural improvements made by the tenant upon his holding with the written consent of his landlord.

Deduction from compensation on account of rent or breach of contract.

S. 6. In the ascertainment of the amount of compensation payable to the tenant under this Act, any sum due to the landlord in respect of rent or of any breach of the contract of tenancy or wilful or negligent damage committed or permitted by the tenant shall be taken into account in reduction of the amount of compensation.

Compensation if not agreed upon to be settled by an arbitrator.

S. 7. The landlord and tenant may agree upon the amount and time of payment of compensation to be paid under this Act. If in any case they do not so agree, the difference shall be settled by an arbitrator.

Appointment of arbitrator.

S. 8. If the landlord and tenant concur they may within twenty-eight days after the determination of the tenancy jointly appoint such arbitrator. If they do not concur, such arbitrator shall be appointed in the following manner:—

(1.) The landlord and tenant or either of them may apply personally or in writing to the justices of the peace, acting for the petty sessional division in which the holding is situated, in petty sessions, and such justices shall upon the receipt of the application appoint one of their number not being interested in the holding, or other competent person not being interested as aforesaid, to act as such arbitrator.

(2.) If before award the person so appointed dies or becomes incapable of acting or for seven days after his appointment fails to act the justices shall appoint in manner aforesaid another arbitrator.

Justices if practicable to appoint person to act as arbitrator without remuneration.

S. 9. The justices shall in all cases in which it is practicable obtain the consent of the arbitrator to act without remuneration, and in any case in which it is impracticable to obtain such consent they shall direct that the arbitrator shall be paid such moderate sum as they consider will reasonably remunerate him for his time and expenses.

Time for commencement of arbitration.

S. 10. The arbitrator shall proceed to determine any difference referred to him under this Act within seven days after his appointment.

Power for arbitrator to administer oaths.

S. 11. The arbitrator, if he shall consider it desirable or necessary so to do, shall have power to call for the production of any document which is in the possession of either party, or which either party can produce, and which to the arbitrator seems necessary for determination of the difference referred to him, and to take the examination of the parties and witnesses on oath and to administer oaths and take affirmations, and if any person so sworn or affirming wilfully and corruptly gives false evidence he shall be guilty of perjury.

Power to proceed in absence of either party.

S. 12. The arbitrator may proceed in the absence of either party after notice given to both parties.

Form of award and time for its delivery.

S. 13. The award shall be in writing signed by the arbitrator, and shall be ready for delivery within fourteen days after his appointment, or within such extended time not exceeding in the whole twenty-eight days after his appointment as the parties may agree upon in writing.

Costs of arbitration.

S. 14. The costs (if any) of and attending the arbitration including the remuneration (if any) of the arbitrator shall be borne and paid by the parties in such proportion as to the arbitrator appears just, and the award may direct the payment of the whole or any part of the aforesaid costs by the one party to the other, or may declare that no costs shall be payable.

Day for payment.

S. 15. The award shall fix a day not sooner than fourteen days after the delivery of the award for the payment of the money awarded for compensation, costs, or otherwise.

Award to be final.

S. 16. The award shall be final and conclusive in every case; and neither the submission to arbitration nor the award shall be made a rule of any court, or be removable by any process into any court.

Recovery of compensation money.

S. 17. Where any money agreed or awarded to be paid for compensation, costs, or otherwise, is not paid within fourteen days after the time when it is agreed or awarded to be paid, it shall be recoverable upon order made by the judge of the county court within the district of which the holding is situated, as money ordered to be paid by a county court under its ordinary jurisdiction is recoverable.

50 & 51 Vict. c. 26.

No claim to be made under the Agricultural Holdings (England) Act for any matter or thing for which a claim is made under this Act.

S. 18. No claim for compensation shall be made under the Agricultural Holdings (England) Act, 1883, for any matter or thing in respect of which a claim for compensation is made under this Act, and in any case in which the provisions of that Act and of this Act conflict the provisions of this Act shall prevail.

ALLOTMENTS ACT, 1887.

50 & 51 Vict. c. 48.

50 & 51 Vict. c. 48.

S. 3 (2). If a sanitary authority are unable by hiring or purchase by agreement to acquire suitable land sufficient for allotments under this Act for any district or parish at a reasonable price or rent, and subject to reasonable conditions, such authority may petition the county authority of the county in which the district or parish is situate, and the county authority (after such inquiry and procedure as provided in the sections hereinafter incorporated in this Act) may make a provisional order authorizing the sanitary authority to put in force, as respects the land mentioned in the order, the provisions of the Lands Clauses Consolidation Act, 1845, and the Acts amending the same with respect to the purchase and taking of land, otherwise than by agreement.

(3.) The Local Government Board, on the application of any county authority, shall introduce into Parliament a bill confirming provisional orders made under the Act by such county authority, and the sanitary authority petitioning for the order shall be considered as the promoters of such order.

(4.) For the purpose of the purchase of land under this section, otherwise than by agreement, sections one hundred and seventy-six, two hundred and ninety-six, and two hundred and ninety-seven of the Public Health Act, 1875, shall, so far as consistent with the tenour of this Act, be incorporated with this Act, and apply as if they were herein re-enacted with the substitution of "the county authority" for "the Local Government Board," and of "any officer of the county authority appointed for the purpose of an inquiry" for "inspectors of the Local Government Board." Provided that:—

(*a*) Any question of disputed compensation shall be referred to the arbitration of a single arbitrator appointed by the parties, or if the parties do not concur in the appointment of a single arbitrator, then, on the application of either of them, by the Local Government Board, and the remuneration to be paid to the arbitrator appointed by the Local Government Board shall be fixed by that Board:

(*b*) If an arbitrator appointed for the purposes of this Act dies or becomes incapable to act before he has made his award, or fails to make his award within two months after he is appointed, his appointment shall determine, and the determination of the compensation shall be referred to another arbitrator appointed in like manner as if no arbitrator had been previously appointed: Provided always, that the same arbitrator may be re-appointed:

(*c*) An arbitrator appointed under this section shall be deemed to be an arbitrator within the meaning of the Lands Clauses Consolidation Act, 1845, and the Acts amending the same, and the provisions of those Acts with respect to an arbitration shall apply accordingly; and, further, the arbitrator, notwithstanding anything in the said Acts, shall determine the amount of the costs, and shall have power to disallow as costs in the arbitration the costs of any witness whom he considers to have been called unnecessarily, and any other costs which he considers to have been incurred unnecessarily.

HOUSING OF THE WORKING CLASSES ACT, 1890.

53 & 54 VICT. C. 70.

PART I.—*Acquisition of Land.*

Acquisition of land.

S. 20. The clauses of the Lands Clauses Acts, with respect to the purchase and taking of lands otherwise than by agreement shall not, except to the extent set forth in the Second Schedule to this Act, apply to any lands taken in pursuance of this part of this Act, but save as aforesaid the said Lands Clauses Acts, as amended by the provisions contained in the said schedule, shall regulate and apply to the purchase and taking of lands, and shall for that purpose be deemed to form part of this part of this Act in the same manner as if they were enacted in the body thereof; subject to the provisions of this part of this Act and to the provisions following; that is to say,

(i.) This part of this Act, shall authorise the taking by agreement of any lands which the local authority may require for the purpose of carrying into effect the scheme authorised by any confirming Act, but it shall authorise the taking by the exercise of any compulsory powers of such lands only as are proposed by the scheme in the confirming Act to be taken compulsorily:

(ii.) In the construction of the Lands Clauses Acts, and the provisions in the Second Schedule to this Act, this part of this Act shall be deemed to be the special Act, and the local authority shall be deemed to be the promoters of the undertaking; and the period after which the powers for the compulsory purchase or taking of lands shall not be exercised shall be three years after the passing of the confirming Act.

Special provision as to compensation.

S. 21.—(1.) Whenever the compensation payable in respect of any lands or of any interests in any lands proposed to be taken compulsorily in pursuance of this part of this Act requires to be assessed—

(*a*) the estimate of the value of such lands or interests shall be based upon the fair market value, as estimated at the time of the valuation being made of such lands, and of the several interests in such lands, due regard being had to the nature and then condition of the property, and the probable duration of the buildings in their existing state, and to the state of repair thereof, without any additional allowance in respect of the compulsory purchase of an area or of any part of an area in respect of which an official representation has been made, or of any lands included in a scheme which, in the opinion of the arbitrator, have been so included as falling under the description of property which may be constituted an unhealthy area under this part of this Act; and

(*b*) in such estimate any addition to or improvement of the property made after the date of the publication in pursuance of this part of this Act of an advertisement stating the fact of the improvement scheme having been made shall not (unless such addition or improvement was necessary for the maintenance of the property in a proper state of repair) be included, nor in the case of any interest acquired after the said date shall any separate estimate of the value thereof be made so as to increase the amount of compensation to be paid for the lands; and

(2.) On the occasion of assessing the compensation payable under any improvement scheme in respect of any house or premises situate within an unhealthy area evidence shall be receivable by the arbitrator to prove—

(1st) that the rental of the house or premises was enhanced by reason of the same being used for illegal purposes or being so overcrowded as to be dangerous or injurious to the health of the inmates; or

(2ndly) that the house or premises are in such a condition as to be a nuisance within the meaning of the Acts relating to nuisances, or are in a state of defective sanitation, or are not in reasonably good repair; or

(3rdly) that the house or premises are unfit, and not reasonably capable of being made fit, for human habitation;

and, if the arbitrator is satisfied by such evidence, then the compensation—

(*a*) shall in the first case so far as it is based on rental be based on the rental which would have been obtainable if the house or premises

53 & 54 Vict. c. 70.

were occupied for legal purposes and only by the number of persons whom the house or premises were under all the circumstances of the case fitted to accommodate without such overcrowding as is dangerous or injurious to the health of the inmates; and

(*b*) shall in the second case be the amount estimated as the value of the house or premises if the nuisance had been abated, or if they had been put into a sanitary condition, or into reasonably good repair, after deducting the estimated expense of abating the nuisance, or putting them into such condition or repair, as the case may be; and

(*c*) shall in the third case be the value of the land, and of the materials of the buildings thereon.

PART II.

S. 38.—(6.) The amount of such compensation [*i. e.*, for pulling down an obstructive building], and also the amount of any compensation to be paid on the purchase of any lands under this section, shall in case of difference be settled by arbitration in manner provided in this part of this Act.

(7.) Where the local authority is empowered to purchase land compulsorily, it shall not be competent for the owner of a house or manufactory to insist on his entire holding being taken, where part only is proposed to be taken as obstructive, and where such part proposed to be taken can, in the opinion of the arbitrator to whom the question of disputed compensation is submitted, be severed from the remainder of the house or manufactory without material detriment thereto, provided that compensation may be awarded in respect of the severance of the part so proposed to be taken in addition to the value of that part.

(8.) Where in the opinion of the arbitrator the demolition of an obstructive building adds to the value of such other buildings as are in that behalf mentioned in this section, the arbitrator shall apportion so much of the compensation to be paid for the demolition of the obstructive building as may be equal to the increase in value of the other buildings amongst such other buildings respectively, and the amount apportioned to each such other building in respect of its increase in value by reason of the demolition of such obstructive building shall be deemed to be private improvement expenses incurred by the local authority in respect of such building, and such local authority may, for the purpose of defraying such expenses, make and levy improvement rates on the occupier of such premises accordingly; and the provisions of the Public Health Acts relating to private improvement expenses and to private improvement rates, shall so far as circumstances admit, apply accordingly in the same manner as if such provisions were incorporated in this Act.

(9.) If any dispute arises between the owner or occupier of any building (to which any amount may be apportioned in respect of private improvement expenses) and the arbitrator by whom such apportionment is made, such dispute shall be settled by two justices in manner provided by the Lands Clauses Acts, in cases where the compensation claimed in respect of lands does not exceed fifty pounds.

Scheme for area comprising houses closed by closing order.

S. 39. *Where a scheme for reconstruction and taking of sites of houses has been sanctioned by the Local Government Board* "the amount of compensation shall, in case of difference, be settled by arbitration in manner provided by this part of this Act."

Settlement of Compensation.

Provisions as to arbitration.

S. 41. In all cases in which the amount of any compensation is, in pursuance of this part of this Act, to be settled by arbitration, the following provisions shall have effect; (namely,)

(1.) The amount of compensation shall be settled by an arbitrator to be appointed and removable by the Local Government Board.

(2.) In settling the amount of any compensation—

(*a.*) The estimate of the value of the dwelling-house shall be based on the fair market value as estimated at the time of the valuation being made of such dwelling-house, and of the several interests in such dwelling-house, due regard being had to the nature and then condition of the property and the probable duration of the buildings in their existing state, and to the state of repair thereof, and without any additional allowance in respect of compulsory purchase; and

(*b.*) The arbitrator shall have regard to and make an allowance in respect of any increased value which, in his opinion, will be given to other dwelling-houses of the same owner by the alteration or demolition by the local authority of any buildings. 53 & 54 Vict. c. 70.

(3.) Evidence shall be receivable by the arbitrator to prove—

(1st) that the rental of the dwelling-house was enhanced by reason of the same being used for illegal purposes or being so overcrowded as to be dangerous or injurious to the health of the inmates; or

(2ndly) that the dwelling-house is in a state of defective sanitation, or is not in reasonably good repair; or

(3rdly) that the dwelling-house is unfit, and not reasonably capable of being made fit, for human habitation;

and, if the arbitrator is satisfied by such evidence, then the compensation—

(*a.*) shall in the first case so far as it is based on rental be based on the rental which would have been obtainable if the dwelling-house was occupied for legal purposes and only by the number of persons whom the dwelling-house was under all the circumstances of the case fitted to accommodate without such overcrowding as is dangerous or injurious to the health of the inmates; and

(*b.*) shall in the second case be the amount estimated as the value of the dwelling-house if it had been put into a sanitary condition, or into reasonably good repair, after deducting the estimated expense of putting it into such condition or repair; and

(*c.*) shall in the third case be the value of the land, and of the materials of the buildings thereon.

(4.) *On payment or tender of compensation owner to convey or local authority to execute deed poll as in the Lands Clauses Acts.*

(5.) Sections thirty-two, thirty-three, thirty-five, thirty-six and thirty-seven of the Lands Clauses Consolidation Act, 1845, shall apply, with any necessary modifications, to an arbitration and to an arbitrator appointed under this part of this Act. 8 & 9 Vict. c. 18.

(6.) The arbitrator may, by one award, settle the amount or amounts of compensation payable in respect of all or any of the dwelling-houses included in one or more order or orders made by the local authority; but he may, and, if the local authority request him so to do, shall from time to time make an award respecting a portion only of the disputed cases brought before him.

(7.) In the event of the death, removal, resignation, or incapacity, refusal, or neglect to act of any arbitrator before he shall have made his award, the Local Government Board may appoint another arbitrator to whom all documents relating to the matter of the arbitration which were in the possession of the former arbitrator shall be delivered.

(8.) The arbitrator may, where he thinks fit, on the request of any party by whom any claim has been made before him, certify the amount of the costs properly incurred by such party in relation to the arbitration, and the amount of the costs so certified shall be paid by the local authority.

(9.) The arbitrator shall not give such certificate where the arbitrator has awarded the same or a less sum than has been offered by the local authority in respect of such claim before the appointment of the arbitrator, and need not give such certificate to any party where he considers that such party neglected, after due notice from the local authority, to deliver to that authority a statement in writing within such time, and containing such particulars respecting the compensation claimed, as would have enabled the local authority to make a proper offer of compensation to such party before the appointment of the arbitrator.

(10.) If within seven days after demand the amount so certified be not paid to the party entitled to receive the same, such amount shall be recoverable as a debt from the local authority with interest at the rate of five per cent. per annum for any time during which the same remains unpaid after such seven days as aforesaid.

(11.) The award of the arbitrator shall be final and binding on all parties.

SECOND SCHEDULE.

53 & 54 Vict. c. 70.

Section 20.

PROVISIONS WITH RESPECT TO THE PURCHASE AND TAKING OF LANDS IN ENGLAND OTHERWISE THAN BY AGREEMENT AND OTHERWISE AMENDING THE LANDS CLAUSES ACTS.

Deposit of Maps and Plans.

Local authority to deposit maps and schedules of lands to be taken compulsorily.

Appointment of Arbitrator.

(4.) After such deposit at the office of the confirming authority as aforesaid, it shall be lawful for the confirming authority upon the application of the local authority, to appoint an arbitrator between the local authority, and the persons interested in such of the scheduled lands, or lands injuriously affected by the execution of such scheme, so far as compensation for the same has not been made the subject of agreement.

Proceedings on Arbitration.

45 & 46 Vict. c. 54, Sch. (1.) *a-f.*

(5.) Before any arbitrator enters upon any inquiry he shall, in the presence of a justice of the peace, make and subscribe the following declaration; that is to say,

"I, A. B., do solemnly and sincerely declare, that I will faithfully and honestly, and to the best of my skill and ability, hear and determine the matters referred to me under the provisions of the Housing of the Working Classes Act, 1890.

A. B.

"Made and subscribed in the presence of ."

And such declaration shall be annexed to the award when made; and if any arbitrator, having made such declaration wilfully act contrary thereto, he shall be guilty of a misdemeanor.

(6.) As soon as an arbitrator has been appointed as aforesaid, the confirming authority shall deliver to him the maps and schedules deposited at their office, and the local authority shall publish once in each of three successive weeks the following particulars:—

(1.) The appointment of the arbitrator; and

(2.) The deposit at the office of the local authority of the copies of such maps and schedules as aforesaid, with a description of the situation of such office, and a statement of the time at which such copies may be inspected by any person desirous of inspecting the same.

42 & 43 Vict. c. 63, Sch. Art. 1.

Such publication shall be made not only by advertisement, but also by placards and handbills affixed in conspicuous places on or near the lands to be taken, and also by leaving a notice thereof at each house proposed to be taken, and also by sending a notice thereof by post to the persons interested in such lands as owners or reputed owners, lessees or reputed lessees, so far as they can be reasonably ascertained.

(7.) In every case in which compensation is payable under Part I. of this Act, by the local authority to any claimant, and which compensation has not been made the subject of agreement (in this Act referred to as "a disputed case"), the arbitrator shall ascertain in such manner as he thinks most convenient the amount of compensation demanded by the claimant, and the amount which the local authority may be willing to pay; and after hearing all such parties interested in each disputed case as may appear before him at a time and place of which notice has been given as in Part I. of this Act mentioned, he shall proceed to decide on the amount of compensation to which he may consider the claimant to be entitled in each case.

(8.) The arbitrator shall give notice to the claimants in disputed cases by causing such notice to be published or otherwise in such manner as he thinks advisable, of a time and place at which the difference between the claimants and the local authority in disputed cases as to the amount of compensation to be paid will be decided by the arbitrator.

(9.) After the arbitrator has arrived at a decision on all the disputed cases brought before him he shall make an award under his hand and seal, and

53 & 54 VICT. c. 70.

such award shall be final, and be binding and conclusive (subject to the provisions concerning an appeal hereinafter contained) upon all persons whomsoever, and no such award shall be set aside for irregularity in matter of form, but the arbitrator may and, if the local authority request him so to do, shall from time to time make an award respecting a portion only of the disputed cases brought before him.

(10.) Such award as aforesaid shall be deposited at the office of the confirming authority, and a copy thereof shall be deposited at the office of the local authority, and the local authority shall thereupon publish once in each of three successive weeks notice of the deposit having been made at the office of the local authority of a copy of the award, and a further notice requiring all persons claiming to have any right to or interest in the lands (the compensation to be paid in respect of which is ascertained by such award) to deliver to the local authority on or before a day to be named in such notice (such day not being earlier than twenty-one days from the date of the last publication of the notice), a short statement in writing of the nature of such claim, and a short abstract of the title on which the same is founded; and such statement and abstract shall be paid for by the local authority. Such abstract of title, in the case of a person claiming a fee simple interest in the land, shall commence twenty years previous to the date of the claim, except there has been an absolute conveyance on sale within twenty years, and more than ten years previous to the claim when the abstract shall commence with such conveyance.

Special Powers of Arbitration.

Power of arbitrator as to apportionment. 42 & 43 Vict. c. 63, Sch. (2).

(11.) The arbitrator shall have the same power of apportioning any rent-service rentcharge, chief or other rent, payment, or incumbrance, or any rent payable in respect of lands comprised in a lease, as two justices have under the Lands Clauses Consolidation Act, 1845.

Amendment respecting severance of properties. 8 & 9 Vict. c. 18. 42 & 43 Vict. c. 63, Sch. (3).

(12.) Notwithstanding anything in section ninety-two of the Lands Clauses Consolidation Act, 1845, the arbitrator may determine that such part of any house, building, or manufactory as is proposed to be taken by the local authority can be taken without material damage to such house, building, or manufactory, and if he so determine may award compensation in respect of the severance of the part so proposed to be taken, in addition to the value of that part, and thereupon the party interested shall be required to sell and convey to the local authority such part, without the local authority being obliged to purchase the greater part or the whole of such house, building, or manufactory.

The local authority, or any person interested, if dissatisfied with a determination under this enactment, may, in manner provided with respect to appeals to a jury in respect of compensation for land by this schedule, submit the question of whether the said part can be taken without material damage, as well as the question of the proper amount of compensation, to a jury; and the notice of intention to appeal shall be given within the same time as notice of intention to appeal against the amount of compensation awarded is required to be given.

Omitted interests. 42 & 43 Vict. c. 63, Sch. (4).

(13.) The amount of purchase-money or compensation to be paid in pursuance of section one hundred and twenty-four of the Lands Clauses Consolidation Act, 1845, in respect of any estate, right, or interest in or charge affecting any of the scheduled lands which the local authority have through mistake or inadvertence failed or omitted duly to purchase or make compensation for, shall be awarded by the arbitrator and be paid, in like manner, as near as may be, as the same would have been awarded and paid if the claim of such estate, right, interest, or charge had been delivered to the arbitrator before the day fixed for the delivery of statements of claims.

If the arbitrator is satisfied that the failure or omission to purchase the said estate, right, interest, or charge, arose from any default on the part either of the claimant or of the local authority, he may direct the costs to be paid by the party so in default.

Entry on Lands on making Deposit.

(24.) Where the local authority are desirous, for the purposes of their works, of entering upon any lands before they would be entitled to enter

53 & 54 Vict. c. 70.

thereon under the provisions hereinbefore contained, it shall be lawful for the local authority, at any time after the arbitrator has framed his award, upon depositing in the Bank of England such sum as the arbitrator may certify to be in his opinion the proper amount to be so deposited in respect of any lands authorised to be purchased or taken by the local authority, and mentioned in such award, to enter upon and use such lands for the purposes of the improvement scheme of the local authority: and the arbitrator shall, upon the request of the local authority at any time after he has framed such award, certify under his hand the sum which, in his opinion, should be so deposited by the local authority in respect of any lands mentioned in such award before they enter upon and use the same as aforesaid, and the sum to be so certified shall be the sum or the amount of the several sums set forth in such award as the sum or sums to be paid by the local authority in respect of such lands, or such greater amount as to the arbitrator, under the circumstances of the case, may seem proper; and, notwithstanding such entry as aforesaid, all proceedings for and in relation to the completion of the award, the delivery of certificates, and other proceedings under Part I. of this Act, shall be had, and payments made, as if such entry and deposit had not been made.

Appeal.

(26.) *Where the award exceeds one thousand pounds, the party dissatisfied may, by leave of the court or a judge, have the amount of compensation settled by a jury.*

Costs of Arbitration.

See 45 & 46 Vict. c. 54, Sch. (H).

(28.) The salary or remuneration, travelling, and other expenses of the arbitrator, and all costs, charges, and expenses (if any) which may be incurred by the confirming authority in carrying the provisions of Part I. of this Act into execution, shall, after the amount thereof shall have been certified under this article, be paid by the local authority; and the amount of such costs, charges, and expenses shall from time to time be certified by the confirming authority after first hearing any objections that may be made to the reasonableness of any such costs, charges, and expenses by or on behalf of the local authority; and every certificate of the said confirming authority certifying the amount of such costs, charges, and expenses shall be taken as proof in all proceedings at law or in equity of the amount of such respective costs, charges, and expenses, and the amount so certified shall be a debt due from the local authority to the Crown, and shall be recoverable accordingly.

Further, any such certificate may be made a rule of a superior court on the application of any party named therein, and may be enforced accordingly.

(29.)—(1.) It shall be lawful for the arbitrator, where he thinks fit, upon the request of any party by whom any claim has been made before him, to certify the amount of the costs properly incurred by such party in relation to the arbitration, and the amount of the costs so certified shall be paid by the local authority;

See 45 & 46 Vict. c. 54, Sch. (I).

Provided that—

(*a.*) The arbitrator shall not be required to certify the amount of costs in any case where he considers such costs are not properly payable by the local authority;

(*b.*) The arbitrator shall not be required to certify the amount of costs incurred by any party in relation to the arbitration, in any case where he considers that such party neglected, after due notice from the local authority, to deliver to that authority a statement in writing within such time, and containing such particulars respecting the compensation claimed, as would have enabled the local authority to make a proper offer of compensation to such party before the appointment of the arbitrator.

(*c.*) No certificate shall be given where the arbitrator has awarded the same or a less sum than has been offered by the local authority in respect of the claim before the appointment of the arbitrator.

(2.) If within seven days after demand the amount certified be not paid to the party entitled to receive the same, such amount shall be recoverable as a debt from the local authority with interest at the rate of five per cent. per annum for any time during which the same remains unpaid after such seven days as aforesaid.

Miscellaneous.

53 & 54 VICT. c. 70.

(30.) The arbitrator may call for the production of any documents in the possession or power of the local authority, or of any party making any claim under the provisions of Part I. of this Act, which such arbitrator may think necessary for determining any question or matter to be determined by him under Part I. of this Act, and may examine any such party and his witnesses, and the witnesses for the local authority, on oath, and administer the oaths necessary for that purpose.

(31.) If any arbitrator appointed in pursuance of Part I. of this Act die, or refuse, decline, or become incapable to act, the confirming authority may appoint an arbitrator in his place, who shall have the same powers and authorities as the arbitrator first appointed; and upon the appointment of any arbitrator in the place of an arbitrator dying, or refusing, declining, or becoming incapable to act, all the documents relating to the matter of the arbitration which were in the possession of such arbitrator shall be delivered to the arbitrator appointed in his place, and the local authority shall publish notice of such appointment in the London Gazette.

(32.) All notices required by this schedule to be published shall be published in some one and the same newspaper circulating within the jurisdiction of the local authority, and where no other form of service is prescribed all notices required to be served or given by the local authority under this schedule or otherwise upon any persons interested in or entitled to sell lands shall be served in manner in which notices of lands proposed to be taken compulsorily for the purpose of an improvement scheme are directed by Part I. of this Act to be served upon owners or reputed owners, lessees or reputed lessees, and occupiers.

COAL MINES REGULATION ACT, 1887.

50 & 51 VICT. c. 58.

50 & 51 VICT. c. 58.

S. 47. With respect to arbitrations under this Act, the following provisions shall have effect:—

(1.) The parties to the arbitration are in this section deemed to be the owner, agent or manager of the mine on the one hand, and the inspector of mines (on behalf of the Secretary of State) on the other.

(2.) Each of the parties to the arbitration may, within fourteen days after the date of the reference, appoint an arbitrator.

(3.) No person shall act as arbitrator or umpire under this Act who is employed in, or in the management of, or is interested in the mine to which the arbitration relates.

(4.) The appointment of an arbitrator under this section shall be in writing, and notice of the appointment shall be forthwith sent to the other party to the arbitration, and shall not be revoked without the consent of that party.

(5.) The death, removal or other change in any of the parties to the arbitration shall not affect the proceedings under this section.

(6.) If within the said fourteen days either of the parties fail to appoint an arbitrator, the arbitrator appointed by the other party may proceed to hear and determine the matter in difference, and in that case the award of the single arbitrator shall be final.

(7.) If before an award has been made any arbitrator appointed by either party dies, or becomes incapable to act, or for seven days refuses or neglects to act, the party by whom such arbitrator was appointed may appoint some other person to act in his place; and if he fails to do so within seven days after notice in writing from the other party for that purpose, the remaining arbitrator may proceed to hear and determine the matter in difference, and in that case the award of the single arbitrator shall be final.

(8.) In either of the foregoing cases, where an arbitrator is empowered to act singly on one of the parties failing to appoint, the party so failing

50 & 51 VICT. c. 58.

may, before the single arbitrator has actually proceeded in the arbitration, appoint an arbitrator, who shall then act as if no failure had occurred.

(9.) If the arbitrators fail to make their award within twenty-one days after the day on which the last of them was appointed, or within such extended time (if any) as may have been appointed for that purpose by both arbitrators under their hands, the matter in difference shall be determined by the umpire appointed as hereinafter mentioned.

(10.) The arbitrators, before they enter on the matter referred to them, shall appoint by writing under their hands an umpire to decide on points on which they may differ.

(11.) If the umpire dies or becomes incapable of acting before he has made his award or refuses to make his award within a reasonable time after the matter has been brought within his cognizance the persons or person who appointed such umpire shall forthwith appoint another umpire in his place.

(12.) If the arbitrators refuse or fail or for seven days after the request of either party, neglect to appoint an umpire, then, on the application of either party, an umpire may be appointed by the chairman of the General or Quarter Sessions of the Peace within the jurisdiction of which the mine or any shaft of the mine is situate.

(13.) The decision of every umpire on the matters referred to him shall be final.

(14.) If a single arbitrator fails to make his award within twenty-one days after the day on which he was appointed the party who appointed him may appoint another arbitrator to act in his place.

(15.) Arrangements shall, whenever practicable, be made for the matter in difference being heard at the same time before the arbitrators and the umpire.

(16.) The arbitrators and the umpire, or any of them, may examine the parties and their witnesses on oath, and may also consult any counsel, engineer, or scientific person whom they may think it convenient to consult.

(17.) The payment, if any, to be made to any arbitrator or umpire for his services shall be fixed by the Secretary of State, and together with the costs of the arbitration and award shall be paid by the parties or one of them according as the award may direct. Such costs may be taxed by a master of one of Her Majesty's Superior Courts who, on the written application of either of the parties, shall ascertain and certify the proper amount thereof. The amount, if any, payable by the Secretary of State, shall be paid as part of the expenses of inspectors under this Act. The amount, if any, payable by the owner, agent, or manager, may, in the event of non-payment, be recovered in the same manner as fines under this Act.

(18.) Every person who is appointed an arbitrator under this section shall be a practical mining engineer or a person accustomed to the working of mines, and every person who is appointed an umpire under this section shall be a county court judge, a police or stipendiary magistrate, a recorder of a borough, or a registrar of a county court, but when an award has been made under this section, the arbitrator or umpire who made it shall be deemed to have been duly qualified as provided by this section.

COUNTY COURTS.

51 & 52 VICT. c. 43.

51 & 52 VICT. c. 43.

The County Courts Act, 1888.

S. 14. No judge shall practice at the bar or as a special pleader or equity draughtsman, or be directly or indirectly concerned as a conveyancer, notary public or solicitor, or act as arbitrator or referee for any remuneration to himself.

51 & 52 VICT. c. 43.

Suits may be settled by arbitration.

S. 104. And be it enacted, That the judge may in any case, with the consent of both parties to the action, order the same, with or without other matters within the jurisdiction of the court in dispute between such parties, to be referred to arbitration, to such person or persons, and in such manner, and on such terms as he shall think reasonable and just; and such reference shall not be revocable by either party except by consent of the judge: and the award of the arbitrator or arbitrators or umpire shall be entered as the judgment in the action, and shall be as binding and effectual to all intents as if given by the judge: provided that the judge may, if he think fit, on application to him at the first court held after the expiration of one week after the entry of such award, set aside any such award so given as aforesaid, or may, with the consent of both parties aforesaid, revoke the reference, or order another reference to be made in the manner aforesaid.

ORDER XX.

COUNTY COURT RULES, 1889.

Arbitration by consent.

At any time after an action is commenced the judge may, with the consent of the parties, as well in cases within the ordinary jurisdiction of the court as in cases of agreement under section sixty-four of the Act make an order for a reference, under the provisions of section one hundred and four of the Act, and all the provisions in the last-mentioned section contained as to references shall apply to a reference proceeding under such an order: provided that the same fees shall be paid as would have been payable on entering judgment under a default summons, but when any reference is ordered to the registrar or other officer of the court the same hearing fee shall be paid as if the action had been tried.

[Section 64 *deals with actions assigned to the Queen's Bench Division and to cases where both parties agree that the judge shall have jurisdiction to try.*]

INDEX.

ABANDONED CLAIM, not a matter in difference, 124, 268.

ABATEMENT,
of nuisance, award of, enforced by attachment, 588.
who to carry out, 295.
of cause referred, by death, no attachment on award, 588.

ABORTIVE REFERENCE, effect of, 706. *See* CAUSE; EQUITY.

ACCEPTING,
money awarded, good cause against rule to set aside award, 687.
by void award justifies plea of accord and satisfaction, 548.

ACCIDENT, whether award set aside, when matter omitted by, 673.

ACCOMMODATION WORKS. *See* LANDS CLAUSES CONSOLIDATION ACT.

ACCORD AND SATISFACTION when a bar, award a bar, 548.

ACCOUNT, MATTER OF, compulsory reference of action for, 6, 87. *See* COMMON LAW PROCEDURE ACT, 1854; JUDICATURE ACTS; ARBITRATION ACT, 1889.

ACCOUNT STATED, award not evidence of, 555.

ACCOUNTANT,
whether functions ministerial, 213.
when notice to be given to parties by arbitrator calling in, 209.
explanation to, when called in on reference, 194.
costs of, 375, 638.

ACCOUNTS, referee taking, need not follow chief clerk's practice, 368.

ACQUIESCENCE,
in reference may bind stranger, 22.
in award, may bind stranger, 558. *See* EVIDENCE.

ACT OF PARLIAMENT, construction of, submissible, 4.

ACTION,
referred, submission of, and proceedings in. *See* CAUSE.
for breach of agreement to refer, damages in, 62.
for revocation, 154. *See* REVOCATION.
for breach of agreement not to sue, 68.
for matters referred pending reference, stayed, 46.
after award made, not maintainable, 514.
against arbitrator. *See* ARBITRATOR, 859—*Personal Interests.*
awarding right to bring in other party's name, 424, 436.
attachment on the award, not permitted together with, 594. *See* ATTACHMENT, 862.

ACTION—*continued.*
ON AN AWARD, 539.
an award a ground of action, 539.
when action only remedy, 540.
under Lands Clauses Act, 540.
when it will lie, 540.
costs of reference need not be taxed before action, 540.
action for costs of award, 540.
enforcing award by action, 541.
statement of claim, 541.
old forms, assumpsit, debt, 541.
scire facias, 541.
covenant, 542.
case, 542.
points of practice in actions to enforce awards, 542.
as to change of venue, and affidavit of debt, 542.
interest recoverable on sum awarded, 542.
reference to the master to compute principal and interest, 543.
writ of inquiry, 543.
pleadings in an action on an award, 543. *See* PLEADING.

ADJUSTMENTS between counties and boroughs, reference of, 8.

ADMINISTRATION ACTION, referee not bound by ordinary practice of chief clerk, 368.

ADMINISTRATOR. *See* EXECUTOR.

ADMISSION,
of mistake by arbitrator, setting aside award for, 308, 676.
remitting back award for, 484.
by arbitrator of bribery not received, 310.
made by party before arbitrator, when evidence, 507.

ADMITTED DEMAND, a matter in difference, 124, 268.

ADULTERY, receiving evidence of, though not pleaded, 201.

ADVOCATES, arbitrators acting as, improper, 215.

AFFECTED DELAY, moving for costs for, 107.

AFFIDAVIT,
form of. *See* APPENDIX, 781.
of arbitrator, admitting mistake in award, 307, 311.
to explain intention, not receivable, 313, 509.
barrister not usually make, 510, 680.
verifying award on summons, to enforce, 630.
on motion for attachment, 602. *See* ATTACHMENT.
to enforce or set aside award, 677. *See* EXECUTION; SETTING ASIDE.
copy to be served with notice of motion, 677.
irregularity of service of, may be condoned, 677.
to show matter not awarded on, 268.
entitling on motion to set aside award in equity, 704.
evidence by, when admissible on a reference, 184.

AFFIRMATION,
form of. *See* APPENDIX, 754.
of Quaker, &c., attachment granted on, 606.

AGENT,
reference by, 23.
what sufficient authority to refer, 23.
arbitrator acting as, improper, 215.
demand by, of thing awarded, 597. *See* ATTACHMENT, 862.
demanding execution of a deed awarded, 536, 597.

AGREEMENT
of reference, termed a submission, 40.
verbal, 52.
by writing not under seal, 53.
requires stamp, 54.
not valid till all parties execute, 136.
under the Statute of William. *See* STATUTE OF WILLIAM III.
revocation of, 152. *See* REVOCATION.
to refer future disputes,
effect of, as a submission, 60.
when arbitrator not named in, 60.
when arbitrator named in, 61.
when specified, how arbitrator to be appointed, 61.
whether assent, after difference arisen, necessary, 61.
in partnership deed, not revocable, 153.
effect in law of agreement to refer future disputes, 61.
whether action for breach, 62.
governing principle, 62.
liquidated damages, 62.
damages for breach, 62.
no plea in law to bar action, 62.
when condition precedent to action, 62, 63, 64.
ground for application to stay action, 64.
effect in equity of agreement to refer future disputes, 64.
no specific performance of agreement where parties refuse to appoint, 64.
no plea of, in equity, 64.
how useful in equity, 65.
no ground for injunction, 65.
distinguished from a covenant not to sue, 65.
under Railway Companies Arbitration Act binding, 65.
agreement not to proceed at law or equity, 65.
effect of the Arbitration Act, 1889.. 66.
provisions implied in submissions, 66.
single arbitrator, 66.
arbitrator's power to appoint umpire, 66.
appointment by court, 66.
court cannot compel appointment, 67.
nor appoint third arbitrator, 67.
nor where reference not strictly an arbitration, 67.
effect in law of agreement not to sue, 68.
agreement enforced by action, 68.
by setting aside proceedings, 68.
by attachment, 68.
discretion in enforcing it, 69.
no plea on equitable grounds, 69.
agreement precluded motion to arrest judgment, 69.
or for judgment non obstante veredicto, 69.
or bringing error on the record, 70.
or on a special case, 70.
not prevent motion to set aside award, 70.
effect in equity of agreement not to sue, 70.
plea of agreement sometimes allowed, 70.

AGREEMENT—*continued.*
to make submission a rule of court, 58.
enlarging time by, 147. *See* ENLARGEMENT.

AGRICULTURAL HOLDINGS ACT, 1883. *See* STATUTES, 827.
award under, specific items to be stated, 478.
reference of matters under, with other matters, 478.
enforcing award, 631.

"AIMIABLES COMPOSITEURS," 122.

ALL MATTERS IN DIFFERENCE,
what included, 125. *See* SUBMISSION, 949.
award must decide as to all, 264. *See* AWARD, 867.

ALLOCATUR,
separate, for costs of cause and reference, 643.
unless consent to single, 644, 695.
new, requisite after award on reference back, 644.

ALLOTMENT OF LANDS. *See* INCLOSURE ACT.

ALLOTMENTS ACT, 1887 (50 & 51 Vict. c. 48). *See* STATUTES, 832.
arbitrator to determine costs, 380.

ALLOTMENTS, &c. (COMPENSATION FOR CROPS) ACT, 1887 (50 & 51 Vict. c. 26). *See* STATUTES, 830.
compensation to be settled by arbitration, 8.
appointment of arbitrator under, 114.
award, how enforced, 631.

ALLOWANCE ordered by arbitrator on goods, 414.

ALTERATION
of order of reference by way of amendment, 79.
court cannot make without consent, except in furtherance of agreement, 79.
striking out clause not to file bill in equity or bring error, 80.
as to all matters in difference, 81.
amending compulsory order as to costs, nunc pro tunc, 81.
amending clerical error, 81.
damages not allowed to be increased, 73.
no amendment of material mistake of officer, 81.
of terms of reference without altering submission, 82.
allowing particulars of set-off after reference, 82.
enlarging particulars of demand, 82.
no new plea allowed, 83.
allowing plea to further maintenance, 83.
of submission, error in account delivered, 81.
of the record, power of the arbitrator on the reference, 202.
of award, arbitrator could not make, 141, 529.
may make to correct clerical error, 529.
court cannot make, 528.
by party, may destroy award, 529.
by a stranger, effect of, 529.
on reference back arbitrator may make, 489.
of verdict, not made according to arbitrator's notes, 635.
of report of official referee, 368. *See* REFEREE.

ALTERNATIVE AWARD, 280. *See* AWARD, 868.
A. or B. to do an act, 295.
defendant or his executors to release, 295.

AMENDMENT. *See* ALTERATION.

AMENDMENT OF THE LAW (3 & 4 Will. IV. c. 42), 804. *See* STATUTES.

AMENITIES, loss of, no ground of compensation, 458. *See* LANDS CLAUSES CONSOLIDATION ACT.

AMOUNT awarded, certainty as to, 288. *See* AWARD, 869.

ANIMUS ARBITRANDI necessary in award, 255.

ANNUITY,
matters relating to, reference of, 133.
release of, awarding, 433.

ANSWER,
to support plea of award to bill in equity, 572. *See* EQUITY.
of arbitrator, read against co-defendant in bill to set aside award, 703.

APPEAL,
against compulsory order of reference, 91.
from judgment on special case, 319, 320.
under Lands Clauses Act, 320.
at quarter sessions referable, 9, 97. *See* QUARTER SESSIONS.
attorney may refer, 27.
against award, though equivalent to verdict, not to Court of Appeal, 370.
against report of referee, 371.
against judgment directed by referee, in Chancery Division, 371.
against award on compulsory reference, to Divisional Court, 371.
whose decision is final, 664, 692.
from order of referee, 372.
did not lie to House of Lords on award in Chancery, 704.
from refusal of judge in Chancery Division to set aside award, 704.

APPOINTMENT,
of arbitrator, 41, 61.
forms of. *See* APPENDIX, 742.
in submission, 40, 60.
what necessary, in Scotch law, 41.
pursuant to arbitration clause, 61.
by will bad, 43.
not complete till notified to other side, 43.
accepted by arbitrator, 112.
by judge under Arbitration Act, 66.
not when reference to three arbitrators, 67.
by party, cannot be compelled, 67.
under Allotments, &c. Compensation for Crops Act, 1887 .. 114.
by Board of Trade or Local Government Board irrevocable, 115, 161.
under the Lands Clauses Act, 99.
should be in duplicate, 585.
making rule of court, 585.
where one party makes default, 100.
of new arbitrator on death, &c., 101.
under Railways Clauses Consolidation Act, 102.
Railway Companies Arbitration Act, 1859 .. 102.

APPOINTMENT—*continued.*
of arbitrator—*continued.*
under Companies Clauses Consolidation Act, 1845 . . 103.
Public Health Act, 1875 . . 103.
Local Government Act, 1888 . . 104.
Tramways Act, 105.
Housing of the Working Classes Act, 105.
of umpire, 231. *See* UMPIRE.
of third arbitrator, recital in award no evidence of, 554.
for a meeting in a reference, 172.
form of. *See* APPENDIX, 752.

APPORTIONING
tithe rent-charge, 434.
costs of the cause and issues, 638.

APPRAISEMENT not an award, 254.

APPRENTICESHIP INDENTURES, awarding cancellation of, 411, 414.

ARBITRATION ACT (9 & 10 Will. III. c. 15). *See* STATUTES, 803.

ARBITRATION ACT, 1889 (52 & 53 Vict. c. 49). *See* STATUTES.
application of, to arbitration,
doubtful if to awards on submissions by parol, 57.
under all Acts not inconsistent, 227, 470, 583.
what inconsistent, 319.
under Building Societies Act, 1875 . . 319.
to Highway Act, Land Drainage Act, 98, 663.
not to affect previous right or liability, 699.
nor pending arbitration, 699.
not to Scotland or Ireland, 41.
to any arbitration commenced after Act under submission before, 378.
to old submission, 378.
arbitrator or referee under,
may enlarge term for award, 143.
appointment of, by court, 165.
how to conduct reference, 177.
authority of, cannot be revoked without leave of court, 153.
may be removed for misconduct, 116.
when officer of court, 203, 495.
effect of being, 203, 496.
may state special case, 206.
remuneration of, 386, 495.
by the Crown, 39.
may give costs, 383.
award under, to be made in three months, 138.
time for making, may be enlarged by arbitrator, 138.
by court, 150.
when remitted, to be made in three months, 139.
clerical mistake in, may be corrected, 142, 267, 310, 529, 668.
not if reference by order of court, 310.
to be in writing, 248.
may be enforced as judgment, 622.
execution on, 630.
setting aside, 653.
whether on parol submission, 653.
for what causes, 664.
"improperly procured," 676.

ARBITRATION ACT, 1889 (52 & 53 Vict. c. 49)—*continued.*
award on reference for trial equivalent to verdict, 370.
for purposes of enforcement, 370.
not for appeals, 370.
costs, orders as to, 378.
arbitrator may fix, 381, 384.
may give, as between solicitor and client, 384, 641.
but not in arbitration under submission before the Act, 384.
authority making order, power over, 691.
court, definition of, 151, 223.
powers of, under, 224.
Court of Appeal, 224.
power to refer cause or question thereon, 87.
to appoint arbitrator if no appointment made, 66, 223.
if arbitrator fails to act, 66, 223.
not to compel party to appoint, 67.
not to appoint when reference to three arbitrators, 67.
powers of court and judge under, may be exercised by master, 72.
but not as to attachment, 606.
to enlarge time for award, 150.
to determine remuneration of referee, 386.
to remit matters to arbitrator, 480, 485.
on motion, 487.
from time to time, 487.
to remove arbitrator for misconduct, 497.
to enforce award as a judgment, 622.
over costs, 691.
same, over references by order of court as over references by consent out of court, 224, 622.
Crown may refer under, 39.
not compellable to, 39.
master, powers of court under, 72, 606.
not to make order of attachment, 606.
reference of matters under, 5.
for inquiry and report, 87.
trial, 87, 370.
by consent, 87.
of parties not under disability, 15, 19.
when prolonged examination necessary, 6, 88.
matters of account, 88.
not criminal matters, 59, 75.
of cause or question in, not of cause and all matters, 88.
question arising in cause, what is, 89.
time for, 88.
conduct of, 177.
witnesses' attendance at, how enforced, 179.
swearing of, 182.
giving false evidence, guilty of perjury, 183.
remitting award, 480.
repeal by, of Common Law Procedure Act, 5.
of Judicature Acts, 6.
of stat. 9 & 10 Will. III. c. 15..477, 654.
does not affect right acquired before commencement of Act, 699.
report of referee may be adopted wholly or partially, 367.
if adopted may be enforced as a judgment, 367.
how adopted or varied, 368.

ARBITRATION ACT, 1889 (52 & 53 Vict. c. 49)—*continued.*
schedule, terms of, included in submission, 66.
single arbitrator unless otherwise provided, 66.
two arbitrators may appoint umpire, 66.
written award in three months, 138.
witnesses to be examined on oath, 182.
documents to be produced, 190.
two arbitrators may appoint umpire, 214, 223.
in default court may appoint, 214, 223.
umpire so appointed has full powers, 235.
umpire's award within a month, 238.
costs of reference and award to be in discretion of arbitrator, 378.
as between solicitor and client may be given, 378, 384.
this deemed included in submissions before the Act, 378, 384.
special case under, 318.
court may order arbitrator to state, 320.
but parties cannot compel, 320.
in arbitration under Building Societies Act, 1875..319.
staying proceedings contrary to reference, 46.
submission under, 41, 53.
not parol, 53.
any agreement, whether arbitrator named or not, 53, 60.
includes terms in schedule to Act, 53.
unless excluded, 56.
same effect as if made order of court, 53.
for enforcing, 86.
as to taxing costs, 292.
as to attachment, 576.
taxation of costs, 643.
setting aside award on, 686.
not revocable, 153, 156.
umpire appointed by arbitrators, 229.
after notice to do so, 229.
limit of time for appointing, 229.
time for entering on reference, 234.
powers of, when appointed by court, 235.
award of, time for, 238.
may be enlarged, 238.

ARBITRATION PENDING,
no plea in action as to the matters referred, 45.
agreement for action on, 62.
plea of, when condition precedent, 63.

ARBITRATOR,
how appointed. *See* APPOINTMENT.
appointing pursuant to arbitration clause, 61.
acceptance of office, 112.
appointment by judge, when parties fail to agree, 66.
who may be arbitrator, 111.
any person, 111.
not interested, or partial, 112.
person interested, 112.
architect, who has guaranteed price of building, 112.
known interest not disqualify, 112.
architect to superintend builder, 112.
company's valuer, 113.
surveyor and shareholder of railway, 113.

ARBITRATOR—*continued.*
who may be arbitrator—continued.
known interest not disqualify—*continued.*
party arbitrator in his own cause, 113.
stewards of a horse-race, not arbitrators, 114.
fluctuating body, 114.
foreigner not good arbitrator by French law, 114.
nominee of Board of Trade, 116.
county court judge may not be for reward, 115.
special arbitrators by statute, 114.
mining engineer, 114.
manufacturers and workmen, 114.
justice of the peace, 114.
barrister, 114.
barrister to certify rules of savings banks, 115.
the master to settle costs of compensation-jury, 115.
on a compulsory reference, 115.
official and special referees, 115.
under Arbitration Act, officers of court, 115.
made trustee to convey lands pursuant to award, 43.
moral qualities requisite in an arbitrator, 116.
incorruption and impartiality, 116.
for misconduct court may remove arbitrator, 116.
taking money of party before award made, 116.
purchasing claim in dispute before him, 116.
bonâ fide agreement with party, 117.
imposing terms on a party, 117.
principles by which the arbitrator should be guided, 117.
characters filled by arbitrator, 117.
judge of law and fact—jury—judge at Nisi Prius—Court in banc, 118.
Master in Chancery—Lord Chancellor—Attorney-General—dictator, 118.
principles of decision generally, 118.
when all matters referred, 119.
power according to law, 119.
legal and equitable authority, 119.
reforming a deed, 119.
arbitrator not bound by rule of practice, 120.
moral considerations, 120.
power beyond law, 121.
"aimiables compositeurs," 122.
OVER WHAT MATTERS THE SUBMISSION GIVES THE ARBITRATOR JURISDICTION, 123. *See* SUBMISSION.
DURATION OF THE ARBITRATOR'S AUTHORITY, 136.
duration when not enlarged or revoked, 136.
when the submission provides no time within which the award is to be made, 136.
commencement, 136.
not till execution of submission by all, 136.
time for awarding usually limited, 137.
entering on the reference, 137.
duration for life, when no limit, 137.
power formerly to revoke authority, 137.
no limit by jury process, on reference at Nisi Prius, 138.
or when arbitrator to certify, 138.
limit on Scotch reference, one year, 138.
arbitrator cannot fix a limit, 138.

ARBITRATOR—*continued.*
DURATION OF THE ARBITRATOR'S AUTHORITY—*continued.*
duration when not enlarged or revoked—*continued.*
when the submission prescribes a limited time for making the award, 138.
award must be within time limited, 138.
time for awarding under Arbitration Act, 138.
within three months, unless enlarged, 138.
within one month when award remitted, 139.
"within" includes the last day, 139.
limit "until" a certain day, 139.
months formerly lunar, not calendar, 139.
valuation to be made on a day fixed, 139.
periodical limits, 140.
limit under the Lands Clauses Act, 140.
two arbitrators acting, 142.
one of two acting, 142.
single arbitrator, 142.
limit under Railway Companies Arbitration Act, 141.
in local Act held directory, 141.
authority of arbitrator determined by making the award, 141.
arbitrator cannot alter award, when made, 141.
may correct clerical error, 142.
cannot make new, when award set aside, 142.
power to make several awards, 142.
making new award under a statute, when first void, 142.
enlarging the time for making the award, 143. *See* ENLARGEMENT.
revoking the arbitrator's authority, 152. *See* REVOCATION.
notice to arbitrator of revocation, necessary, 154.
mistake of arbitrator in law, ground for application for leave to revoke, 160.
corrected on motion to revoke, 206.
when award made after revocation effective, under 3 & 4 Will. IV. c. 42..156.
bankruptcy no revocation, 162.
death, or refusal to act, of the arbitrator, a revocation, 164. *See* REVOCATION.
supplying vacancy, 66, 165.
POWER AND DUTY OF THE ARBITRATOR BEFORE MAKING THE AWARD, 171.
proceedings in the reference, 171.
serving the submission on the arbitrator, 171.
procuring order of reference, 172.
power of the arbitrator to regulate the proceedings in the reference, 172.
arbitrator to decide how reference to be conducted, 172.
appointing time and place of meetings, 172.
serving appointment on opponent, 173.
rescinding appointment, 173.
when court will review exercise of arbitrator's discretion, 173.
notice of attendance by counsel, 173.
ordinary course of a reference, 173.
refusing to hear counsel, 174.
refusing to allow a stranger to attend, 174.

ARBITRATOR—*continued.*
POWER AND DUTY OF THE ARBITRATOR, &c.—*continued.*
proceedings in the reference—*continued.*
excluding son of party and shorthand writer, 174.
calling in solicitor or accountant, 174.
examining sick witness at his own house, 175.
accepting hospitality of party, 176.
arbitrator must perform condition precedent, 176.
declaration under the Lands and Railways Clauses Acts, condition precedent, 176.
power under Railway Companies Arbitration Act, 176.
under the Common Law Procedure Act, 177.
arbitrator under Arbitration Act, 177.
power of referee under Judicature Acts and Rules of Court, 177. *See* REFEREE.
copies of bankers' books evidence, 180.
examination of the witnesses on oath, 182.
when requisite to swear witnesses, 182.
when discretionary, 182.
under Arbitration Act, 1889.. 182.
power to administer oath, 182.
old practice, swearing witnesses, 183.
before the court or a judge, 183.
not before commissioners for taking affidavits, 183.
arbitrator formerly no power to administer oath, 183.
new practice, arbitrator may administer oath, 183.
witnesses sworn at the meeting, 183.
false evidence, perjury, 183.
arbitrator empowered to administer oath under Lands, Railways, and Companies Clauses Acts, 183.
no power formerly on county court reference, 184.
evidence by affidavits, when admissible, 184.
attempt to mislead arbitrator a misdemeanor, 184.
duty of the arbitrator to hear the evidence, 185.
arbitrator should hear all the evidence, 185.
evidence must be tendered, 185.
how arbitrator may be set right, 160, 185, 206.
award bad, if made without hearing evidence, 185.
hearing one side only, 185.
when arbitrator may refuse to hear evidence, 186.
when peculiarly skilled, 186.
where usage to value on inspection, 187.
if deciding on inspection of samples, 187.
government board, arbitrators, 187.
view discretionary, 187.
rejecting evidence of want of assets, 188.
misleading party, awarding before case closed, 188.
closing case too hastily, 188.
party asking to be heard, 188.
for time, 188.
refusing to reopen case, 189.
to wait for absent witness, 189.
arbitrator should take notes of the evidence, 189.
examining party as witness, 189.
under the Lands, Railways, and Companies Clauses Acts, 190.

ARBITRATOR—*continued.*
POWER AND DUTY OF THE ARBITRATOR, &c.—*continued.*
proceedings in the reference—*continued.*
power of the arbitrator to call for documents, 190.
provision in the order of reference, 190.
in submission, 190.
under the Lands, Railways, and Companies Clauses Acts, and Railway Companies Arbitration Act, 1858 . . 190.
duty of the arbitrator to receive no evidence unless both parties are present, 191.
arbitrator should not receive a private statement from a party, 191.
should examine witness in presence of both parties, 191.
irregular examination avoids award, 191.
held, in the Common Pleas,—only when party in fault, 192.
in the Queen's Bench,—though party not in fault, 192.
examining witness, both parties absent, bad, 193.
party in private, bad on public grounds, 193.
no exception in case of merchant arbitrators, 194.
inquiring whether party admits or disputes items, 194.
private statements to accountant, 194.
meeting, nothing done in the reference, 195.
waiving objection to irregular conduct of the arbitrator, 195.
parties may waive irregularity, 195.
improper enlargement of time, 195.
appointment of umpire, 196.
examination in private, 196.
irregular meeting, 196.
rehearing by three arbitrators, 196.
attending meetings under protest, 196.
waiver, by lying by without objecting, 197, 216.
arbitrator's course to cure irregularity, giving full notice, 197.
when the arbitrator empowered to proceed ex parte, 197.
power to proceed ex parte implied, 197.
arbitrator may not proceed ex parte without good cause, 198.
party refusing to attend, 198.
attempting to revoke, 198.
notice of intention to proceed ex parte, 198.
peremptory notice for each meeting, 198.
whether notice requisite when authority denied, 199.
Railway Companies Arbitration Act, 1859 . . 199.
duty of the arbitrator in deciding points of evidence, 199.
arbitrator bound by the rules of evidence, 199.
his decision not open to review, 200.
refusing to hear evidence on a matter is not a mere mistake of evidence, 200.
determining claim for damages to be a debt, 200.
if doubtful, arbitrator should receive the evidence, 200.
receiving evidence of adultery in assumpsit, when not pleaded, 201.

ARBITRATOR—*continued.*
POWER AND DUTY OF THE ARBITRATOR, &c.—*continued.*
proceedings in the reference—*continued.*
rejecting evidence after accounts closed, 201.
knowingly receiving inadmissible evidence, 201.
evidence of collateral matters, 201.
arbitrator to take notice of stamp on documents, 202.
power to apply to the court for directions, 202.
of arbitrator between counties and boroughs to state case, 202.
party retaining power of objecting to evidence, 202.
duty of the arbitrator when empowered to amend, 202.
may correct error in description, 203.
may not strike out substantial claim, 203.
power of the arbitrator to make or decline to make an award, 203.
court no power to compel arbitrator to award, 203.
unless under Arbitration Act he is "officer of the court," 203.
compelled to award by the civil law, 203.
injunction to restrain arbitrator, 203.
the parties, 204.
closing the case, 205.
arbitrator should give notice that case is closed, 205.
reopening case, 205.
requiring matters in difference to be stated in writing, 205.
making interlocutory award, 205.
when arbitrator about to award wrongly, 206.
setting him right on motion to revoke, 160—206.
stating case or trying issue pending the reference, 206.
case stated under Arbitration Act, 1889 . . 206.
Rules of Court, 207.
error did not lie on case stated, 206.
delegating authority before award, 207.
power of the arbitrator to adopt the opinion of another, 207.
arbitrator may not delegate judicial functions, 207.
may adopt opinion of another, 208.
but not when he believes it wrong, 209.
may take assessors, 208.
calling in a valuer, 209.
when objectionable to call in solicitor, 209.
duty of the arbitrator in taking an opinion on matter of fact, 210.
whether arbitrator should examine adviser as a witness, 211.
duty of the arbitrator in taking an opinion on a point of law, 211.
may consult counsel as to framing award, 211.
should be in presence of parties, 213.
taking counsel's opinion on a case, 211.
on a case stated incorrectly, 212.
power of the arbitrator to delegate a ministerial act, 213.
whether accountant ministerial officer, 213.
taxing costs ministerial, 213.
duty of joint arbitrators, 214.
appointment of joint arbitrators, 214.
court cannot compel appointment, 214.
appointing includes notifying to party, 214.

ARBITRATOR—*continued.*
POWER AND DUTY OF THE ARBITRATOR, &C.—*continued.*
duty of joint arbitrators—*continued.*
power of two arbitrators to appoint umpire, 214. *See* UMPIRE.
powers under Arbitration Act, 1889.. 214.
disadvantages of a reference to several arbitrators, 215.
arbitrators often advocates of party appointing, 215.
mistake as to nature of duty, 215.
two arbitrators appointing a third, 215.
judge appointing a third arbitrator
under Common Law Procedure Act, 226, 227.
under Arbitration Act, 1889.. 223.
ambiguity of submission, 216.
additional liability to failure, 216.
duty of all the arbitrators to act, 216.
if one refuse no award can be made, 216.
waiver of objection to not acting, 216.
arbitrators may not delegate to each other, 217.
nor agree beforehand to be bound by a stranger's opinion, 217.
may adopt each other's opinion, 217.
all the arbitrators must act together, 217.
one cannot proceed if other merely fail to attend, 218.
separate examination of witnesses, irregular, 218.
absence of one arbitrator procured by a party, 218.
all should execute award together, 218.
appointment of umpire sometimes condition precedent to acting, 219.
under the Lands, Railways, and Companies Clauses Acts, and Railway Companies Arbitration Act, 219.
disagreement of joint arbitrators, 236. *See* UMPIRE.
arbitrators' charges may be cost of umpirage, 245, 375.
duty of arbitrators when award by less than all valid, 219.
before commencing, two must choose a third, 219.
third arbitrator not an umpire, 219.
enlarging time before appointing third arbitrator, 219.
recital in award no evidence of appointment of third arbitrator, 554.
two may act alone, if third refuse, 219.
where no refusal, third must be consulted, 220.
death, refusal, or incapacity of one of two arbitrators under the Lands, Railways, and Companies Clauses Acts, and Railway Companies Arbitration Act, 221.
what a refusal to act, 222.
power and duty of an umpire, 223. *See* UMPIRE.
DUTY OF THE ARBITRATOR IN MAKING HIS AWARD, 246. *See* AWARD, 866.
DUTY OF ARBITRATOR STATING A CASE, 206. *See* CASE; AWARD.
power to employ solicitor to draw award, 639.
HOW TO AWARD ON THE CAUSE REFERRED, 336. *See* CAUSE.
directing judgment, 645.
HOW TO AWARD AS TO COSTS, 373. *See* COSTS.
HOW TO AWARD UNDER THE LANDS CLAUSES ACT, 452. *See* LANDS CLAUSES CONSOLIDATION ACT.

ARBITRATOR—*continued.*
WHAT DIRECTIONS MAY BE GIVEN IN THE AWARD, 409.
directions under the general powers of the arbitrator, 410.
what kind of satisfaction may be directed, 410.
arbitrator no implied power over person or land, 411.
power over personal estate only, 411.
over apprenticeship, but not apprentice, 411.
none to award lien on land, 411.
or to direct two parties to marry, 411.
whether arbitrator may award other satisfaction than money, 411.
awarding chattel, 411.
defendant to keep plaintiff's goods, 411.
on salvage of goods burnt, 412.
bond to be delivered up, 412.
begging pardon, 412.
power to give directions, not implied, 412.
none to order tenant to replace fixtures, 412.
or party to take disputed title with all faults, 412.
awarding power of distress invalid, unless dispute respecting right to power, 413.
matter in difference necessitating special directions, 413.
awarding agent to verify vouchers, 413.
regulating future payment of tithes, 414.
ordering indentures of apprenticeship to be cancelled good, 414.
assignment of apprentice void, 414.
directing acceptance of goods at reduced price, 414.
securities to be delivered up, 414.
no power to direct illegal act, 415.
or to order party to commit a trespass, 415.
directions as to payment of money, 415. *See* PAYMENT.
as to payment of interest, 420. *See* INTEREST.
in cases of partnership, 421. *See* PARTNERS.
as to giving an indemnity, 424. *See* INDEMNITY.
as to executing releases, 427. *See* RELEASE.
as to executing conveyances, 428. *See* CONVEYANCE.
as to allotting lands, 440. *See* INCLOSURE ACT.
in making partition of lands, 442. *See* PARTITION.
directions affecting strangers to the submission, 443. *See* STRANGER.
directing a payment to be made to a stranger, 443.
a stranger to do an act, 446.
directions affecting a stranger's property, 449.
directions under a power to award what shall be done, 432.
whether clause to say what shall be done compulsory, 430.
words "shall or may" construed imperative, 430.
"what, if anything, shall be done," permissive, 430.
award to enjoy property as before, bad, 431.
that nothing be done, good, 431.
whether award bad when faulty direction, what to be done, 432.
injunction where no directions in award and nuisance recurring, 432.
directions as to what shall be done held valid, 432.
no objections to directions allowed as to the merits, 433.
directions when presumed certain, 433.
awarding release of annuity, 433.
undivided shares of tithes, 434.
easement, 434.
imposing duty of repairing, 435.
regulating a stream of water, 435.

ARBITRATOR—*continued.*
WHAT DIRECTIONS MAY BE GIVEN IN THE AWARD—*continued.*
directions as to what shall be done held valid—continued.
provision for possible change of course of stream, 435.
directing change from wooden to iron machinery, 436.
giving liberty to sue in other party's name, 436.
directing specific performance of agreement, 436.
to pull down wall, 436.
directing running of trains on railway, 436.
directions as to what shall be done held void, 437.
directing entry of verdict, 437.
awarding too large a right of way, 437.
directing surveyor to fix water-marks, 438.
uncertain directions invalid, 438.
not specifying fixtures, 438.
what precautions to be taken, 438.
what process of filtering to be used, 439.
arbitrator should award specifically on scientific matters, 439.
award not specifying capacity of drain awarded, 439.
advisable to annex a plan to the award, 440.
directions under Coal Mines Regulation Act, 440.
the award, how far affected by a mistake of the arbitrator, 303.
See MISTAKE.
effect of extrinsic statements by the arbitrator showing a mistake on his part, 310.
statement by arbitrator of wrong reasons for decision, 310.
hearsay evidence of admissions, 310.
whether admissible to impeach award, 310.
old practice to act on such statements, 311.
statement of reasons delivered with award, 311.
case stated with award, 311.
letter admitting excess of jurisdiction, 311.
affidavit of mistake, 311.
statement with a view to the court's opinion, 312.
modern rule, statements of arbitrator not receivable, 312.
letter of arbitrator rejected, 313.
of barrister arbitrator, 313.
affidavit to explain award, 313.
letter of arbitrator to show his intention, 313.
paper delivered with award to limit verdict, 314.
inquiry by the court of the arbitrator's grounds of award, 314.
on what matters arbitrator has awarded, 315.
damages, up to what date, 315.
inquiry in open court, 315.
in equity, 315.
STATING CASE UNDER ARBITRATION ACT, 1889 . . 318.
arbitrator may state special case, 318.
court may compel it, 318.
was not compulsory to do so under Common Law Procedure Act, 318.
referee under Judicature Acts may state case, 318.
appeal from judgment on case, 319.
costs of hearing special case, 319.
arbitrator under Lands Clauses Act may state a case, 319.
not so Local Government Board when statutory arbitrators, 319.
arbitrators under Building Societies Act compellable to, 319.

ARBITRATOR—*continued.*
STATING CASE UNDER ARBITRATION ACT, 1889—*continued.*
duty of the arbitrator when empowered to raise a point of law, 320.
clause in submission, when compulsory, 320.
when enabling, 320.
under Arbitration Act, 1889 . . 320.
power as to evidence and points reserved as a judge at Nisi Prius, 320.
how to state a case in an award, 321. *See* AWARD.
PERSONAL INTERESTS OF THE ARBITRATOR, 492.
arbitrator's right to remuneration, 492.
whether arbitrator can sue for fees, 493.
when implied promise to pay, 493.
when express promise to pay his charges, 493.
whether remedy for fees by attachment, 493, 589.
practice not to deliver award until fees paid, 494.
lien of arbitrator on award for his fees, 494.
no lien on documents put in evidence before him, 494.
costs of solicitor drawing award, 494.
under Arbitration Act, 1889 . . 495.
fees on award under Lands Clauses Act, 495.
liability of the arbitrator at law, 495.
liability in respect of fees, 495.
arbitrator attempting to extort excessive fee, 495.
whether liable to action for withholding award, 496.
not liable to attachment, 496.
court no jurisdiction over arbitrator, 496.
excess extorted recoverable by action, 497.
liability for misconduct or in respect of the award, 497.
removal for misconduct under Arbitration Act, 1889 . . 497.
whether arbitrator liable to action for corrupt award, 497.
not liable for want of skill or care, 497.
mandamus to arbitrators to appoint umpire and assess costs, 498.
misconduct of arbitrator a misdemeanor under the Lands and Railways Clauses Acts, 498.
arbitrator directing trespass liable to action, 498.
liability for appointing a receiver, 498.
liability of the arbitrator when a stakeholder, 498.
arbitrator holding chattel to abide award, 499.
bankruptcy of party depositing it, 499.
interpleader on adverse claims, 499.
liability of arbitrator for money had and received, 499.
to whom arbitrator should deliver chattel, 499.
liability of arbitrator to an action for the chattel, 500.
liability of the arbitrator in equity, 501.
arbitrator made defendant to a bill to impeach award, 501.
might generally demur, 501.
action to impeach award for mistake, arbitrator should not be made party, 501.
striking out arbitrator's name as defendant, 502.
arbitrator cannot demur when gross misconduct charged, 502.
costs may be prayed against corrupt arbitrator, 502.
no decree against arbitrator except for costs, 502.

ARBITRATOR—*continued.*
PERSONAL INTERESTS OF THE ARBITRATOR—*continued.*
liability of the arbitrator in equity—*continued.*
arbitrator need not answer as to grounds of award, 503.
but must as to charge of corruption, 503.
arbitrator may be entitled to costs, 503.
condemned to pay costs when corruption proved, 504, 703.
testimony by the arbitrator, 504.
arbitrator called as a witness, 504.
not privileged to refuse testimony, 505.
whether he need state grounds of award, 505.
inquiring whether he had considered a matter, 505.
not as to grounds of compensation, 505.
arbitrator may prove proceedings in the reference, 506.
proving admission made by parties before him, 507.
what admissions receivable, 507.
not admissions with a view to a compromise, 507.
referee to report may be examined, 508.
voluntary statements by the arbitrator, 509.
whether arbitrator should state grounds of award to a party, 509.
affidavit by arbitrator of mistake in award, 311, 509.
to explain award not receivable, 510.
as to proceedings in the reference, 510.
when the arbitrator is a barrister, 510.
barrister arbitrator not usually make affidavit, 510.
using arbitrator's notes on motion to set aside award, 511.
barrister arbitrator declining to explain to the parties, 511.
whether court can notice explanatory letter of arbitrator, 512.
court inquiring of the arbitrator the grounds of his award, 512.
court not amend verdict by notes of, 635.
error in judgment or as to evidence no ground for setting aside award, 667.
DUTY OF ARBITRATOR WHEN AWARD REFERRED BACK,
arbitrator's powers revived by reference back, 488.
same power over costs of second reference as of first, 488.
limit of time on reference back, 139, 489.
three months under Arbitration Act, 139.
arbitrator, when bound to hear evidence, 489.
award sent back for specific purpose, 489.
to be amended, 490.
mode of framing second award, 491.

ARCHITECT, when arbitrator, 42, 112.

ARREST,
reference of cause no discharge of defendant from, 86.
award no discharge of defendant from, 525.
privilege from, attending reference, 181.
arbitrator no power to discharge from, 182.
of party on attachment, 614.
payment to sheriff, no discharge, 615.

ARREST OF JUDGMENT, prohibited by agreement not to sue, 69.

ARTIZANS' DWELLINGS ACT,
repealed by Housing of Working Classes, 1890 . . 7, 452.
requisition under, equivalent to notice to treat, 452.
awarding under, 470.
effect of award on house taken, 523.
to pass property, 523.
interest allowed where jury increase sum, 523.

ASSAULT, indictment for, referable, 13.

ASSENT to reference, binds stranger, 22.

ASSESSMENT committee no power to refer, not liable for costs, 9.

ASSESSORS,
under Rules of the Supreme Court, 88.
legal, cost of, allowed to lay arbitrator, 640.

ASSETS,
reference when admission of, by executor, 30. *See* EXECUTOR.
by trustee of bankrupt, 33.
award as to. *See* EXECUTORS.

ASSIGNEE,
of bankrupt, reference by, 33. *See* BANKRUPT.
of contract or debt, reference by, 23.
of insolvent, reference by. *See* INSOLVENT.
of insolvent petitioner, reference by, 33.
of right in difference could not sue on award in his own name, 541.
may sue the assignor, if he receive the sum awarded, 525.

ATTACHMENT,
lies to enforce submission, 86.
for breach of agreement not to sue, 68.
for preventing award being made, 106.
for revoking submission made rule of court, 154.
to compel production of documents by the parties, 190.
not against arbitrator, 496.
award in equity enforced by, 578, 587.
costs should be applied for, 614.
ENFORCING THE AWARD BY ATTACHMENT, 586.
in what cases an attachment will be granted, 586.
only when submission is or has effect of a rule of court, 586.
when submission a rule, not performing award contempt of court, 586.
when attachment first granted at common law to enforce award, 587.
attachment in equity, 587.
under 9 & 10 Will. III. c. 15 . . 587.
Arbitration Act, 1889 . . 587.
lies when submission can be made a rule, 587.
and not otherwise, 588.
not when cause has abated by death, 588.
lies to enforce award on indictment, 588.
for whom and for what an attachment will be granted, 589.
for party or representative, 589.
not for a stranger, 589.
whether for arbitrator to enforce payment of his costs, 493, 589.
attachment lies if award not performed, 589.

ATTACHMENT—*continued.*
ENFORCING THE AWARD BY ATTACHMENT—*continued.*
in what cases an attachment will be granted—*continued.*
to compel plaintiff to dismiss bill in equity, pursuant to award, 580.
for costs as well as damages awarded, 589.
for money overpaid on taking up award, 589.
not for interest on sum awarded, 589.
second motion for, on new facts, 590.
who not liable to be attached, 590.
not peers or members of parliament, 590.
or executor of party, 590.
liability of executors, trustees, and assignees, when parties, 590.
whether husband of woman in default, 591.
not public officer defendant by statute, 591.
not a corporation as such, 591.
party beyond jurisdiction, 591.
when bankrupt, 163.
on what awards attachment refused, 591.
on compulsory reference of cause, under Common Law Procedure Act, 591.
when award fails to ascertain amount, 591.
does not order payment, 592.
directs A. or B. to do act, 592.
unreasonable award, 592.
whether on parol award, 592.
when mistake in award, 592.
not when validity of award doubtful, 593.
delay in applying for unexplained, 593.
no proceeding by attachment and action at the same time, 594.
old rule, attachment granted, though action brought, 594.
party sometimes put to his election, 594.
attachment granted on discontinuing action, 595.
filing affidavit of debt not bar attachment, 595.
if action brought, attachment discharged, 595.
imprisonment for contempt not bar action, 595.
steps necessary to bring the party into contempt, 595.
demanding performance of the award, 595.
submission must be equivalent to or made rule of court, 596.
rule no relation back, 596.
costs must be taxed before demand, 596.
demand of performance must be made, 596.
though party not paid at time and place prescribed, 596.
not good pending motion to set aside award, 596.
demand by all parties entitled, 597.
of money by one plaintiff, 597.
or under power of attorney from all, 597.
agent to demand money must act under power of attorney, 597.
not, when demand to execute a deed, 597.
demand by solicitor, whether good, 597.
when award orders payment to plaintiff or his attorney, 598.
when party has not attended to receive sum awarded, 598.

ATTACHMENT—*continued.*
ENFORCING THE AWARD BY ATTACHMENT—*continued.*
steps necessary to bring the party into contempt—*continued.*
condition precedent must be performed, 598.
demand to execute deed after appointed day is past, 598.
must be of only what is well awarded, 598.
of precise thing awarded, 599.
service of the rule, award, and other documents, 599.
service must be personal, 599.
copy of award and rule to be left, 599.
so of allocatur and agent's power of attorney (if any), 600.
originals must be shown, 600.
originals shown two days after service of copies, bad, 600.
notice of enlargement of time must be given, 600.
verbal notice sufficient, 600.
serving submission not requisite, 600.
tendering copies and leaving them, good service, 601.
no attachment if party cannot be served, 601.
unless award, &c., already in his possession, 601.
what errors in copy served fatal, 601.
the course of the motion for an attachment, 602.
affidavits on the motion for an attachment, 602.
when cause referred, affidavits must be entitled in it, 602.
when reference out of court, entitled in the matter, 602.
affidavits on showing cause, 602.
rule to show cause, 603.
affidavit of service of rule nisi, 603.
after attachment granted, title should be, "Queen against party," 603.
objection, want of title, could not be waived, 603.
award must be verified by affidavit, 603.
should be shown made in time, 603.
enlargements of time should have been made part of rule with submission, 603.
affidavit must show demand and service, 604.
execution of power of attorney, 605.
non-performance of award, 605.
performance of condition precedent, 605.
presumption as to payment of costs of award, 605.
misnomer in affidavit, 605.
attachment granted on copy of award, original lost, 605.
on affirmation of a Quaker, &c., 606.
the motion for an attachment, 606.
in open court formerly, 606.
can now be made in chambers, 616.
not to be heard by registrar or master in Queen's Bench Division, 606.
should generally be in court in Chancery Division, 606.
chief clerk power to refuse, but not to grant it, 606.
could not be moved for on last day of term, 606.
nor cause shown on that day, 607.

ATTACHMENT—*continued.*
ENFORCING THE AWARD BY ATTACHMENT—*continued.*
the course of the motion for an attachment—*continued.*
moved for against one of several defendants, 607.
separate attachments for separate sums, 607.
rule drawn up on reading what, 607.
on reading rule embodying submission, award, and affidavits, 607.
master may refuse to draw up rule on unstamped award, 255, 607.
rule, rule nisi only formerly, 607.
service of rule nisi must generally have been personal, 607.
since Judicature Acts, service of notice of motion, 608.
no rule nisi for attachment, 608.
leave of court for attachment, 608.
notice of motion to state grounds, 608.
affidavits intended to be used to be served with, 608.
if not, court may condone the irregularity, 608.
need not be served personally, 608.
waiving want of personal service, 608.
by appearing, by consenting to enlarging rule, 608.
what may be shown for cause against the rule, 609.
irregularity in demand or service of documents, 609.
defect in affidavits, 609.
defects on face of award, 609.
not misconduct of arbitrator nor matter omitted, 609.
award made after time elapsed, 610.
after revocation, 610.
appointment of umpire by arbitrators separately, 610.
validity of award but doubtful, 610.
party not liable to attachment, 610.
award performed as far as possible, 611.
when bankruptcy an answer, 611.
when claim barred by certificate, 611.
inability to pay from want of means no answer, 612.
cross-demand not brought forward no answer, 612.
set-off an answer, 612.
foreign attachment no answer, 612.
governed by same principle as rule to pay, 613.
granting or refusing the rule, 613.
cross-motion to set aside award heard with motion for attachment, 613.
moulding the rule, 613.
rule, when discharged with costs, 613.
making rule absolute, no cause shown, 613.
title of affidavits, 613.
making rule absolute on terms, 613.
producing award on drawing up rule, 614.
proceedings on the attachment, 614.
drawing up rule, 614.
procuring attachment, 614.
arresting party in contempt, 614.
attachment on award, civil process, 614.
setting aside attachment, on what affidavit, 614.
effect of, since Judicature Acts, 615.

ATTACHMENT—*continued.*
ENFORCING THE AWARD BY ATTACHMENT—*continued.*
the course of the motion for an attachment—*continued.*
officer making arrest not entitled to receive amount awarded, 615.
party in contempt imprisoned, 615.
sometimes examined on interrogatories, 615.
party fined and imprisoned, if reported in contempt, 615.
discharged, if master report him not in contempt, 615.
discharging on bail to appear and be examined, 616.
old practice in the Common Pleas, 616.
brought up for judgment and sentenced, 616.
discharging bankrupt as to debt covered by his certificate, 616.
discharging insolvent, 617.
costs of attachment, 617.

ATTACHMENT, FOREIGN. *See* FOREIGN ATTACHMENT.

ATTAINTED PERSON could not refer, 15.

ATTESTING WITNESS verifying award, 603.

ATTORNEY,
power of, to bind client by reference, 25.
of cause, 25.
of all matters in difference, 25.
town agent of, 26.
power of solicitor, 26.
consent of, good for enlargement of time, 149.
to make submission rule of court, 26.
court not make rule to pay absolute on, 626.
clerk of, no power to consent to appointment of umpire by lot, 26, 233.
demand sum awarded, 630.
of corporation, authority to refer need not be under seal, 26, 629.
when personally bound by referring, 27.
may refer appeal at quarter sessions, 27.
not suit in equity as to infant plaintiffs, 27.
attending reference privileged from arrest, 181.
called in by arbitrator after protest, 174.
demand by, of sum awarded, 598.
has a lien on sum awarded, 527, 598.
enforcing lien by rule of court, in case of fraud, 527.
not unless claim free from doubt, 527, 621.
no rule to enforce lien in his own name, 527, 622.
when lien paramount to claim of assignees, 528.
bill of costs of award to pay amount of, 293.
to draw award, costs of, 639.
rule to strike off the rolls not referable, 11.

ATTORNEY AND CLIENT,
awarding costs as between, 332.
under Arbitration Act, 1889..383, 642.
taxing costs as between, 641.

ATTORNEY-GENERAL,
arbitrator as, 118.
consent of, to reference of charity suit, necessary, 22.
to enforce award in charity suit, 580.

ATTORNEY, POWER OF,
agent making demand of money awarded must have, 600.
affidavit of execution of, 604.

ATTORNEY, WARRANT OF,
taking, to enforce award, 44.
as to possession of lands, 44.

AUTER DROIT, demand in, a matter in difference, 124.

AUTHORITY,
of agent to refer, what sufficient, 23.
of arbitrator. *See* ARBITRATOR.
of umpire. *See* UMPIRE.
of court. *See* COURT.
of equity. *See* EQUITY.

AVERMENTS,
in pleading an award at law, 543. *See* PLEADING.
in equity, 570. *See* EQUITY.
in bill to set aside award, 701. *See* EQUITY.

AWARD,
forms of. *See* Appendix, 760.
preventing, breach of submission, 106. *See* SUBMISSION.
on what to award, 123. *See* SUBMISSION, 949.
when to be made, 138. *See* ARBITRATOR, 851.
interlocutory, making, 205.
on part by arbitrators precludes umpire acting, 238.
HOW THE AWARD IS TO BE MADE,
formal requisites of the award, 247.
making the award, 247.
award must follow submission, 247.
under Arbitration Act, 1889, be in writing generally, 248.
must generally be signed by arbitrator, 248.
parol award, when valid, 248.
joint execution by all arbitrators, 248.
practice—two copies made, 249.
under the Lands and Railways Clauses Acts, 249.
declaration of arbitrator to be annexed, 249.
publishing the award, 249.
award published when executed, 250.
by all arbitrators, 250.
publishing to the parties, 250, 655.
delivering the award, 250.
award when made, ready to be delivered, 250.
not ready till stamped, 251.
when delivery necessary, 251.
delivery on payment of fees, 251.
award under the Lands Clauses Act to be delivered to the promoters, 252. *See* LANDS CLAUSES CONSOLIDATION ACT.
stamping the award, 252. *See* STAMP.

AWARD—*continued.*
HOW THE AWARD IS TO BE MADE—*continued.*
form of the award, 256.
any words expressing a decision an award, 256.
what words sufficient, 256.
no recitals necessary in award, 257.
award need not show jurisdiction, 257.
what recitals advisable, 257.
specifying matters in difference, 257.
false recitals not give authority, 258.
not vitiate award, 258.
certificate addressed to the officer of the court, 259.
the award must be entire, 260.
award cannot be made in parts, 260.
consulting as to parts, 260.
made up of two certificates, good, 260.
arbitrator empowered to make several awards, 260.
first award not final when dependent on second, 261.
the award must be final, 261.
effect of clause "ita quod fiat de præmissis," in submission, 261.
old rule when no "ita quod" award on part good, 261.
modern rule—whether parties intend award to be on all matters, 261.
arbitrator empowered to make several awards, 262.
omitting to decide matter not brought forward, 262.
collateral dispute to main question, 263.
award void if matter left undecided, 263.
excepting one matter on face of award, 263.
not deciding between co-defendants, 264.
not deciding on matter subject of suit, 264.
whether there was a partnership, 264.
right to indemnity, 264.
awarding nothing due at present, 265.
nothing due at date of reference, 265.
matters not to be matters in difference, 266.
award showing matter left undecided, 266.
no direction as to rent, 266.
awarding in one sum on all matters, 266.
not deciding cause separately, 266.
clerical error in description of subject-matter, 267.
power to correct under Arbitration Act, 1889 .. 267.
omitting to award balance of set-off, 267.
partition of land must direct conveyances, 267, 443.
omission not appearing on face of award, 268.
award bad, omission being proved, 268.
failing to decide ejectment, 268.
admitted demand is a matter in difference, 268.
not so, a claim abandoned, 268.
omitting to award on claim to indemnity, 268.
proof that matter is omitted must be clear, 269.
arbitrator must decide the question, not settle the case, 269.
omitting to decide as to all parties, 269.
awarding on the cause and costs. *See* CAUSE; COSTS.

AWARD—*continued.*
HOW THE AWARD IS TO BE MADE—*continued.*
the award must be final—*continued.*
award of mutual releases a decision of all matters, 269. *See* RELEASE.
rule awarding de præmissis, 270.
award de præmissis presumed final, 270.
purporting to be on all matters, an award de præmissis, 271.
award de præmissis, general finding presumed final, 271.
awarding a gross sum on all matters, 272.
instances, 272.
award de præmissis, particular finding presumed final, 273.
respecting banking account on general reference, 273.
ordering release to day before submission, 273.
on cause only, presumed no other matters in difference, 274.
whether matter presumed decided when award silent, 274.
award silent, decision sometimes presumed, 274.
deciding action, silent as to equitable claim, held good, 275.
silent as to defendant's claim, held good, 275.
claim beyond, held bad, 276.
claim for indemnity, bad, 276.
claim for severance, 277.
guiding rule as to when silence sufficient, 277.
conditional award, 277.
event conditional on voluntary act of opponent, 278.
what condition may be good, 279.
conditional direction valid, 279.
to do act on stranger's lands, on condition stranger consents, 279.
award conditioned to be void on a certain event, bad, 279.
alternative award good, 280.
to pay by instalments, or on failure of one, to pay whole sum at once, 280.
one alternative uncertain or impossible, 280.
award reserving or delegating judicial authority, 281.
arbitrator may not reserve or delegate authority, 281.
reservation of future power to himself, bad, 281.
when reservation mere excess, may be good for the rest, 282.
award to abide by the decision of another, bad, 282.
partial delegation, bad, 282.
or to repair to satisfaction of another, 282.
or delegating to party to decide in his own cause, 282.
exception delegating to the master the taxing of costs, 283.
master ministerial officer, 283.
award reserving or delegating ministerial duty, 283.
arbitrator may delegate ministerial duty, 283.
measurement of land, 284.
whether valuer ministerial officer, 284.
reserving power to settle deeds, 285.
reservation to arbitrator void, 285.
to stranger void, 285.
to counsel valid, 285.
counsel act ministerially, 285.
to court if they think fit, 286.

AWARD—*continued.*
HOW THE AWARD IS TO BE MADE—*continued.*
the award must be certain, 286.
what certainty requisite, 286.
certainty to a common intent, 286.
award need not specify time, or place, 286.
bad, if doubtful whether matter decided, 287.
how matter decided, 287.
not finding as to assets, 287.
awarding separately on separate matters, 288.
certainty as to the amount awarded, 288.
arbitrator must fix the amount to be paid, 288.
instances of awards not specifying sums, 288.
to pay money due for task work, 288.
so much as the land is worth, 288.
arrears of rent, 288.
according to market price, 288.
sufficient to release securities, 289.
money received, if any, 289.
share of expenses, 289.
of joint damages to plaintiff and stranger to cause, 290.
of money due from A., B., and C., some or one of them, 290.
certainty as to costs awarded, 290.
arbitrator need not ascertain amount of costs, 290.
except costs in inferior court, 290.
giving rule for computing amount, 290.
made certain by reference to other document, 291.
costs of reference taxable on rule of court, 292.
submissions, rules of court, 292.
costs under Public Health Act taxable by master, 292.
award when presumed certain,
not specifying amount, presumption no dispute about it, 292.
to pay interest from date of last settlement, 293.
debt in proportion to shares in ship, 293.
amount of bill delivered, 293.
distributive shares, 293.
to apportion trust estate, 294.
certainty as to general directions, 294. *See* ARBITRATOR.
arbitrator awarding security must specify its nature, 294.
must specify property to be delivered up, 294.
reasonable precision sufficient, 295.
to pull down nuisance on defendant's land, 295.
defendant or his executors to release, 295.
not deciding which of two parties to do act, 295.
award to pay plaintiff or his solicitor good, 296.
not saying to whom costs to be paid, 296.
to pay upon proof of certain things done, 296.
the award must be mutual, 296.
must benefit both parties, 296.
compensation awarded must be in discharge of claim, 296.
old rule of construction, 297.
modern rule, 297.
award de præmissis, 297.
sum awarded presumed in satisfaction, 298.
manifestly unequal, 298.

AWARD—*continued.*
HOW THE AWARD IS TO BE MADE—*continued.*
the award must be mutual—*continued.*
when infants parties, 18, 298.
when married women parties, 17, 298.
the award must be possible and consistent, 300.
will be upheld if possible, 300.
impossible, unintelligible, bad, 300.
contradictory, repugnant, bad, 300.
finding for defendant on inconsistent pleas, 301.
whether must be reasonable, 302.
AWARD, HOW FAR AFFECTED BY MISTAKE OF ARBITRATOR, 303. *See* MISTAKE.
award when arbitrator empowered to raise a point of law, 320. *See* ARBITRATOR, 859.
should state facts, not evidence, 321.
should find positively, 321.
stating abstract legal propositions, 321.
point intended to be left for court's decision, 321.
should provide for the events of the court's opinion, 322, 323.
raising point as to validity of custom, 322.
as to judgment non obstante veredicto, 323.
deciding case first, then raising point for court, 323.
awarding hypothetically, 324.
AWARD, THOUGH BAD IN PART, WHEN GOOD FOR THE REST, 325.
when the bad part of the award is separable, 325.
may be good if all matters well decided, 325.
bad in part for excess, 325.
excess as to costs, 325.
entry of verdict, 326.
entry of judgment, 326.
strangers, 326.
releases, 326.
suits, 327.
directions what to be done, 327.
future repairs, 327.
hypothetical provisions for the future, 327.
reservation of authority, 328.
who may complain, award wholly bad for excess, 329.
bad as to illegal subject-matter, 329.
poor rate and costs, 329.
whether bad when faulty direction what to be done, 432.
when excess a condition precedent, 329.
bad part separable, though no excess, 330.
uncertain as to part, 330.
alternative, one alternative bad, 330.
when the bad part of the award is inseparable, 331.
award wholly void, 331.
excess inseparable, award void, 331.
award of one sum including matters not referred, 331.
lease for too long a term, 331.
price to be paid at a future day, 332.
costs as between attorney and client, 332.
making unauthorised deductions, 332.
direction depending on the excess, 333.
difficulty in separating bad and good parts, 333.
old rule, award good if something well awarded to each, 334.
modern rule, award bad, if reciprocity altered, 334.

AWARD—*continued.*
AWARD, THOUGH BAD IN PART, WHEN GOOD FOR THE REST—*contd.*
when the bad part of the award is inseparable—continued.
costs affected by void part, 335.
excess affecting decision as to residue, 335.
WHAT DIRECTIONS MAY BE GIVEN IN THE AWARD, 409. *See* ARBITRATOR, 857.
how to award under the Lands Clauses Act, 452. *See* LANDS CLAUSES CONSOLIDATION ACT.
how to award on the cause referred, 336. *See* CAUSE.
how to award as to costs, 373. *See* COSTS.
what are costs of the award, 375.
when costs to be taxed, 635.
costs of award, action for, 540.
EFFECT OF THE AWARD, 514.
the award a final judgment in law and equity, 514.
certificate equally final, 514.
award changing nature of claim, 514, 546.
award when not an estoppel, 515.
effect of award on a judgment, 515.
reductio in possessionem of wife's choses in action, 520.
in equity as a decree, 515.
sometimes effective in equity, though made after time, 162, 516.
parol valid, 248, 516.
under Public Health Act, 1875.. 516.
under seal no deed, 517.
cannot be made a record at law, 576.
may be made order of equity, 574.
but not necessary, 574.
on appeal entered as judgment of quarter sessions, 649.
on county court reference entered as judgment of court, 97.
effect of a colourable award, 517.
agreement in Scotland put into form of a submission and decreet arbitral, 517.
effect of an award on matters in difference not brought forward, 517.
no action lies for matters within submission, 517.
arbitrator concluded by former award, 517.
effect of award on demand rejected by arbitrator, 518.
not set up, 518.
whether suit will lie in equity for matter omitted, 518.
accidental omission, 518.
party made to account for item omitted, 518.
not conclude matters not in difference, 519.
no waiver of extrinsic objections, 519.
effect of an award on some special matters, 519.
on a cause referred, 336, 519. *See* CAUSE.
on costs, 338, 373, 520. *See* COSTS.
on the rights of a married woman, 18, 520.
on matters not referable, 5, 520.
on matters criminal, 11, 520.
effect of an award to transfer property, 520.
cannot transfer right to land, 520.
may decide title as between parties, 521.
not give title as against a stranger, 521.
cannot transfer personal property, 522.
transferring title to chattel deposited to abide award, 499.

AWARD—*continued.*
EFFECT OF THE AWARD—*continued.*
effect of an award to transfer property—continued.
award by statute may operate as a conveyance, 522.
award under Inclosure Act, 522. *See* INCLOSURE ACT.
under Artizans' Dwellings Act, 523.
award to deliver land enforceable as a judgment in ejectment, 521.
effect of an award on the parties and strangers, 524.
on infants, 18. *See* INFANTS.
corporations, 21. *See* CORPORATIONS.
parties added, 524. *See* PARTIES TO THE REFERENCE.
agents, 23. *See* AGENTS.
solicitors, 25. *See* ATTORNEY.
executors, 29. *See* EXECUTOR.
trustees, 32. *See* TRUSTEE.
assignees, 524. *See* ASSIGNEE.
public officer, 32. *See* PUBLIC OFFICER.
strangers to submission, 525. *See* STRANGER.
award no discharge of defendant from arrest, 525.
proceeding with cause after award, 525.
assigning contingent right before award, 525.
effect of the award on the arbitrator, 525. *See* ARBITRATOR.
effect of an award on a party bankrupt, 526. *See* BANKRUPT.
effect of an award on the solicitor's lien for costs, 527. *See* ATTORNEY.
enforcing award by action, 539. *See* ACTION.
under the Lands Clauses Acts, 540.
by attachment, 586. *See* ATTACHMENT, 863.
by execution under the statute of Victoria, 618. *See* EXECUTION.
under Judicature and Arbitration Acts, 630.
under the Railway Companies Arbitration Act, 631.
by judgment and execution in the cause referred, 632. *See* EXECUTION.
in equity, 562. *See* EQUITY.
by motion and petition in equity, 574. *See* EQUITY.
by mandamus against company, 650.
pleading an, 543. *See* PLEADING.
effect of, in evidence, 553. *See* EVIDENCE.
under Lands, Railways, and Companies Clauses Acts, 453. *See* LANDS CLAUSES CONSOLIDATION ACT; RAILWAYS CLAUSES CONSOLIDATION ACT; COMPANIES CLAUSES CONSOLIDATION ACT.
effect of altering an award, 141, 528. *See* ALTERATION.
taking advantage of defects in award,
by plea, 546. *See* PLEA.
by demurrer, 552, 570. *See* PLEADING; EQUITY.
by evidence, 559. *See* EVIDENCE.
by motion to set aside award, 652. *See* SETTING ASIDE.
by motion to set aside judgment in cause referred, 693. *See* SETTING ASIDE.
referring back award, 479. *See* REFERRING BACK.
impeaching award in equity, 697. *See* EQUITY.
how award should be performed, 530. *See* PERFORMANCE.

BAIL,
discharge of, by reference of action, 85.
indulgence to, on execution against defendant, 708.

BALANCE not awarded to defendant, setting aside award for, 670.

BANKERS' BOOKS copies of evidence, 180.

BANKRUPT,
cannot make a valid reference concerning his estate, 33.
submission by, binds himself, 33.
reference by assignees and trustees, 34.
whether valid, without creditors' consent, 34.
such consent need not be averred in action on the award, 34.
no stamp on submission or award, 252.
personal liability of assignee, 34.
reference when admission of funds in hand, 33, 34.
assignee adopting previous reference by bankrupt, 34.
when liable to attachment on the award, 163, 590.
may move to set aside award, 679.
recent appointment no excuse for not moving in time, 663.
bankruptcy no revocation of submission, 162. *See* REVOCATION.
may be ground for court to allow revocation, 163.
of opponent, plea of, to action for revocation, 155.
leave to revoke for bankruptcy of opponent, 159.
plea of, 551. *See* PLEA.
award not avoided by subsequent bankruptcy, 526.
sum awarded good petitioning creditor's debt, 526.
so penalty in arbitration bond, on breach, 527.
no bar to claim for costs not proveable, 526.
when ground of discharge from attachment, 611.
no ground for setting aside judgment in cause referred, 695.
lien of attorney of, on sum awarded, 527.
depositing chattel to abide award, liability of arbitrator, 499. *See* ARBITRATOR, 859.

BANKRUPTCY, no revocation, 162. *See* BANKRUPT.

BARRISTER,
as counsel, power to refer, 27. *See* COUNSEL.
arbitrator not make affidavit, 510. *See* ARBITRATOR, 860.
not on motion to set aside award, 680.
notes of, not to be used on the motion, 680.
letter of, whether receivable by the court, 313, 511.
charges of, 375.

BENEFIT BUILDING SOCIETIES,
when reference compulsory, 34.
where standing arbitrators not appointed, action not stayed, 36.
"disputes" defined, 37.
equity cannot question award good on face unless arbitrators are corrupt, 38.
interest awarded to member of, 421.
distinguished from friendly societies, 37.
rights under mortgage not referable, 37.
award must be enforced, 38.
arbitrators compellable to state case, 319.

BENEFIT BUILDING SOCIETIES ACT, 1884. *See* STATUTES, 827.

BILL IN EQUITY,
how to award on, 366. *See* CAUSE.
award suit to be dismissed, final, 366.
to enforce award, 562. *See* EQUITY.
for specific performance of contract, reference failing, 710. *See* EQUITY.
to set aside award, 701. *See* EQUITY.
when only remedy for misbehaviour of arbitrator, 653.
against arbitrator, when it lies, 501. *See* ARBITRATOR, 859.
defendant moving to dismiss, pursuant to award, 580.

BILL OF LADING, disputes under, 128.

BLANK in submission for limit of time for making award, 138.

BOARD (LOCAL GOVERNMENT),
appointment of arbitrator by, under Public Health Act, 1875 .. 103.
under Local Government Act, 1888 .. 104.
under Housing of the Working Classes Act, 1890 .. 105.
not revocable by court, 161.

BOARD OF TRADE,
appointment of umpire by, 105, 222, 225.
under Tramways Act, 1870 .. 105.

BOARD OF TRADE ARBITRATIONS, &c., ACT. *See* STATUTES, 816.

BOND,
submission by, penalty not limit damages, 54.
altering submission by bond, 54.
separate bonds—two bonds many parties, 55.
bond to arbitrator, 55.
stamp on bond, 55.
effect of, 56.
sufficient writing under Statute of Frauds, 56.
averments in action on, 545. *See* PLEADING.

CANCELLATION of award, court no power to order, 534.

CASE,
stating, under Arbitration Act, 1889 .. 206, 318.
pending the reference, 206, 318.
judgment on, 206.
appeal against, lies, 320.
error did not, 206.
by arbitrator under Lands Clauses Acts, 320.
not by Local Government Board, 320.
court may order arbitrator to state, 320.
in arbitrations under Building Societies Act, 319.
costs, when not submitted to arbitrators, in power of judge, 319.
how to state in award, 321.
costs of special case, costs of cause, 636.

CAUSE,
HOW CAUSE AT LAW REFERRED, 71.
forms of submission in a cause, 71. *See* APPENDIX OF FORMS, 717.
submission must be by parties on the record, 71.
strangers may be added, 71.
submission by order of court, 72.
how obtained, 72.
submission by order of Nisi Prius, 72.
how drawn up, 72.
effect, when order not drawn up, 73.
taking verdict subject to reference—benefit of, 73.
verdict, security for damages in cause only, 74.
award under Arbitration Act, 1889, equals verdict, 73.
juror withdrawn, or jury discharged, 74.
all matters in difference—indictment, 74.
not issue out of Chancery, 75.
not cause tried before sheriff, 75.
reference on the usual terms, 76.
what the usual terms are, 76.
clause relieving from finding on each issue, 77.
clause to make rule of court, 77.
setting aside a submission made in a cause, 77.
for fraud, or mistake, or bad faith, 78.
amending a submission made in a cause, 79. *See* ALTERATION.
altering terms of reference without altering submission, 82. *See* ALTERATION.
submission in a cause a stay of proceedings, 84.
whether without express clause, 84.
express agreement to stay proceedings enforced, 84.
when to apply to stay proceedings, 84.
waiver of peremptory undertaking, 85.
staying proceedings under Arbitration Act, 1889.. 46.
compulsory and other references under the Arbitration Act, 1889.. 87.
reference for report of question in, 87.
trial of cause or question in, 88.
question arising in cause, what is, 89.
application for order or reference, 88.
time for, 88.
in what cases granted, 89.
matters of account, 90.
where prolonged examination of documents, 92.
fraud, 92.
submission in a cause a discharge of bail, 85.
discharge of replevin sureties, 85.
no discharge of defendant from custody, 86.
what referred by reference of a cause, 125. *See* SUBMISSION.
"cause" or "all matters in the cause," same effect, 125.
whether issues at law as well as fact referred, 125.
reference of, refers matters up to date of writ, 132.
award on, presumed final, though reference general, 274.
HOW TO AWARD ON THE CAUSE REFERRED, 336.
disposing of, without deciding it, 337.
when sufficient, 337.
awarding suits to cease, 337.
award of a nonsuit, 337.
directing a stet processus, 337.

CAUSE—*continued.*
HOW TO AWARD ON THE CAUSE REFERRED—*continued.*
awarding on, when costs abide the event, 338.
the arbitrator must decide the cause when costs abide event, 338.
merely disposing of cause insufficient, 338.
award of a stet processus, or cause to cease, bad, 338.
no legal event as to costs, 338.
award deciding issues and directing stet processus, 338.
award of a general verdict, effect of, 339.
cause must be decided separately from other matters, 391. *See* COSTS.
with separate damages and specified amount, 391.
what a sufficient decision before the rules as to costs of issues, 339.
award, on the whole, showing cause decided, sufficient, 339.
award neither party has any claim, 340.
nothing due to plaintiff, 340.
plaintiff not proved defendant caused the injury, 340.
plaintiff no case except for money brought into court, 340.
in ejectment, defendant to deliver up premises, and pay for rent, 340.
deciding cause referred before issue joined, 340.
arbitrator not bound to find on each count, 340.
sufficient if he decided cause for either party, 341.
award of cause to cease and damages good, 341.
payment of balance, 341.
proper mode of awarding on cause referred before plea, 342.
cause referred after plea and before issue joined, how to award, 342.
awarding on the issue since the rules as to costs, 342.
when costs abide event, arbitrator should find on issues, 342.
since Judicature Acts, 342.
old rule, arbitrator must award on each issue, 342.
though not requested so to do, 343.
award defendant indebted does not show on what count, 343.
sum due "in respect of all the matters referred," 344.
plaintiff good cause of action "as stated in the declaration," 344.
costs when issue joined, but not made up, 344.
arbitrator finding on each demise in ejectment, 345.
awarding in favour of lessors of plaintiff, 345.
should specify lands, 345.
must have awarded on each plea, 351.
whether substantial finding on each sufficient, 346.
specific finding sometimes held necessary, 346.
substantial decision held sufficient, 346.
whether award of general verdict a finding on each, 347.
award verdict to stand, but damages to be reduced, 347.

CAUSE—*continued.*
HOW TO AWARD ON THE CAUSE REFERRED—*continued.*
awarding on, when costs abide the event—*continued.*
proper mode of awarding on the issues, 348.
in the words of the pleadings, 348.
awarding distributively, 348.
finding on specific claim in a general count, 349.
when arbitrator need not find on the issues, 349.
when he is to tax costs himself, 350.
when there is clause in submission relieving him, 350.
need not award on each issue when costs of reference only abide event, 350.
when arbitrator only to decide specific questions, 350.
awarding an entry of a verdict, 350.
when arbitrator empowered to award a verdict, 350.
no implied power to award entry of verdict, 350.
when no verdict taken at Nisi Prius, 351.
express power in submission, 351.
verdict taken, power to settle the cause, 351.
power to order verdict on the issues, 351.
verdict taken on one issue only, 352.
power in one cause gives no power in another, 352.
duty of the arbitrator in awarding a verdict, 352.
substantial decision sufficient direction, 352.
specifying lands by metes and bounds, 353.
awarding verdict subject to opinion of court, 354.
effect of an authorised award of a verdict, 354.
unauthorised award of a verdict, bad, 354.
not equivalent to a direction to pay, 354.
when rejected as surplusage, 355.
duty of the arbitrator in awarding damages, 356.
arbitrator finding for plaintiff should award damages, 356.
not when pleas found for defendant answer claim, 356.
when plea immaterial, 356.
damages on new assignment, 357.
contingent damages on a demurrer, 357.
general damages on all issues, 357.
one breach damages on several issues, 358.
damages should not exceed amount taken on the reference, 73, 358.
no limit to damages, as to matters out of cause, 74, 358.
limiting damages by plaintiff's particulars, 359.
motion to increase damages, 359.
not specifying amount in debt, 360.
fixing day of payment of damages, 360, 416.
awarding speedy execution, 360.
awarding joint damages to plaintiff and party added, 360.
special damages in ejectment, 361.
nominal damages, 361.
no damages to be awarded to defendant, cause only referred, 361.
awarding judgment, 362.
power to direct entry or arrest of judgment, 362.
no implied power, 362.
when award of judgment surplusage, 362.
awarding judgment on a demurrer, 362.
clause empowering arbitrator to award judgment, 363.
award not specifying kind of judgment, 363.
awarding damages non obstante veredicto, 363.

CAUSE—*continued.*
HOW TO AWARD ON THE CAUSE REFERRED—*continued.*
awarding judgment—*continued.*
court no power to decide on right to judgment non obstante veredicto, 364.
arbitrator no power, 364.
raising point as to the right on face of award, 365.
arbitrator no implied power to direct arrest of judgment, 365.
power to direct judgment since Judicature and Arbitration Acts, 365.
motion if arbitrator refrains from directing, 366.
awarding on an action in equity, 366.
dismissing suit final, 366.
determining subject of suit, 366.
when arbitrator substituted for master in Chancery, to take accounts, 367.
referee,
duty of, under Arbitration Act, 1889 .. 367.
in reference for report, 367.
to make report to assist the court, 367.
to set out items of accounts, 368.
to take accounts in reasonable manner, 368.
to hold judicial inquiry, 368.
to send notice of report to parties, 368.
may have to explain report to court, 369.
should not be sworn, 369.
report of, effect of, 368.
adoption or variation of, 368.
where further consideration adjourned, 368.
not adjourned, 368.
on reference for trial, 369.
duty of referee, 369.
to determine question of fact, 369.
not to set forth evidence or reasons, 369.
may now deal with whole cause, 370.
direct judgments, 371.
deal with costs, 371.
report or award of, equivalent to verdict, 370.
for enforcing, not setting aside, 370.
not for purposes of appeal under Finlay's Act, 370.
appeal from, 370.
from award on compulsory reference, 371.
on any question of law, 371.
from judgment entered wrongly on the findings, 372.
motion on affidavit, not counsel's statement, 372.
case remitted on, after judgment, 372.
from order by referee, 372.
costs of cause, power and duty of arbitrator as to. *See* COSTS.
what are costs of, 373. *See* COSTS.
proceeding in, to enforce award, 632. *See* EXECUTION.
not decided properly, setting aside award for, 669. *See* SETTING ASIDE.
award in, at common law, equity could set aside, 701.
compulsory reference of, under Common Law Procedure Act. *See* COMMON LAW PROCEDURE ACT.
Arbitration Act. *See* ARBITRATION ACT.

CAUSE—*continued.*
REFERENCE FAILING PROCEEDING WITH THE CAUSE REFERRED, 706.
action proceeds, unless cause terminated, 706.
juror withdrawn on reference, effect of, 707.
when verdict taken, a new trial must be had, 707.
trial by proviso, infant plaintiff repudiating award, 707.
award set aside, first verdict falls with it, 707.
when no award made, first verdict must be set aside, 707.
new verdict irregular until first verdict set aside, 707.
award set aside, costs of first trial not follow second trial, 708.
allowing plaintiff to issue execution, unless defendant will refer again, 708.
when only amount of damages referred, 708.
when cause referred altogether, 708.
held in Queen's Bench, court had power to allow execution, if defendant refuse, 708.
discretionary when to grant it, 709.
held in Exchequer, court had no power, 709.
court cannot order verdict for defendant, plaintiff refusing to refer again, 709.
in equity, reference failing, suit proceeds, 709.
reserved liberty to apply, 710.

CAUSE, SHOWING,
against motion for attachment, 609. *See* ATTACHMENT, 864.
rule to pay money awarded, 626.
rule to set aside award, 686. *See* SETTING ASIDE, 941.

CERTAIN, award must be, 286. *See* AWARD, 869.

CERTIFICATE,
arbitrator to make, instead of award, 259.
not require stamp, 259.
two certificates forming one award, 260.
entering verdict pursuant to, 351.
may be set aside as an award, 679.
in award, cause proper for superior court, 407.

CERTIFYING,
for costs, 404. *See* COSTS.
for speedy execution, 360.
award referred back when certificate for costs defective, 486.

CHAMBERS,
judge at, no power to set aside award, 653. *See* JUDGE.
showing cause at, against rule to pay amount awarded, 625.
whether summons for attachment at, 606.

CHANCE, appointing umpire by, bad, 231. *See* UMPIRE.

CHANCELLOR, arbitrator sometimes as, 118.

CHANCERY, submission and award in. *See* SUBMISSION; EQUITY.

CHARGES,
of arbitrator, whether action lies for, 493. *See* ARBITRATOR, 859.
in mercantile arbitrations, implied promise to pay, 493.

CHARITY,
suit, consent of Attorney-General to reference necessary, 22,
so to proceeding on award in equity, 580.
corporation compelled to renew lease, 580.
awarding as to lands of, 429.

CHARTER-PARTY, clause in, for reference, not affect disputes on bill of lading, 128.

CHATTEL,
of wife, husband might bind by reference, 17.
deposited with arbitrator to abide award, 498, 499.
whether arbitrator may award, 411.

CHOSES IN ACTION of wife, award reduces into possession, 18, 520.

CIVIL INTERESTS. *See* SUBJECT-MATTERS OF REFERENCE.

CIVIL LAW will compel arbitrator to award, 203.

CLAIM,
admitted, is a matter in difference, 124, 268.
abandoned, is not a matter in difference, 124, 268.
for compensation under the Lands Clauses Act, 453. *See* LANDS CLAUSES CONSOLIDATION ACT.

CLERICAL ERROR
in submission, amending, 81.
in award, amending, 142, 267, 310, 529.
in description of subject-matter, 267.

CLERK,
to attorney, no power to consent to appointment of umpire by lot, 26, 233.
to senior official referee, to distribute business, 93.

CLIENT,
when bound by reference by his solicitor, 25.
or his counsel, 27.

CLIENT AND ATTORNEY,
awarding costs as between, 332, 383.
under Arbitration Act, 1889..383.
taxing costs as between, 641.

COAL, award to dig for, performance of, 532.

COAL MINES REGULATION ACT, 1887,
reference under, 8.
arbitrator to be mining engineer, 114.
umpire, who, 114.
award under, 440.

CO-DEFENDANTS, mutual claims of, referred by general reference, 132, 264.

COLLEGE, reference by master and fellows, 21.

COLLUSION
of arbitrator not pleadable. *See* PLEA.
charging, in bill to impeach award, 502.
to procure arbitrator's absence, 218.

COLOURABLE AWARD, effect of, 517.

COMMENCEMENT
of arbitrator's authority, 136. *See* ARBITRATOR, 851.
of umpire's, 234. *See* UMPIRE.
of period limited for setting aside award, 655.

COMMISSION to take evidence granted in aid of arbitration, 96, 181.

COMMISSIONERS OF PARTITION, powers of, 442.

COMMISSIONERS OF RAILWAYS,
powers transferred to Board of Trade, 228.
appointment of umpire by, 234.

COMMITTAL
to Queen's prison of party not performing award in equity, 577.
by county court judge for non-production of documents, 181.
no power of, in referee, 178.

COMMITTEE OF LUNATIC, power of, to refer, 32. *See* LUNATIC.

COMMON LAW,
submission of a cause by judge's order at, 71.

COMMON LAW PROCEDURE ACT, 1854 (17 & 18 Vict. c. 125), 805.
See STATUTES.
repeal of, 5.
reference of action under, 89.
judge at Nisi Prius could not order, 89.
but might discharge jury and then order, 89.
in what cases ordered, 89.
when part only matter of account, 89.
cause still remained in court, 91.
order of reference usually provided for the costs, 89.
arbitrator no implied power over costs, 89, 380.
same powers and duties as in other references, 177.
action stayed after agreement to refer, 47.
though made rule of Chancery, discovery not compelled, 60.
where provisions of, embodied in submission, irrevocable, 157.
no reference to county court judge, 91, 203.
court or judge might enlarge time for award, 151.
power to refer back (s. 8) general, 480.
parties could not compel arbitrator to state a case, 318.
pleadings to be awarded on distributively, 348.
doubtful whether award could be enforced by attachment, 591.
or by rule to pay, 622.
signing judgment on compulsory reference, 647.
effect of County Court Act on costs, 641.

COMMONS, inclosure of, by award, 6. *See* INCLOSURE ACT.

COMMONS, HOUSE OF, no attachment on award against member of, 590.

COMPANIES CLAUSES CONSOLIDATION ACT, 821. *See* STATUTES.
reference under, 103.
matters concerning incorporated joint stock companies to be referred, 8.
appointing arbitrator, 103.
submission not revocable by death of party, 170.
on death, incapacity, refusal, or neglect of one of two arbitrators, new one may be appointed, 103, 166.
arbitrators to appoint umpire before entering on reference, 226.
appointment to be in writing, 226.
effect, if they cannot agree as to an umpire, 103, 226.
judge might appoint by Common Law Procedure Act, 1854..227.
probably may, under Arbitration Act, 1889..227.
submission to be made rule of court, 585.
costs of arbitration in discretion of arbitrators or their umpire, 380.
arbitrators and umpire may administer oath, 184, 190.
may examine on oath parties and witnesses, 184, 190.
may call for documents, 190.

COMPANY,
mandamus against, to enforce award, 591, 650.
reference by, under statute, 38.
dissentient member no right to inspect books of, 181.
manager of, may show cause against rule on company to pay, 626.
rule to pay on, refused, 627.

COMPENSATION,
for future damage, reference of, 134.
may be awarded for lands taken for public undertakings, 6.
award of, under the Lands Clauses Act, 452. *See* LANDS CLAUSES CONSOLIDATION ACT.
apportionment of, under the Lands Clauses Act, 456. *See* LANDS CLAUSES CONSOLIDATION ACT.
under Public Health Act, 1875..456.
inquiry, costs of, 402.
payment of, before possession taken by Drainage Board in Ireland, 517.

COMPLAINT for setting aside, notice of motion sufficient, 659.

COMPROMISE of action by counsel, 28.

COMPULSORY REFERENCE, 5, 87, 370. *See* ARBITRATION ACT.
appeal from award on, 371.
decision of Queen's Bench Division on final, 692.
unless leave to appeal given, 692.

COMPUTATION of time for making award, 136.

COMPUTING principal and interest on award, 543.

CONCEALMENT, fraudulent, ground for setting aside award, 673.

CONDITION, arbitrator imposing on party improper, 117.

CONDITION PRECEDENT,
to arbitrators entering on reference, 176.
making declaration under Lands Clauses Act, 176.
sometimes appointment of umpire, 219, 225, 228.
sometimes of third arbitrator, 219.
awarded must be performed before attachment, 598.
to action, when award a, 62.

CONDITIONAL AWARD, 277. *See* AWARD.
of a verdict, 634.

CONDITIONAL DIRECTION in award as to stranger, 450.

CONDUCT of parties a consent to enlargement, 148.

CONSENT,
of creditors to reference by assignee of bankrupt, 33.
to reference binds stranger, 22.
to award binds stranger, 569.
of parties to appointment of umpire by lot, 232. *See* UMPIRE.
to enlarge time for making award, 147.
cures irregularity in proceedings, 195, 665, 686.
to marriage, plea to action for revocation by marriage, 155.
submission under Lands Clauses Act, held a submission by, 60, 100.

CONSEQUENCES of the award, 514. *See* AWARD, 871.

CONSISTENT,
award must be, 300. *See* AWARD, 870.
finding on inconsistent pleas for same party, when valid, 301.

CONSPIRACY, indictment for, referable, 12, 133.

CONSTRUCTION,
of terms in submission, 123. *See* SUBMISSION, 949.
of award with a view to support award, 530, 688.
of terms in award, 256.

CONTEMPT,
of court, breach of submission made rule is a, 68, 86.
revocation of submission made rule is a, 154.
disobedience to award is a, 586. *See* ATTACHMENT.
party reported in, sentence, 615. *See* ATTACHMENT, 864.

CONTINGENT CLAIMS, reference of, 134.

CONTRACT, enforcing, though reference fail, 710. *See* EQUITY.

CONTRADICTORY AWARD, 301. *See* AWARD, 870.

CONVEYANCE,
arbitrator making partition should award, 267, 520.
should award to pass title to land, 428.
must specify nature of, 428.
need not draw it, 429.
reserving power to settle, when good, 286. *See* AWARD, 868.
advisable to award who to prepare, 429.
to pay for, 429.
award silent, who bound to prepare and tender, 534.
costs of preparing, 535.
award to execute, enforced in equity, 563.
of charity estates, 429.

CONVEYANCING ACT, 1881 (44 & 45 Vict. c. 41), trustee empowered to refer, 32.

CONVEYING lands to arbitrator on trust to abide award, 44.

COPY,
of submission, making rule of court, 583.
of documents on motion for attachment, 601.
of allocatur, to be served on motion for attachment, 600.
of award, &c., 600.
of award, on moving to set aside, 677
of bankers' books evidence, 180.

COPYHOLD,
award to surrender, 448.
performance of, 535.

CORPORATION,
reference by, sole or aggregate, 21.
rector as to tithes during his incumbency, 21.
deans and chapters, mayors and commonalty, 21.
charitable, with consent of Attorney-General, 21.
attorney of, appointment need not be under seal, to bind, 26, 629.
no attachment on award against, 591.
compelled to renew lease awarded, 580.

CORRUPTION,
or undue means, what amounts to, 675.
of arbitrator ground for setting aside award, 675. *See* SETTING ASIDE.
charged in equity, 502, 503.
denied by pleadings, 572.
whether pleadable at common law, 550.
whether evidence of, admissible in action on award, 560.
action against arbitrator for, 497.

COSTS,
moving for, when award prevented being made, 107.
DUTY OF THE ARBITRATOR IN AWARDING AS TO, 373.
the arbitrator's power and duty in awarding costs, 373.
what are the costs of the cause, reference, and award, 373.
what costs costs of cause, 373, 397.
what costs of reference, 374, 396.
costs of witnesses costs of reference, 374.
of accountant, 374.
of drawing further submission after action stayed, 374.
of award costs of reference, 377.
arbitrator's fees, when, 375.
need not be taxed before action, 540.
of deeds awarded to be executed, 384.
what costs of award, 375.
arbitrators' charges, 375.
costs of attorney to draw award, 639.
costs of award, action for, 541.
when costs of reference costs of cause, 376.
costs of opposing, rule to set aside award, 376, 690.
costs of umpirage, arbitrator's fees may be, 245, 375.

COSTS—*continued.*
DUTY OF THE ARBITRATOR IN AWARDING AS TO—*continued.*
the arbitrator's power and duty in awarding costs—*continued.*
the power of the arbitrator over costs, 377.
arbitrator has implied power over costs of cause, 377.
so where all costs are costs in cause, 377.
but not of reference or award, 377.
general power over costs includes those of cause and reference, 377.
reference includes award, 377.
general power over costs under Arbitration Act, 1889 . . 378.
to give costs as between solicitor and client, 378.
given to referee by Rules of Court, 378.
costs of compulsory reference of action, 376.
costs of indictment, 377.
effect of County Courts Act, 378.
under the Lands Clauses Act, 101, 379, 472.
of compensation inquiry settled by master, 115.
under the Railways Clauses Act, 102, 380.
under the Companies Clauses Act, 380.
under Public Health Act, 1875 . . 380.
under Allotments Act, 1887 . . 380.
of reference at Quarter Sessions, 380.
duty of the arbitrator in awarding costs, 380.
award silent as to costs, 380.
costs of cause follow verdict, 380.
of reference and award, how borne, 381.
when arbitrator bound to award some costs, 381.
under schedule in Arbitration Act, 381.
fixing amount of costs in award, 381.
what sufficient certainty as to amount, 290.
delegating taxation of, to the master, 283, 290.
when arbitrator bound to fix amount, 381.
special clause, 381.
cause in inferior court, 382.
reference out of court, 382.
what a sufficient award, 382.
arbitrator may apportion costs, 382.
costs as between solicitor and client, 332, 382.
under Arbitration Act, 1889 . . 384, 641.
costs of special jury, 384.
costs of executing deeds, 384.
setting off costs in cross actions, 384.
awarding costs to be paid by party disobeying award, 382.
awarding each party to pay moiety, inconvenient, 383.
who to get costs taxed, 384, 534.
arbitrator awarding a fee to himself, 385.
remuneration under Arbitration Act, 1889 . . 386.
excess as to costs, when separable, award good, 325.
when inseparable, award set aside, 332.
effect of awarding payment of the costs of the cause, 387.
costs of cause awarded same as on a verdict, 387.
award of costs in the action not give costs of reference, 388.
costs of special jury, 388.

COSTS—*continued.*
DUTY OF THE ARBITRATOR IN AWARDING AS TO—*continued.*
power and duty of the arbitrator when costs abide the event, 389.
power of the arbitrator when costs abide the event, 389.
"the costs," costs of cause and reference, 389.
arbitrator no power on costs abiding event, 389.
awarding speedy execution, 389.
awarding injunction, 389.
what the event when the costs of cause only abide the event, 338, 390.
costs of cause abiding event of cause, 390.
how to award on the cause. *See* CAUSE.
arbitrator must decide cause separately, 391.
arbitrator must give separate damages in cause, 391.
to allow taxing costs on verdict, 391.
to determine right to costs, 392.
and scale of taxation, 392.
cost of claims when not distributive, 392.
waiving right to costs, 404.
what the event when the costs of cause and reference abide the event, 392.
event to be construed distributively, 392.
claim and counter-claim successful, 392.
larger sum found due on counter-claim, 393.
event, general event of whole award formerly, 393.
no costs, award finding part for each, 393.
costs following balance, 394.
when costs follow general event, whether arbitrator need decide cause, 395.
awarding action to cease, 395.
costs of cause abiding event of cause, 395.
of causes abiding event of each, 396.
of cause and suit abiding general event, 396.
of reference to be costs of cause, 397.
not abiding event, how to award on the cause, 350. *See* CAUSE.
effect of the award when costs abide the event, 397.
award same effect as a verdict, 397.
as to costs of first trial, 397.
of executors plaintiffs, 397.
damages under forty shillings, 398.
reference before issue finding on one matter for plaintiff, 398.
amount recovered by verdict, 399.
reference before verdict, 399.
after verdict, 399.
compulsory, 399.
before or after verdict, semble, the same effect, 400.
present rule, 400.
no costs in cases where County Courts Act prohibits, 400.
certificate for costs, cause referred by consent, 400.
costs when defendant arrested for too large a sum, 400.
plaintiff recovering less than 20*l.*, 401.
affidavit of debt for too much, 401.
double costs in replevin, 402.
costs in action for not setting out tithes, 402.

COSTS—*continued.*
DUTY OF THE ARBITRATOR IN AWARDING AS TO—*continued.*
power and duty of the arbitrator, &c.—*continued.*
depriving of costs, Court of Requests Act, 402.
costs of compensation inquiry, 402.
under Small Debts Act, 403.
of claim and counter-claim, 403.
following verdict as agreed, though claim reduced, 403.
supporting award defective as to costs, 404.
waiving right to costs, 404.
duty of the arbitrator when empowered to certify for costs, 404.
no implied power, 404.
hardship when not given, 404.
costs of special jury, 405.
certifying cause fit to be tried before a judge, 404.
judge may certify at any time, 404.
power transferred from judge to arbitrator, 406.
not prevent judge's other power, 406.
arbitrator must certify in award for costs of special jury, 406.
certifying no distinct matter of complaint on each count, 406.
certifying action brought to try a right, 407.
in the award, 407.
costs of preparing conveyance awarded, who to bear, 429, 535.
costs of arbitration when costs of purchase, 471.
effect of award on attorney's lien for costs, 527. *See* ATTORNEY.
when bankrupt's certificate no discharge from costs, 616. *See* BANKRUPT.
when administrator liable to, 31. *See* EXECUTOR.
taxation of, 635. *See* EXECUTION, 901.
when to be taxed, 640.
under Ord. LXV. r. 15 . . 640.
party ordered to pay must get taxed in time, 384, 533.
not necessary before action commenced, 535.
of costs of reference and cause in one allocatur, 636.
new taxation after award on reference back, 644.
costs of abortive award after reference back, 644.
attachment lies for costs awarded, 589.
not for arbitrator for his fees, 493, 589.
rule to pay costs awarded, specifying amount, 629.
setting award aside for not deciding properly as to, 671. *See* SETTING ASIDE, 940.
of first trial, award set aside and new trial had, 708.
may be prayed in equity against corrupt arbitrator, 502.
of Crown, 39.

COUNSEL,
power of, to refer the cause, 27.
when with full information of facts, 27.
in the Scotch Courts, 29.
attending by, on reference, 173.
arbitrator taking opinion of, 211.
should be in presence of parties, 213.
no ground for setting aside award, 666.

COUNSEL—*continued.*
arbitrator refusing party time to get, 665.
refusing to hear, 174.
refusing to hear on friendly society reference, 174.
employed by arbitrator to draw up award, 211.
reservation in award to, to settle deeds, 285.
opinion of, whether an award, 256.
acting as arbitrator. *See* BARRISTER.
costs of, 639.
second disallowed, 639.
fees of Queen's, as arbitrator, 375.
motion papers to make submission, rule signed by, 72.

COUNT in declaration awarding on each, 343.

COUNTER-CLAIM,
costs of cause abiding event, 403.
effect of County Courts Acts on, 403.
power of court to stay, 49.

COUNTY COURT,
submission by order of, 97.
not revocable without leave, 97, 161.
arbitrator formerly no power to administer oath, 184.
judge may enforce attendance of witnesses, 184.
no compulsory reference to, 91, 115.
may not be arbitrator for reward, 115.
may set aside award, 654.
time for applying to him, 654.
umpire under Coal Mines Regulation Act, 114.
award entered as judgment, 97.
superior court no power to set aside award, 654.

COUNTY COURTS ACT (51 & 52 Vict. c. 43). *See* STATUTES, 840.
effect of, on costs of reference, 378, 403.
certificate to prevent, 400.
does not apply to deprive defendant of costs, 403.

COURT. *See* ARBITRATION ACT.
of Appeal, powers of, under Arbitration Act, 224.
in bank, arbitrator sometimes as, 118.
consent of, to reference of indictment, 12.
may compel reference of action or matter under Arbitration Act, 87.
may refer issues and questions of fact to official or special referee or arbitrator, 87. *See* ARBITRATION ACT, 1889.
jurisdiction of, when submission cannot be made or is not equivalent to rule, 56.
made rule under the 9 & 10 Will. III. c. 15 . . 58, 581.
to enforce submission in a cause, 86.
to set aside submission, 77.
to amend submission, 79.
to alter terms of reference, 82.
allowing new particulars, new plea, 82.
to enlarge time for making award, 149. *See* ENLARGEMENT.
to give leave to revoke submission, 155. *See* REVOCATION.

COURT—*continued.*
jurisdiction to compel attendance of witnesses before the arbitrator, 179.
none, to compel arbitrator to award, 203.
unless an "officer of the court," 203.
when to restrain him making award, 203.
none, to make him to refund excessive fee, 496.
none, to alter award, 528.
none, to compel delivery up of satisfied award, 534.
to enforce award at law. *See* ACTION; ATTACHMENT; EXECUTION.
to enforce award in equity, 562. *See* EQUITY.
to adopt and enforce report of official referee, 367.
to vary or set aside report of referee, 368.
to require explanations from referee, 370.
to review arbitrator's decision. *See* ARBITRATOR; AWARD.
inquiring of arbitrator the grounds of his award, 314, 512. *See* ARBITRATOR, 860.
to set aside award at law, 652. *See* SETTING ASIDE.
to set aside award in equity, 697. *See* EQUITY.
to set aside judgment entered pursuant to award, 693. *See* SETTING ASIDE.
to refer back award, 479. *See* REFERRING BACK.
to compel defendant to refer again, first award set aside, 708. *See* CAUSE.
favours awards, 688.
will presume award good until proved bad, 270, 688. *See* AWARD.
Divisional, appeal to, from award on compulsory reference, 664.
decision of, final unless leave given, 664.

COVENANT,
not to sue, effect of, 68.
enforcing award by action of, 542. *See* ACTION.

COVERTURE,
party referring with knowledge of opponent's, 17, 299.
award not set aside, 674.

CREDITORS, under law in the Mauritius award binds, 525.

CRIMINAL MATTERS, when referable, 11. *See* SUBJECT MATTERS OF REFERENCE.

CROPS, tenants of allotments, compensation for, 8.

CROSS ACTIONS, arbitrator awarding costs of, to be set off, 384.

CROSS DEMAND, an answer to motion for attachment on award, 612.

CROSS MOTIONS for attachment and setting aside award together, 613.

CROWN, reference by, under Arbitration Act, 39.

DAMAGES,
to accrue to a mine periodically, reference of, 135.
liquidated, for breach of agreement to refer, 62.
nominal, 62.
substantial, 63.
from severance or otherwise, what included, 277, 462.
awarding, 356. *See* CAUSE, 877.
in cause limited by verdict taken on the reference, 73.
omitting to assess, award set aside, 670.
award conclusive as to amount of, 555.
amount of, referred to referee, 92.
on indictment for conspiracy, 315.

DATE,
of reference, matters arising after, not within submission, 134.
writ, limit in action, 134.
of award, undated, computed from delivery, 292.
of publication of award to the parties, 656.

DEAN AND CHAPTER, reference by, 21.

DEATH,
of a party when a revocation of submission, 166. *See* REVOCATION.
not under Lands Clauses Act, 100.
clause to prevent it being a revocation, 169. *See* REVOCATION.
when not prevent enlargement of time, 144.
award prepared but not executed before, void, 711.
sum awarded must be paid to personal representative, 536.
cause abating by, no attachment on award, 588.
of arbitrator when a revocation, 164. *See* REVOCATION.
of arbitrator or umpire, supplying vacancy, 164.
of agent to whom estimate was to be submitted, 711.

DEBT,
certain, reference of, 3. *See* SUBJECT MATTERS OF REFERENCE.
awarding as to amount of, 359.
damages to be, 305.
on the arbitration bond, 541. *See* ACTION.
on the award, 541. *See* ACTION.
of arbitrator to party, 112.

DEBTS AND CREDITS of a firm, awarding on, 422.

DECEIT of party, award set aside for, 672.

DECLARATION,
of arbitrator under the Lands and Railways Clauses Act, 176.
when to be made, 176.
to be annexed to the award, 249, 476.
wilfully acting contrary to, a misdemeanor, 498.

DECREE, effect of award as a, 515.

DECREET ARBITRAL, agreement put in form of, 517.

DEED,
submission by, 56.
one party only executing under seal, 56.
must be executed by all parties before arbitrator has power, 136.
or parties bound, 20.
effect of, 56.
revocation by, when necessary, 153.
award under seal no deed, 259.
award to execute. *See* CONVEYANCE.
reserving power to settle, 285. *See* AWARD, 868.
awarded, executing, 534. *See* PERFORMANCE.

DEFECT in award may be shown as cause to defeat attachment, 610.

DEFENDANT,
arrested, not entitled to discharge on reference, 525.
award of money to, bad, cause only referred, 361.
balance not awarded to, on general reference, setting aside award for, 670.
court no power to direct verdict for, plaintiff refusing to refer again, 709.
not deprived of costs by County Courts Acts, 403.

DEFICIENCY, setting aside award for not providing as to, 423, 671.

DELAY,
affected and wilful, preventing award, costs for, 107.
what must be shown on motion for, 107.
in applying, bar to attachment, 593.

DELEGATION,
of authority by arbitrator, 207, 217. *See* ARBITRATOR, 855.
in award, 281, 283. *See* AWARD, 863.
setting aside award for, 666, 669.

DELIVERY,
of award, 251. *See* AWARD, 866.
up of award, court no power to order, 534.

DEMAND,
omitted, effect of award on, 518. *See* AWARD, 867.
of obedience to award necessary before attachment, 596. *See* ATTACHMENT.
on rule to pay sum awarded, 623. *See* EXECUTION.
before enforcing award in equity, 576.

DEMURRER,
abolished by Rules of Court, 552.
whether referred by referring cause, 126.
contingent damages on, 357.
awarding judgment on, 362.
award on conclusive, though wrong in law, 305.
to award bad on its face as pleaded, 552.
to bill in equity setting out void award, 570.
to bill to set aside award in equity, 702. *See* EQUITY.
by arbitrator when made defendant to bill to set aside award, 501. *See* ARBITRATOR, 859.

DEPRECIATION,
of value of house, compensation for, 463. *See* LANDS CLAUSES CONSOLIDATION ACT.
of reservoir, 466.

DEPOSIT for expenses before reference, 95.

DEVASTAVIT, when reference by executor a, 29.

DIRECTIONS,
in award, 409. *See* ARBITRATOR, 857.
conditional in award, 279, 450. *See* AWARD, 868.

DISAGREEMENT,
of arbitrators, termination of their authority, 164.
what is a, 236. *See* UMPIRE.
umpire's authority commences, 136.

DISCHARGING JURY on reference at Nisi Prius, 79.

DISCONTINUANCE,
award of, 337, 448.
of action not allowed, 337.

DISCOVERY,
referee power to grant, 177.
on reference of action, power of court as to, gone, 180.
equity not grant, in aid of voluntary reference, 60, 96.
aliter on compulsory reference, 96, 567.
pleading award in bar of, in equity, 571. *See* EQUITY.
of new matter, award whether set aside for, 673. *See* SETTING ASIDE, 940.

DISCRETION of judge as to compulsory reference, appeal from, 91.

DISCRETIONARY,
with court to grant attachment, 592.
or rule to pay money awarded, 620.
to stay proceedings in action, 47.

DISMISS bill, defendant moving to, pursuant to award, 580.

DISPUTES,
meaning of, in Building Society Rules, 37.
in submission, 128.

DISTRESS,
power of, when arbitrator may award, 413.
infinite under Railway Companies Arbitration Act, 631.

DISTRIBUTIVE finding on double plea, costs of, 637.

DIVISIONAL COURT. *See* COURT.
decision of, on appeal from compulsory reference final, 664.

DIVORCE,
suit for, reference of, 10, 17, 64.
terms of separation deed settled by Chancery reference failing, 712.

DOCUMENTS,
power of arbitrator to call for, 190.
production of, how enforced, 181, 190.
before official referee, 181.
at county court reference, 181.
prolonged examination of ground of reference, 91.
what is, 92.

DRAIN, award of, capacity not specified, 439, 531.

DRAINAGE ACT, reference of appeals, 98.

DUPLICATE,
orders of reference not agreeing, 314.
appointment of arbitrators under Lands Clauses Act, 585.

DURATION,
of arbitrator's authority, 136. *See* ARBITRATOR, 851.
of umpire's authority, 234. *See* UMPIRE.

EASEMENT, awarding, 434.

ECCLESIASTICAL COURT,
matrimonial suits in, reference of, 10.
terms of separation referable, 10.

EFFECT,
of the award, 514. *See* AWARD, 871.
of an award in evidence, 555. *See* EVIDENCE.
of failure of the reference, 706. *See* CAUSE and EQUITY.

EJECTMENT,
awarding verdict in, 353.
on each demise, 345.
award in, conclusive as to title to land, 521, 556.
judgment in, 648. *See* EXECUTION.
when award bad for not deciding, 268.

ELECTING to proceed by action or attachment on award, 594.

ELEGIT to enforce award in equity, 579.

ENFORCING,
submission in a cause, 86.
award by action, 539. *See* ACTION.
by attachment, 586. *See* ATTACHMENT, 861.
by proceedings in the cause referred, 632. *See* EXECUTION
by execution under the statute of Victoria, 618. *See* EXECUTION.
under Arbitration and Judicature Acts, 630.
under Railways Clauses Act, 631.
Agricultural Holdings Act, 1883...631.
in equity, 562. *See* EQUITY.
contract dependent on abortive reference, 710. *See* EQUITY.

ENGINEER,
as arbitrator, action against for withholding certificate, 603.
of purchasing company refusing to certify, arbitrator to settle price, 128.

ENLARGEMENT,
forms relating to. *See* APPENDIX, 756.
of the time by the arbitrator, 143.
no implied power to enlarge, 143.
should be made during original period, 143.
after period under special power good, 144.
enlarging "until" a certain day, 144.
defective clause to enlarge, 144.
enlarging after death of party, 144.
judge's order for, when to be made, 145.
by two of three arbitrators, 145.
how it should be made, 145.
according to submission, 146.
under Arbitration Act, 146.
often by writing indorsed on submission, 146.
no particular form of words, 146.
from time to time, 147.
by umpire not enure for arbitrators, 147, 238.
under the Lands Clauses Act, 147.
of the time by consent of the parties, 147.
by consent, a new submission, 147.
stamp required, 147.
by deed, not to defeat action on arbitration bond, 541.
conduct of parties often a consent to, 148.
attending meetings after time expired, 148.
bringing forward new claims after time, 149.
stating future day as limit, 149.
enlarging time by consent a discharge of surety, 149.
of the time by the courts of law, 149.
no common law power to enlarge, 149.
power given by Arbitration Act, 1889...150.
for one month if not otherwise specified, 150.
court may enlarge after time elapsed, 150, 657.
after award made, 150.
rule to enlarge not granted ex parte, 151.
enlargement, quantum valeat, 151.
drawing up rule, 151.
enlarging under Common Law Procedure Act, 1854...151.
no power under Public Health Act, 1875...151, 241.
general power under rules of court, 657.
of the time by a court of equity, 151.
practical enlargement of time in equity, 152.
under the Lands Clauses Act, 152.
not an entering on the matters referred, 228.
before appointment of third arbitrator, the two cannot enlarge, 219.
by umpire before disagreement of arbitrators, 238.
notice, what sufficient for attachment, 600.

ENQUIRY. *See* INQUIRY.

ENTERING,
on the reference, what is, 228.
verdict, 632. *See* VERDICT; EXECUTION.
judgment, 645. *See* JUDGMENT; EXECUTION.

ENTIRE, award must be, 260. *See* AWARD, 867.

ENTITLING AFFIDAVITS. *See* AFFIDAVITS.

EPPING FOREST ACT, costs of arbitration costs of purchase, 472.

EQUITY,
submission by order of court of, 95.
stay of proceedings in, 95.
revocable at will of a party, 160.
of one of several parties, 153.
would grant discovery on compulsory reference, not on voluntary, 96, 567.
whether jurisdiction to enlarge time, 151.
practical enlargement, 152.
issue from court of, not referable by court of Nisi Prius, 75, 95.
jurisdiction of, gone by such reference, 96.
effect of an award as a decree, 515.
whether suit will lie for matter omitted in award, 517.
THE AWARD AS A GROUND IN OLD TIMES OF PROCEEDINGS OR DEFENCE IN EQUITY, 562.
enforcing an award by bill in equity, 562.
when specific performance decreed, 562.
whatever the submission action will lie, 562.
performance of award enforced as of a contract, 563.
not to enforce award for payment of money only, 563.
to enforce award of lease or conveyance of lands, 563.
under Lands Clauses Act, 564.
not to enforce award inconsistent with submission, 564.
not unless award ratified or part performed, 564.
award bad in law enforced when part performed, 565.
party not bound to take penalty in lieu of performance, 566.
proceeding at law no bar to bill, 566.
whether lapse of time a bar, 566.
scire facias on submission by recognisance, 567.
discovery when allowed, 567.
when award invalid or inequitable, 567.
no action lies to enforce award contrary to law, 567.
illegal direction not enforceable, 567.
award directing a perpetuity, 567.
unreasonable award, 567.
inequitable award, 567.
award affecting infant, whether enforced, 19, 567.
married woman's lands, 568.
enforcing award against stranger consenting to it, 569.
stranger bound through laches, 569.
stranger cannot enforce award, 569.
demurrer to action setting forth void award, 570.
award void in part, 570.
injunction to prevent breach of award, 570.
to restrain continuing nuisance not prohibited by award, 570.
pleading an award in bar to an action in equity, 570.
pleading award to bill to set it aside, 570.
to open the account, 570.
plea good to merits and discovery, 571.
whether award made after bill filed pleadable, 571.
ground of motion to stay proceedings, 572.
corruption or fraud charged in bill, 572.
must be denied by plea and answer, 572.
whether plea of, award good, when corruption denied in answer only, 572.
answer must deny specifically charges in bill, 572.

EQUITY—*continued.*
THE AWARD AS A GROUND IN OLD TIMES, &c.—*continued.*
pleading an award in bar to an action in equity—*continued.*
plea of award and release, 573.
no plea for a stranger to submission, 574.
enforcing an award by summary proceedings in equity, 574.
whether the award must have been made an order of court before enforcement, 574.
making award in suit an order in Chancery, 574.
practice since Judicature Acts, 574.
motion to make award order of court required notice, 576.
making award under the statute of Will. III. an order of Chancery, 575.
award cannot be made a record at law, 575.
motion to enforce award, 575.
award under the statute of Will. III., 575.
award not a judgment or decree, 576.
submissions to have effect of orders of court under Arbitration Act, 1889..576.
practice enforcing award under the statute of Will. III., 576.
submission and award must have been made orders of court, 576.
notice of motion to make award order, 576.
service of award and demand of performance, 577.
notice of motion for order to obey award, 577.
motion in term or vacation, 577.
order to obey award within a specified time, 577.
order served personally, 577.
order to obey, or stand committed, 577.
order absolute for committal, 577.
party imprisoned until he obey, 578.
practice when award made under order of equity in an action, 578.
award made order of court, 578.
objections to award not allowed after, 578.
notice of motion to obey award, 578.
order to perform within specified time, 578.
order enforced as order in a suit, 578.
by attachment, 579.
by leave of the court, 579.
to be applied for on notice of motion, 579.
enforcing payment of sum awarded under statute of Victoria, 579.
fieri facias and elegit, after order, 579.
taxing costs without special order, 579.
enforcing under Arbitration and Judicature Acts, 579.
motion to pay money out of court according to award, 579.
defendant cannot move to dismiss plaintiff's bill, submission rule of court of common law, 580.
enforcing award in a charity suit by petition, 580.
consent of Attorney-General requisite, 580.
charitable corporation compelled to renew a lease, 580.

EQUITY—*continued.*
IMPEACHING AN AWARD IN EQUITY, 697.
in what cases Chancery has jurisdiction to set aside an award, 697.
jurisdiction of Chancery to set aside awards, 697.
Chancery has jurisdiction, 697.
when reference by private agreement not made rule of court, 697.
when reference in an action at common law, 697.
not affected by the statute of Will. III., 698.
whether equity has jurisdiction when submission out of court made a rule of a court of common law, 698.
equity no jurisdiction, 698.
jurisdiction confined to the court of which submission made rule, 698.
though submission not made rule until after award made, 698.
or until after bill filed, 698.
though submission to be a rule of Chancery, Chancery no jurisdiction by bill, 698.
but by motion, 698.
court in Arbitration Act, 1889..699.
on what grounds equity will set aside an award, 699.
usually same in equity as at law, 699.
evidence as to merits let in to impeach conduct of arbitrator, 699.
equitable proceedings under Arbitration Act, 700.
award under a statute made on a mistake, not set aside, 700.
what the modes of proceeding to set aside an award in equity, 701.
proceeding by bill to set aside an award, 701.
bill lay when submission not under statute of Will. III., 701.
on reference of suit at trial of an issue, jurisdiction of equity gone, 701.
grounds of objection must be stated particularly in bill, 701.
pleading the award in bar, 701.
demurrer when grounds alleged insufficient, 702.
not that parties have proceeded at law, 702.
arbitrator charged with corruption cannot demur, 502, 703.
when arbitrator to be made a defendant, 502, 703.
proceeding by motion to set aside an award, 703.
whether submission be in a suit or under statute of Will. III., 703.
only course when submission provided for being made rule in Chancery, 703.
submission must have been made order of court before motion, 703.
notice of motion must be given, 703.
motion in term or out of term, 703.
notice of motion must state grounds, 704.
how affidavits to be entitled, 704.
cross-motion to set aside, on motion to make award, order of court, 704.
no appeal formerly against decision of Chancery, 704.
appeal against refusal to set aside award is interlocutory, 704.

EQUITY—*continued.*
IMPEACHING AN AWARD IN EQUITY—*continued.*
what the modes of proceeding, &c.—*continued.*
order nisi to set aside award under Lands Clauses Act, 704.
filing exceptions to an award in a suit, 704.
old practice to file exceptions to awards, 704.
present practice no exceptions, but when arbitrator, put for the master, 704.
reference failing, suit proceeds, 709.
reserved liberty to apply to the court, 710.
enforcing in equity a contract dependent on an abortive reference, 710.
when reference of essential terms, no action will lie to enforce contract, 710.
equity not divide an estate, or fix purchase price, 710.
death of agent appointed to approve price, 711.
party dying after award prepared, but not executed, 711.
court will fix price when submission not of essence and part performance, 712.
will settle separation deed, 712.
though reference respecting price, when part performance, 712.
award made after time elapsed, when enforced, 713.
apportionment of compensation under Lands Clauses Act, 456.

ERROR,
clause prohibiting, striking out, 80.
did not lie on case stated pending reference, 206.
clerical, in award amending, 142, 267, 310, 529, 668.
in order of reference amending, 81.
in judgment, award not set aside for, 667.

ESTATE, equity not divide, reference failing, 710.

ESTOPPEL,
award acted on an, 559.
award where not an, 515.

EVENT OF AWARD,
when costs abide, what is, 390. *See* COSTS, 886; CAUSE.
to be construed distributively, 392.
when claim and counter-claim successful, 391.

EVIDENCE,
false, punishment for, 183.
attempting to create, a misdemeanour, 184.
how taken, on a reference, 177.
on oath, 182.
subpœna for witnesses to give, 179.
duty of arbitrator to hear, 185. *See* ARBITRATOR, 853.
arbitrator bound by rules of, 199. *See* ARBITRATOR, 854.
should take, in presence of parties, 191.
should take notes of, 189.
should hear, on reference back, generally, 489.
by affidavits, when admissible on reference, 184.
rejecting, no ground for setting aside award, 673.
awarding contrary to, no ground, 306.
new, discovered, whether ground, 673.
admitting improper, whether ground for revocation, 158.

EVIDENCE—*continued.*
proof of submission and award, 553.
in action on award, execution of all parties must be proved, 553.
rule embodying submission no evidence of the agreement of reference, 553.
but evidence of submission when by judge's order, 553.
performance of award evidence of submission, 553.
recital in award no evidence of appointment of third arbitrator, 554.
acting no proof of appointment, 554.
admission by plaintiff, 554.
production of submission and award primâ facie evidence, 554.
award purporting to be by three, executed by two arbitrators, 554.
when notices under Inclosure Act presumed from award, 554.
order of justices presumed, 554.
effect of an award in evidence, 555.
valid award conclusive as, 555.
not evidence as an account stated, 555.
unless adopted and acted on, 555.
in ejectment, award respecting title to land conclusive, 555.
conclusive as to amount of damages, 555.
when award conclusive against an executor as to assets, 555.
award merely finding debt existing, not conclusive, 555.
award directing executor to pay, conclusive, 555.
award in an action not evidence against party on an indictment, 555.
under Lands Clauses Act, no evidence as to right to compensation, 556.
effect of an award as evidence as to strangers, 556.
no evidence of right or reputation against stranger, 556.
award for tenant not evidence for landlord, 556.
not evidence for the crown against party, 557.
award sometimes evidence for a stranger, 557.
evidence for arbitrator, 558.
acted on evidence as to stranger, 558.
respecting right to tolls, 558.
stranger acquiescing in award, 558.
award acted on an estoppel, 559.
impeaching by evidence award put in evidence, 559.
proving matter not awarded on, 559.
issues in cause not decided, 560.
showing demand in action not within reference, 560.
evidence of misconduct or mistake of arbitrator, whether admissible, 560.
correctness of arbitrator's decision cannot be questioned, 560.
proving submission obtained by fraud, 561.
proving deficiency of assets where proviso in submission for abatement in such event, 561.
taken before referee, court may use, 318.

EWES with lamb, award as to, 134.

EX PARTE,
arbitrator proceeding, 198. *See* ARBITRATOR, 854.
when ground for setting aside award, 665.

EXAMINATION,
on oath by the arbitrator, 182. *See* ARBITRATOR, 853.
under stat. 14 & 15 Vict. c. 99 .. 183.

EXCEPTIONS, filing, to award, 704. *See* EQUITY.

EXCESS,
in award, 325. *See* AWARD, 870.
not cured by recital in award, 258.
setting aside award for, 671. *See* SETTING ASIDE, 940.

EXCUSE for delay in moving to set aside award, 662. *See* SETTING ASIDE.

EXECUTION,
of the award, 248. *See* AWARD, 866.
by joint arbitrators, 219.
of a deed awarded, 536. *See* PERFORMANCE.
EXECUTION UNDER THE STATUTE OF VICTORIA (1 & 2 Vict. c. 110), 618.
rule to pay the amount awarded, 618.
no summary execution on goods before statute, 618.
statute gives to rules to pay effect of judgments, 618.
rule embodying submission not a rule by which money is payable, 619.
construction of the statute, 619.
proper course to move for rule to pay amount awarded, 619.
statute gives it effect of a judgment, 620.
discretionary with court to grant rule, 620.
award containing no direction to pay, 620.
party charged with perjury, 621.
rule refused when right doubtful, 621.
when award does not specify amount, 621.
when party pursues other remedy, 621.
attorney cannot have rule to enforce lien in his own name, 622.
no rule to pay for compensation awarded under Lands Clauses Act, 622.
nor Public Health Act, 1875 .. 622.
nor, *semble*, on compulsory reference of cause under Common Law Procedure Act, 622.
effect of award under Arbitration Act, 622.
practice as to obtaining the rule, 623.
demand of performance same as in attachment, 623.
service of award, &c., same as in attachment, 623.
service of copy award, showing original afterwards, 623.
sometimes personal service dispensed with, 623.
demand by attorney good, award to pay plaintiff or attorney, 623.
party with knowledge of award avoiding service, 624.
moving on last day of term, 624.
rule formerly rule nisi on reference by agreement, 624.
now on notice of motion, 624.
grounds of, to be stated, 624.
form of rule, 625.
on reading what, rule drawn up, 625.
rule, six day rule, 625.
whether cause can be shown at chambers, 625.
service of rule generally personal, 625.
consent of attorney to rule absolute, 626.

EXECUTION—*continued.*
EXECUTION UNDER THE STATUTE OF VICTORIA—*continued.*
practice as to obtaining the rule—continued.
cause could not be shown last day of term, 626.
official manager of company being wound up may show cause, 626.
same objections to award open as on motion for attachment, 626.
rule refused in case of set-off, 626.
no objection, time for setting aside award not expired, 627.
no rule when misnomer of party in award, 627.
after reference back no rule granted on old allocatur, 627.
rule against company being wound up refused, 627.
presumption of payment of costs of award, 628.
no rule award ordering payment to a stranger, 628.
attorney of corporation not appointed under seal no answer to motion, 629.
making rule absolute on terms, 629.
on motion for rule award referred back, 629.
producing award on drawing up rule, 629.
specifying amount of costs in rule, 629.
interest on sum awarded, 629.
no scire facias necessary after a year and a day, 629.
under the statute of Victoria, in equity, 579.
by fieri facias and elegit, 579.
execution under the Arbitration and Judicature Acts, 630.
application to judge or master at Chambers, 630.
official requirements, 630.
demand of payment by solicitor's clerk not sufficient, 630.
process under the Railway Companies Arbitration Act, 631.
EXECUTION IN THE CAUSE REFERRED, 632.
entering the verdict pursuant to the award, 632.
award in the cause same effect as finding of jury, 632.
verdict taken on the reference modified by award, 633.
no enforcing judgment contrary to the submission, 633.
taxing costs of cause when no award of separate damages in the cause, 633.
practice as to entering verdict, 634.
submission must have been made rule of court, 634.
postea entered pursuant to award, 634.
no application to court necessary, 634.
award of verdict conditional on court's decision, 635.
when party had to apply to court, 635.
rule to enter verdict or set aside award, 635.
verdict cannot be amended by arbitrator's notes, 635.
taxing the costs of the cause and reference, 635.
practice, 636.
costs of cause taxed, 636.
special case costs of cause, 636.
costs on distributive finding on double plea, 636.
old distinction whether reference before or after verdict, 398, 399.
apportioning costs of the cause and issues, 638.
costs of witnesses, 638.
accountant, 638.
of counsel, 639.
how far master will question arbitrator's charges, 639.
costs of attorney to draw award, 639.
how soon costs may be taxed, 640.

EXECUTION—*continued.*
EXECUTION IN THE CAUSE REFERRED—*continued.*
taxing the costs of the cause and reference—continued.
on what scale costs to be taxed, 640.
costs of reference, 641.
to county court judge, 641.
taxing costs of cause when no damages awarded, 641.
master must tax according to award, 641.
taxing costs as between attorney and client, 641.
power of arbitrator to allow, 641.
court directing how costs to be taxed, 642.
costs of issues, 642.
taxation not reviewed because award ambiguous, 642.
whenever submission made or having effect of rule, master may tax costs, 643.
taxing costs when submission rule of another court, 643.
whether for each defendant separately, 643.
new taxation after award on reference back, 644.
taxing costs of cause and reference separately, 643.
judgment, properly for costs of cause only, 644.
by consent may be for all costs, 644.
reference back costs of abortive award, 644.
signing judgment pursuant to award, 645.
no rule for judgment requisite, 645.
when judgment signed, 646.
under Judicature Acts, 645.
motion for judgment, 645.
official requirements for, 645.
before party has had time to move to set aside, 646.
when sum awarded to be paid at a future day, 646.
signing judgment on compulsory reference, 647.
entering up judgment nunc pro tunc, 647.
on a special application, 647.
award on last day of term when judgment to be entered, 647.
award lost, entering up judgment on, 648.
what form of judgment when no verdict taken, 648.
clause, to sign judgment for amount awarded, 648.
judgment in ejectment as on a trial at Nisi Prius, 648.
entering nominal damages to warrant judgment for costs, 649.
moving for judgment on an indictment referred, 649.
entering award on appeal as judgment of Quarter Sessions, 649.
issuing execution for the amount awarded, 650.
no demand requisite before issuing execution, 650.
interest on sum awarded, 650.
obtaining payment out of sum deposited in court, 650.
mandamus against a company, 650.
local board of health, 651.
distress infinite against railway company, 651.
setting aside execution, 694. *See* SETTING ASIDE, 942.

EXECUTOR,
reference by, 29.
not bound to appoint arbitrator by testator's agreement to refer, 29.
demand as, matter in difference on general reference, 123.
when reference by, a devastavit, 30.
how far reference by, and admission of assets, 30.

EXECUTOR—*continued.*
may show arbitrator that he has no assets, 188.
personal liability of, from referring, 29.
when award conclusive against, as to assets, 555.
no direction in the award to pay, 30.
direction to pay, 30, 418.
out of assets not conclusive against, 31, 419.
quando, 31.
award not set aside though no finding as to assets, 287, 671.
how arbitrator should direct executors to pay, 418.
liability to costs as executors, in action, 397.
personal liability to costs, 31.
action on award against, 541.
clause in submission by testator, death not to be a revocation, 169.
not bound to attend before arbitrator, 169.
bound as to assets by award against testator, 169.
not liable to attachment, 590.
payment to, 536.
may have attachment to enforce award, 588.

EXPLOSIVES ACT (38 & 39 VICT. c. 17). *See* STATUTES, 824.

EXTORTION of excessive fee by arbitrator, 495. *See* ARBITRATOR, 859.

FACTS, duty of arbitrator as to stating, 317, 321.

FAILURE of the reference, effect of, 706. *See* CAUSE; EQUITY.

FEE,
award of, by arbitrator to himself, 385.
of arbitrator, delivering award on payment of, 251.
retaining award until payment of, 494.
whether action or attachment lies for, 493.
liability of arbitrator in respect of, 495.
on reference to official referee, 94.

FELON, party examined, award not set aside, 674.

FELONY, not submissible, 11.

FEMALE, marriage by, revocation of submission, 163.

FEME COVERT, reference by, 16. *See* WIFE.

FENCES, to erect, awarding, 443.

FIERI FACIAS to enforce award in equity, 579.

FILTERING, award as to, not specifying what process, 438.

FINALITY, want of, ground of setting aside award, 261, 667. *See* SETTING ASIDE, 940.

FINLAY'S ACT,
appeal against award not under, 370.
general power of court over costs, 319.

FIRE, risk of, compensation for, 462.

FIXTURES,
where arbitrator may not order replacement, 411.
when award bad for not specifying quality, &c., 438.

FOREIGN ATTACHMENT,
no answer to motion for attachment, 612.
plea of, in debt on arbitration bond, bad, 551.
on award, good, 551.

FOREIGN COURT, reference to, 50.

FOREIGNER, when not good arbitrator by French law, 114.

FRAUD,
setting aside submission for, 78.
charge of, when referable compulsorily, 48, 90, 92.
proving in action submission obtained by, 561.
setting aside award for, 672.

FRAUDS, STATUTE OF. *See* STATUTE OF FRAUDS.

FRIENDLY SOCIETY,
what is, 35.
disputes concerning, settled by arbitration according to the rules, 35.
or by county court, 35.
claim on a policy, 36.
arbitrators not bound to have counsel, 35.
distinction between, and building societies, 37.

FRONTAGER,
effect of award on, under Public Health Act, 516.
loss of river frontage, 463.

FURTHER,
time for moving to set aside award, 657, 661. *See* SETTING ASIDE, 939.
maintenance of action, pleading award to, 548.

FUTURE,
claims, reference of, 134.
differences and use of property, 5.

GENERAL VERDICT, effect of award of, 347.

GOODWILL to be considered in value of premises taken, 463.

GROUNDS,
of award, whether arbitrator must state, 503.
for setting aside award, 664. *See* SETTING ASIDE, 939.
must be stated on motion, 683.
for setting aside judgment, need not, 696.
award in equity, 703. *See* EQUITY.

GUARDIAN,
death of infant, revocation of submission by, 168.
award to give bond for infant to convey, held unreasonable 568.

GUILTY, verdict of, should be taken on reference of indictment, 75.

HABEAS CORPUS, for bringing prisoner for examination before referee, 179.

HIGHWAY,
indictment for non-repair of, not arbitrable, 13.
award on, not evidence of liability against stranger, 557.
of herbage to surveyors of, 524.
obstruction of, compensation for, 459. *See* LANDS CLAUSES CONSOLIDATION ACT.

HIGHWAY ACT, 1864, compulsory reference of appeal, 98.

HOSPITAL, reference by master and fellows of, 21.

HOUSE OF COMMONS, no attachment against member, 590.

HOUSE OF LORDS, no appeal to, formerly, on award under statute of Will. III., 704.

HOUSING OF THE WORKING CLASSES ACT, 1890 (53 & 54 Vict. c. 70). *See* STATUTES, 833.
submission under, 7.
arbitrators under Part I., 105.
appointed by "confirming authority," 105.
appeal from award of, to jury, 105.
under Part II., 105.
appointment by Local Government Board, 105.
repeal by, 452.

HUSBAND AND WIFE,
submission between, when valid, 17.
between husband's and wife's trustee, 17.
husband, right of, to refer wife's chattels, 17.
wife's chattels as executrix, 18.
real estate, 18.
binding wife in equity, 567.
civiliter mortuus, wife may refer alone, 16. *See* WIFE.
award of payment to wife only, 419.
husband whether liable to attachment for default of wife, 18.

HYPOTHETICAL,
award, 323. *See* AWARD, 870.
finding on pleas, for costs, 302.

ILLEGALITY,
matters tainted with, not referable, 5.
award to do illegal act invalid, 415.
arbitrator awarding illegal act liable personally, 498.
when arbitrator judge of, award not set aside, 667.

IMPEACHING,
award by motion to set it aside, 676. *See* SETTING ASIDE, 941.
by evidence, 559. *See* EVIDENCE.
in equity, 697. *See* EQUITY.

IMPOSSIBLE AWARD bad, 300. *See* AWARD, 870.

IMPRISONMENT for contempt in disobeying award, 586, 616.

IN REM, proceeding in, after award, 516.

INCAPACITY of arbitrator or umpire, supplying vacancy, 165.

INCLOSURE ACT,
objects of, effected by arbitration, 6.
powers of arbitrator under, 440.
giving allotment for right not extinguished, bad, 440.
exchanged lands should be specified, 441.
proper consents should be recited, 441.
award to surveyors of highways and their successors, 441.
good as a parliamentary declaration of parties to hold, 441.
right of way omitted in award, 441.
when unnecessary to specify lands liable to rent-charge, 442.
what a neglecting to make an award, 442.
award under, Chancery no jurisdiction to rectify, 441.
no ad valorem stamp necessary on award, 253.
award under, effect of, 523.
title not generally given by allotment before award, 523.
allotment for tithes extinguished, 523.
when title to compensation money complete, 523.
notices under, when presumed given, 554.
order of justices under, when presumed made, 554.

INCONSISTENT AWARD,
bad, 300. *See* AWARD, 870.
setting aside, 671.

INDEMNITY,
arbitrator has no general power to award, 424.
only when a necessary provision, 425.
award of, against costs of action, 425.
against bills of exchange, 425.
against debts from a certain date, 425.
against costs in action where other person's name used, 426.
principle of awarding, 426.
award omitting to decide on claim for, bad, 264, 268.

INDICTMENT,
for felony not submissible, 11.
for misdemeanor, what referable, 11. *See* MISDEMEANOR.
before quarter sessions referable, 14.
whether consent of court to reference requisite, 14.
referable at Nisi Prius, 75.
on reference verdict of guilty should be taken, 75.
no compulsory reference of, within Arbitration Act, 59, 75.
Statute of Will. III. did not make reference of, irrevocable, 157.
costs incident to, what are, 377.
awarding compensation for injury after, 133.
moving for judgment on, pursuant to award, 659.
attachment lies to enforce award on, 588.
award in a cause not evidence on, 554, 557.

INDORSEMENT,
enlarging time by, when necessary, 146.
appointing umpire by, when necessary, 234.

INEQUITABLE AWARD, enforcing, in equity, 567.

INFANT,
submission of, voidable, not void, 18.
when plaintiff in a suit, solicitor cannot bind by referring, 27.
party bound for, 18.
whether equity will enforce award affecting, 19, 568.
reference to the master whether arbitration for infant's benefit, 19.
mutuality of infant's submission, 19, 298, 567.
parties referring with full knowledge of the infancy, 19.
award not set aside because infant party, 674.
plaintiff avoiding award defendant may proceed in action, 707.

INFERIOR COURT, costs of cause in, award must fix amount, 290, 382.

INJUNCTION,
to restrain arbitrator from proceeding, 203.
when not granted, 204.
party from proceeding with reference, 204.
awarding, against recovering at law, 389.
not granted to stay action after agreement to refer, 65.
equity might grant, against proceeding on award, 204, 698.
to prevent breach of award, 570.
recurrence of nuisance awarded on, 432.

INJURIOUSLY affecting land by railway works, 458.

INQUIRY,
by court of arbitrator as to grounds of award, 314. *See* ARBITRATOR, 860.
writ of, when unnecessary in action on award, 543.
of official referee, 87. *See* REFEREE.

INSOLVENT,
reference by assignee of, concerning estate of, 34.
liability of assignee, 34.
consent of creditors to reference, 34.
need not be averred in action on the award, 34.
insolvency, whether revocation of submission by, 163.
when award set aside for, 678.
might move to set aside award, 673.

INSPECTION,
of premises, discretionary in arbitrator, 187.
deciding on, without evidence, 187.
of samples, 187.

INSTALMENTS,
payment by, award of, 416.
awarded, when assumpsit lay for, 541.

INTEREST,
right to, is a question of fact, 420.
arbitrator may allow when court cannot, 420.
awarding interest as damages, 420, 421.
in benefit building society arbitration, 421.
award of, from date of last settlement, 293.
on sum awarded, recoverable in action, 542.
not by attachment, 589.
nor formerly by execution in the cause referred, 650.
under Rules of Court, 650.
on rule to pay sum awarded, 629.
direction as to, in writ of execution, 650.

INTEREST—*continued.*
under Judicature and Companies Acts, 543.
Artizans' Dwellings Act, 523.

INTERESTS, PERSONAL, of arbitrator, 492. *See* ARBITRATOR, 859.

INTERLOCUTORY,
award, 205.
judgment on special case, when, 319.
appeals from judge in Chancery refusing to set aside award, 692, 704.

INTERPLEADER on adverse claims to money deposited with arbitrator, 499.

INTERPRETATION ACT, 1890 (52 & 53 Vict. c. 53), words in singular include plural, and vice versâ, 248.

INTERROGATORIES,
filing, on attachment, 615. *See* ATTACHMENT.
referee answering, 369.

IRELAND, Arbitration Act, 1889, does not apply to, 41.

IRREGULARITY,
of arbitrator in conducting the reference. *See* ARBITRATOR.
in examination of witnesses, 191.
ground for setting aside award, 665.
no answer to motion for attachment, 609.
may be waived, 196.
improper enlargement of time, 196.
improper appointment of umpire, 196.
course to cure, 197.
setting aside judgment on award for, 695.
waiver of, in entering judgment, 694.
in service of affidavits on motion for attachment condoned, 608.
in proceedings for contempt, answer to motion for attachment, 609.
objections to be stated when moving to set aside for, 696.

ISSUE,
of law, whether referred by referring cause, 126.
directed pending reference, 206.
duty of arbitrator to award on each, 342. *See* CAUSE.
clause relieving from finding on each, 77.
costs of, how to be taxed, 642. *See* EXECUTION.
not decided properly, setting aside award for, 669.
out of Chancery not referable by court of Nisi Prius, 75.
reference of, abandons suit, 95.
no new trial if award unsatisfactory to party, 701.

ITA QUOD, clause in submission, effect, 261. *See* AWARD.

JOINDER,
of third party on reference of a cause, 71.
by order of referee, 23.

JOINT DAMAGES, awarding to plaintiff and third party, 360.

JOINT AND SEVERAL,
disputes, by what words, referred, 131.
how to award on, 131.

JOINT STOCK COMPANY, reference by, 38. *See* COMPANIES CLAUSES CONSOLIDATION ACT.

JUDGE,
may compel reference, 87. *See* ARBITRATION ACT, 1889.
order of, reference of cause by, 72.
at Nisi Prius, power of, to refer, before Judicature Acts, 89.
discretion of appeal from, 91.
appeal to, from refusal of referee to postpone hearing, 177.
arbitrator with same power as, as to evidence, 320.
as to certifying for costs, 404, 407.
power of, to certify for costs after award, 406.
power of, to enlarge time, by the submission, 143.
by statute, 152.
application to, for enforcing award, 630.
may give leave to revoke, 156.
appoint arbitrator or umpire on disagreement, under Arbitration Act, 1889..66, 214, 223.
on reference under Companies Clauses Act, 226.
no power to set aside award, 653.
except in cause in Common Pleas of Lancaster, 653.
may stay proceedings on award, 653.

JUDGMENT,
effect of award as a, 514.
award of, 362. *See* CAUSE.
power of arbitrator and referee to direct, 365.
not to be signed when no verdict, 633.
unless provided in submission, 648.
signing pursuant to award, 645. *See* EXECUTION, 902.
non obstante veredicto, whether right to, referred by referring cause, 126.
motion for, prohibited by agreement not to sue, 69.
excess in award, as to entry of, 326.
unauthorized entry, setting aside award for, 670.
on special case, 319.
when interlocutory, when final, 319.
appeal from, 319.
on report of official referee moving for, 371. *See* REFEREE.
setting aside, 693. *See* SETTING ASIDE.
directed by referee and entering for other party, 695.
rule to pay sum awarded has effect of, 620. *See* EXECUTION.
of quarter sessions, entering award as, 649.

JUDICATURE ACTS. *See* STATUTES, 808.
prolonged examination of documents under, 92.
referees appointed under, 93. *See* REFEREE.
effect of, on term for setting aside award, 654.
execution under, 630.
appeal against judgment on compulsory reference under, 371.
to Divisional Court, whose decision final, 692.
See RULES and ORDERS.

JUDICIAL FUNCTIONS,
arbitrator delegating, before award, 207. *See* ARBITRATOR, 855.
by award, 281. *See* AWARD, 868.

JURISDICTION,
of the arbitrator. *See* ARBITRATOR.
of a judge. *See* JUDGE.
of a court. *See* COURT.
of Chancery. *See* EQUITY.
attachment on award lies against party beyond, 591.
ousting, 61.

JUROR,
withdrawn, reference of cause, 74.
cause not necessarily terminated, 707.

JURY,
discharged, reference of cause, 74.
arbitrator in the place of, 117.
award is as finding of, 632.

JUSTICE, proceeding contrary to, "undue means," 675.

JUSTICES,
order of, presumed to support award, 554.
warrant of, to enforce award under Benefit Building Societies Act, 38.
appointing umpire under Lands Clauses Act, 225.
receiving declaration of arbitrator, 176.

LACHES,
of solicitor in objecting to reference by counsel, 28.
stranger guilty of, bound by award, 23, 568.

LANCASTER COMMON PLEAS, setting aside award on cause in, 654.

LAND,
questions relating to, referable, 4.
not settled to separate use, wife could not refer as to, 16.
taking warrant of attorney to abide award as to, 44.
conveying to arbitrator upon trust to divide, 44.
may not be awarded in satisfaction for personal matters, 410.
lien on, cannot be awarded, 411.
award in ejectment should specify parcels of, 353.
of a charitable corporation, award as to, 429, 580.
where conveyance of, awarded, who to prepare, 429.
of a stranger, awarding act to be done on, 449. *See* STRANGER.
award as to, determines title as between parties, 521.
not convey title as against stranger, 521.
except under statute, 522. *See* INCLOSURE ACT.
conveyance of, should be awarded to pass title, 267, 520.
how to be awarded, 428. *See* CONVEYANCE.
award may direct measurement of, 284.
taken by statute, compensation for, 6. *See* LANDS CLAUSES CONSOLIDATION ACT.
reference as to price of, failing—enforcing contract in equity, 712.

LAND DRAINAGE ACTS,
references under, 7.
compulsory reference of appeal, 98.

LANDS CLAUSES CONSOLIDATION ACT,
8 & 9 Vict. c. 18. *See* STATUTES, 817.
32 & 33 Vict. c. 18. *See* STATUTES, 817.

what matters referable,
compensation for lands taken for public undertaking, 6.
taken, used, or injured by railways, 6.
markets and fairs—harbours, docks, and piers, 7.
for water works—improvements in towns—cemeteries, 7.
for injuries by drainage by statute, 7.
price of lands resold, 7.
public health—houses of working classes, 7.
railway companies, 7.
matters authorized or directed to be referred, 98.

parties to the reference,
promoters of the undertaking, and parties claiming interest in lands, 38.

how submission to be made,
notice by promoters lands required, 98.
claim by party for compensation exceeding fifty pounds, 98, 452.
demand of arbitration by party, 98.
compulsory on promoters, 98.
should be limited to compensation, 99.
parties should try to agree on single arbitrator, 99.
unless agreeing in one, each to appoint an arbitrator, 99.
appointment of arbitrator, the submission, 100.
submission not revocable without consent, 100.
nor by death of party, 100.
submission held to be a submission by consent, 60, 101.
one side refusing to appoint, single arbitrator to act for both, 100.
signature of secretary or clerk binds promoters, 101.
on death or incapacity of sole arbitrator, matter referred de novo, 101, 165.
of one of two, new arbitrator appointed, 101, 165, 221.
or remaining arbitrator acts alone, 101, 165, 221.
on refusal or neglect to act of one of two, remaining arbitrator may proceed alone, 101.
what not a refusal to act, 222.
arbitrators to appoint umpire before entering on matters referred, 101, 223.
appointment by, to be in writing, 225, 233.
and within three months after their own appointment, 230.
to appoint new umpire on death or incapacity, 225.
on refusal or neglect of arbitrators, two justices to appoint umpire, 225.
when railway company party, Board of Trade to appoint, 226.
submission to be made a rule of court, 584.
costs of arbitration, how to be borne, 101, 379.
rule to pay costs of award not granted, 622.
costs of inquiry settled by master as arbitrator, 115.
declaration by arbitrators and umpire before entering on reference, 176.
wilfully acting contrary to, a misdemeanor, 498.
may be made before any justice, 176.
arbitrators and umpire may administer oath, 184, 190.
examine on oath parties and witnesses, 184, 190.
call for documents, 190.

LANDS CLAUSES CONSOLIDATION ACT—*continued.*
time for award,
within twenty-one days, unless time enlarged, 141, 147.
arbitrator may enlarge to three months from appointment, 147.
sole arbitrator has three months to award in, 141.
same limit on reference under s. 68 . . 141.
umpire, authority of, when it commences, 240.
duration of power of, three months from duty devolving, 240.
duty of, to rehear case, 244.
now award to be made, 452.
must be in writing, 475.
notice to treat, 452.
service of, 452.
claim must state nature of interest, 453.
arbitrators cannot go beyond claim, 453.
arbitrators not to try title, 453.
party failing to make title deposit of compensation in bank, 453.
on deposit estate to vest in promoters, 454.
title to be assumed when claim under s. 68 . . 454.
promoters may contest that claimant is damaged, 455.
award no evidence only legal claims considered, 455.
party claiming greater title than he has, 455.
amount may be settled before liability, under Public Health Act, 456.
apportionment by equity of compensation, 456.
arbitrator not empowered to try whether claim to easement well founded, 456.
though claim doubtful, arbitrator should assess compensation, 457.
test when land injuriously affected, none being taken, 458.
compensation, none for injury to amenities or annoyance, 458.
for special damage from obstruction of highway, 459.
interference with ancient lights, 460.
abstraction of water, 461.
injury from use of railway, 461.
damage foreseen, 461.
vibration, noise and smoke, 461.
when land taken, larger elements of, 462.
for danger from fire, 462.
for cutting off springs, 462.
depreciation for substituting highway for river frontage, 462.
goodwill, trade profits, 463.
not for injury from works on other land, 463.
for sewers, 464, 469.
compensation should be for necessary and probable damage, 464.
no future claim sustainable, if unforeseen damage arise, 465.
action, not arbitration, for damage by negligence, 466.
compensation, from time to time, 466.
for severance of rifle range, 466.
depreciation of reservoir, 466.
severance of accommodation works, 467.
arbitrator has no right to set out approaches, 467.
no right to order works, 467.
damages contingent on company's option, 467.
no right to order payment, 468.

LANDS CLAUSES CONSOLIDATION ACT—*continued.*
how award to be made—continued.
one compensation for stream to be taken from time to time, 468.
awarding no compensation due, 468.
awarding no damage by severance, 468.
whether a sewer a benefit or not, 469.
arbitrator may not consider excuse for not paying damages, 469.
nor possible claims by tenants, 469.
land of yearly tenant injuriously affected, 469.
verbal award by justices to yearly tenant, 470.
award under Artizans and Labourers Dwellings Improvement Act, 470, 523.
special case, power of arbitrator to state, 470.
under Arbitration Act, 470.
appeal from decision on, 320.
costs of reference and award, 471.
when lands taken under Public Health Act, 472.
and consequent on reference under Public Health Act, 471.
under Local Act, incorporating, 471.
no offer by promoters, 472.
costs when lands taken under Public Health Act, 1875..471.
how late promoters may offer compensation, 472.
whether to settle costs in award, 472.
costs of separate claims, 473.
no lien on land for costs, 473.
claim for costs on fund in court, 473.
right to costs before conveyance of lands, 474.
taxation by master under Lands Clauses Act, 1869..474.
no costs if solicitor uncertificated, 474.
what recitals advisable in award, 474.
misdescription of subject-matter, 475.
delivery of award to promoters, 475.
declaration to be annexed to award, 476.
compelling promoters to take up award, 475.
award not void for defect of form, 476.
not enforceable summarily, 622.
enforcing award by action, 476.
before taxation, 477.
time for moving to set aside award, 663.
moving to set aside award not bar right to costs of title, 477.
award not prevent deviation, 477.
enforceable in equity as a contract, 477.
how submission to be made a rule of court, 584.
if Arbitration Act does not affect it, 584.
entitling affidavits for, in Chancery, 584.
appointments of both arbitrators made rule, 584.
in equity order drawn up upon one only under special circumstances, 584.
advisable to make the appointments of the arbitrators in duplicate, 585.
appointment of umpire not rule, 585.
settling compensation by jury in default of arbitration, 710.

LAPSE OF TIME, whether bar to bill to enforce award, 566.

LAST DAY OF TERM,
no attachment granted on, 606.
no cause shown on, against attachment, 607.

LAST DAY OF TERM—*continued.*
motion for rule to pay money awarded, 624.
no showing cause on, against rule, 626.
motion to set aside award rarely allowed on, 691.
whether cause could be shown on, against, 685.

LAW AMENDMENT ACT. *See* STATUTES, 804.

LAW TERMS, what they were, 655.

LAY ARBITRATOR,
award of, same effect as of legal, 303.
affidavit by, on motion to set aside award, 680.

LEASE,
award of. *See* CONVEYANCE.
of charity lands, 429.
enforcing, 580.
for too long a period, 331.

LEAVE OF COURT
to revoke, 155. *See* REVOCATION.
for attachment, 608. *See* ATTACHMENT.

LEGAL
arbitrator, award of, same effect as of lay, 303.
misconduct of arbitrator, what amounts to, 605.

LETTER
of arbitrator, whether receivable to affect award, 311, 313.
of barrister arbitrator, whether receivable as an affidavit, 512.

LIABILITY
by referring of executors. *See* EXECUTOR.
of trustees. *See* TRUSTEE.
of agent. *See* AGENT.
of assignee. *See* ASSIGNEE.
of arbitrator. *See* ARBITRATOR.

LIBERTY RESERVED to apply to the court, 709.

LIEN
cannot be awarded on land, 411.
of attorney on sum awarded. *See* ATTORNEY.
of arbitrator on award for his fees, 475, 494.

LIMIT OF TIME
for matters in difference to arise, 132. *See* SUBMISSION.
for award under a statute when directory only, 141.
for setting aside award, 654. *See* SETTING ASIDE.

LIMITATIONS, STATUTE OF,
plea of, in action on award, 550.
effect of, 550.

LIQUIDATED DAMAGES, for breach of agreement to refer, 63.

LOCAL BOARD, mandamus against, to enforce award, 650.

LOCAL GOVERNMENT ACT, 1888 (51 & 52 Vict. c. 41),
reference under, 104.
of questions as to sewer, 104.
between county and county borough, 104.
arbitrator under, 104.
award under, 104.

LOCAL GOVERNMENT BOARD,
no power to state special case when adjudging between local boards, 319.
appointment of umpire by, under Public Health Act, 1875 .. 103.
of arbitrator by, not revocable by court, 161.
re-opening award between county and county borough, 104.

LOCAL INVESTIGATION, matter requiring, compulsorily referred, 88.

LORD CHANCELLOR, order as to referee's business, 94.

LORDS, HOUSE OF, no appeal to, from decision on an award under statute, 704.

LOST,
award, whether attachment granted on copy, 607.
entering judgment on, 648.

LOT,
appointing umpire by, bad, 231. *See* UMPIRE.
award set aside for, 666.

LUNAR months, time in submission computed by, formerly, 139.

LUNATIC,
power of committee or wife of, to refer, 32.

MACHINERY, change from wood to iron, awarding, 436.

MAILS, conveyance by railway. *See* STATUTES, 809.

MANDAMUS
to enforce award against a company, 591, 650.
to promoters to take up award, 475.

MARRIAGE,
arbitrator cannot award, 411.
of female party a revocation, 163.
without notice to arbitrator, 163.
plea of, in action on an award, 551. *See* PLEA.
plea of consent to, in action for revocation, 155.
whether attachment lies against woman after, 17.

MARRIED WOMEN. *See* WIFE.

MASTER,
reference to, whether arbitration for infant's benefit, 19.
whether for lunatic's benefit, 32.
not, whether for married woman's benefit, 16.
whether party disobeying award in contempt, 615.
to settle terms of lease, reference failing, 710.
evidence by affidavit on, 184.
has all powers of court or judge under Arbitration Act, 1889 .. 72.
not to direct attachment, 606.
as arbitrator to settle costs of inquiry under Lands Clauses Act, 115.
award delegating to, to tax costs, 283.

MASTER—*continued.*
taxation of costs by, award not ascertaining amount, 290.
a ministerial act, 283.
under Lands Clauses Act, court no power to review, 474.
practice taxing costs on award, 635. *See* EXECUTION.

MASTERS AND WORKMEN,
disputes between, settled by arbitration, by statute, 8.
no stamp on submission or award, 252.

MATTER OMITTED
from award, no action lies for, 517.
ground for setting aside award, 263, 673.

MATTERS IN DIFFERENCE,
what are, 123. *See* SUBMISSION.
award must decide on all, 261. *See* AWARD, 867.
reference of, with a cause not under Arbitration Act but at common law, 88, 156.

MATTERS OF ACCOUNT, compulsory reference of action for, 6, 87.

MEASUREMENT of land, ministerial duty, 284.

MEETING in reference, parties bound to attend, 172. *See* ARBITRATOR.

MEMBER OF PARLIAMENT not liable to attachment on award, 590.

MERCHANT-ARBITRATORS,
not authorised to examine parties apart, 194.
not to delegate decision of legal point to barrister arbitrator, 217.
implied promise to pay to, 493.

MESNE PROFITS to time of award part of compensation, 134.

MINE,
compensation for injury to, by railway to be referred, 7.
whether practice in, dangerous, to be referred, 8.

MINERS,
verdict of jury of, no award, 254.
award as to, made under mistake, 700.

MINISTERIAL,
duty, delegating performance of, before award, 207. *See* ARBITRATOR, 855.
by award, 284. *See* AWARD, 868.

MISBEHAVIOUR of arbitrator. *See* MISCONDUCT.

MISCONDUCT,
liability of arbitrator for. *See* ARBITRATOR—*Personal Interests*, 859.
of arbitrator not pleadable in action on award, 550. *See* PLEA.
evidence of, not admissible in action, 560. *See* EVIDENCE.
of party pleadable to action for revocation, 155.
cannot be shown for cause against attachment, 609.
or against rule to pay sum awarded, 626.
ground for setting aside award, 664. *See* SETTING ASIDE.
gross mistake treated as, 308.
when bill in equity only remedy, 653.

MISDEMEANOR,
what referable, 11.
when remedy by action, misdemeanor referable, 11.
whether conspiracy referable, 12.
offence of public nature not referable, 12.
riot—obstructing public officer not referable, 12.
offence against Toleration Act not referable, 12.
assault—nuisance, 13.
perjury, charge of, not referable, 13.
non-repair of highway, 13.
how referred after indictment, 13. *See* INDICTMENT.
arbitrator acting contrary to declaration a, 498.

MISNOMER,
in affidavit of service, 605.
in copy of allocatur, 601.

MISTAKE,
in submission, amending, 79.
setting aside submission for, 78.
of arbitrator as to evidence, when ground of revocation, 160.
in recital of award immaterial, 258.
clerical, in misdescribing subject-matter, 267, 668.
OF ARBITRATOR, THE AWARD HOW FAR AFFECTED BY, 303.
when award good on its face, 303.
award of lay and legal arbitrator, same effect, 303.
erroneous judgment of arbitrator, court not review, 304, 667.
deciding apothecary may charge for attendances, 304.
demurrer wrongly, 305.
liquidated damages to be a penalty, 305.
claim for damages recoverable in debt, 305.
contrary to evidence, 306.
as to legality of contract, 667.
exceptions to the rule, 306.
examination whether arbitrator taxed costs rightly, 306.
question of law, 306.
whether mixed question of law and fact rightly decided, 306.
arbitrator, power to correct clerical, 310.
in equity, award set aside for gross mistake admitted by arbitrator, 306.
admitted, setting aside at law, 307.
referring back for, 483.
at law, modern rule award not impeachable for mistake, 308, 667.
not referred back for, 483.
mistake amounting to misconduct, 308.
in favour of party moving, no ground for setting aside award, 669, 686.
award by mistake not the award of arbitrator, 309.
affidavit by arbitrator of, 311.
statement as to, by arbitrator, effect of, 312. *See* ARBITRATOR, 858.

MISTAKE—*continued.*
OF ARBITRATOR, THE AWARD HOW FAR AFFECTED BY—*contd.*
award setting forth grounds of decision, 316.
whether court will review them for mistake alleged, 316.
old practice, courts reviewed decision, 316.
when arbitrator wrong in law, 316.
Queen's Bench not review them, unless power to state case, 316.
court not examine sufficiency of facts stated, 317.
stating insufficient reasons, 317.
court not presume facts stated only grounds of award, 317.
stating facts without positive decision formerly bad, 317.
where positive finding, statement held surplusage, 317.
of arbitrator not pleadable to action on award, 550. *See* PLEA.
evidence of, not admissible in action, 560. *See* EVIDENCE.
in award when a bar to attachment, 593.
award made under, when not set aside, 700.
arbitrator not to be made defendant to bill to set aside for, 501.

MOIETIES, award of, to pay and receive in, 421.

MONEY, arbitrator may award, 411.

MONEY BOND, award of, 416.

MONTHS, lunar not calendar, time for awarding, formerly computed by, 139.

MORAL CONSIDERATIONS, whether arbitrator may notice, 120.

MORAVIAN, affirmation of, attachment granted on, 606.

MORTGAGE,
rights under, not referable under Benefit Building Societies Act, 36.
questions of construction of, not "disputes" under that Act, 37.

MOTION,
for arrest of judgment for judgment non obstante veredicto, prohibited by agreement not to sue, 69.
to vary or adopt report of referee, 368.
for judgment, when referee abstains from directing, 371.
on indictment referred, 649.
to set aside judgment directed by referee, 372.
for costs for preventing award, 107.
for leave to revoke, 156. *See* REVOCATION.
for enlargement of time, 150. *See* ENLARGEMENT.
for attachment on the award, 606. *See* ATTACHMENT, 863.
for setting aside award, 676. *See* SETTING ASIDE, 941.
for referring back award, 481.
in equity to enforce award, 575. *See* EQUITY.
to set aside award, 703. *See* EQUITY.

MUTUAL, award must be, 296. *See* AWARD, 869.

MUTUAL RELEASES, award of, 269. *See* RELEASES, MUTUAL.

NAME of other party, award to sue in, 424, 436.

NEGLECT to make an award, what is a, 101, 442.

NEGLIGENCE, damages by, ground of action, not arbitration, 466.

NEW ASSIGNMENT, awarding on, 357.

NEW MATTER discovered, whether award set aside, 673.

NEW TRIAL,
when award in a cause set aside, 690, 707. *See* CAUSE.
costs of first trial, not follow success on, 708.

NEXT FRIEND,
of wife, whether to be party to reference, 17.
of infant, not bound by solicitor referring suit, 19.

NISI PRIUS, order of. *See* ORDER; CAUSE.

NO AWARD, plea of, in action on award, 549. *See* PLEA.

NON-REPAIR of road, indictment for, not referable, 13.

NONSUIT, award of, 337.

NOTES,
of the evidence, arbitrator should take, 189.
of arbitrator used by umpire as evidence, 243.
barrister not to be used on motion to set aside award, 511, 680.
court not amend verdict by, 635.

NOTICE,
to arbitrator of matter in difference, 263.
of appointment for meetings must be given to all parties, 173.
to all the arbitrators, 220.
to appoint arbitrator or umpire, 67.
of intention to attend reference by counsel, 173.
that arbitrator will proceed ex parte, 198.
of enlargement may be verbal, for attachment, 600.
of revocation, when to be given to arbitrator, 154, 164.
need not be averred in pleading revocation, 155.
of award made, need not be given to party, 530, 544.
publication to the parties, 656.
of report made, to be given by referee, 368.
requiring arbitration to settle compensation, 98. *See* LANDS CLAUSES CONSOLIDATION ACT.
of motion, form of, Appendix, 788.
for rule to pay, 624.
for attachment, 607.
service of, on solicitor, 608.
to vary or remit report to referee, 368.
sufficient complaint for setting aside award, 659.
to set aside award in equity, 703.
must specify grounds, 685, 704.
under Inclosure Act, when presumed given, 554.
to treat under Lands Clauses Act, 452.
binds the parties, 452.

NUISANCE,
indictment for, referable, 13.
attachment to enforce award on, 588.
moving for judgment on, 649.
injunction to prevent recurrence of, 432.

NUL AGARD. *See* NO AWARD.

NULLITY, setting aside award when a, 668.

NUNC PRO TUNC,
entering judgment, 647. *See* EXECUTION.
rule to set aside award drawn up, 658.

OATH,
power of arbitrator to administer, 183.
examination of witness on, 182.

OBJECTION, GROUNDS OF, for setting aside award, 664. *See* SETTING ASIDE.

OFFICER OF COURT,
arbitrator and referee when, 203.
power of court over, 203.

OFFICIAL MANAGER under Winding-up Act may show cause, 626.

OFFICIAL REFEREE. *See* REFEREE.
appointment of, 93.
distribution of business among, 93.
fees for proceedings before, 94.

OPINION,
scientific, adoption of, by arbitrator, 208.
positive, an award, 256.
of counsel, whether an award, 256.
arbitrator taking, award not set aside, 666.

ORDER,
of a judge. *See* JUDGE.
submission by. *See* CAUSE.
of Nisi Prius, submission by. *See* CAUSE.
revoking, a contempt of court, 106.
ground of action, 106.
revocable by writing not under seal, 157.
amendment of. *See* ALTERATION.
of reference under Arbitration Act, 87.
of court, submission to have effect of, 53.
to obey award in equity, 577.
to pay sum awarded. *See* EXECUTION.

ORDERS AND RULES. *See* RULES.

ORIGINAL award, &c., showing, on demand of performance, 600.

OUTLAW cannot refer, 15.

PARDON, begging, arbitrator may award, 411.

PARISH OFFICERS,
award of land to, 441. *See* INCLOSURE ACT.
prevented levying rate in fraud of award, 10.

PARLIAMENT, MEMBER OF, not liable to attachment, 590.

PAROL,
submission, though valid, disadvantageous, 52.
cannot be made a rule of court, 52.
effect of Statute of Frauds on, 53.
award on, no plea to action on bond, 548.
appointment of arbitrator under Public Health Act void, 53.
Arbitration Act not apply, 53.
revocation of arbitration bond by, 154.
award, when valid, 253.
effect of, 516, 592.
whether attachment lies on, 592.

PART of award only set aside, 689.

PART PERFORMANCE,
of award, effect of, in equity, 564.
enforcing contract on, though reference failed, 718.

PARTIALITY of arbitrator. *See* MISCONDUCT.

PARTICULARITY, award set aside for want of, 669.

PARTICULARS,
of demand, whether limited to damages, 359.
enlarged after reference, 82.
not necessarily before arbitrator, 175.
of set-off not allowed after reference, 82.

PARTIES TO A REFERENCE,
persons interested in the subject-matters, 15.
persons capable of contracting, 15.
not persons attainted, or outlaws, 15.
married women, 16. *See* WIFE.
husband and wife, 17. *See* HUSBAND AND WIFE.
infant, 18. *See* INFANT.
partners and parties with joint interests, 20. *See* PARTNERS.
corporation, 21. *See* CORPORATION.
parties interested added, on reference of a cause, 22.
added afterwards, by subsequent consent, 22.
by acquiescence, 22.
by laches, 23.
persons not interested,
authorized agent, 23. *See* AGENT.
attorneys and solicitors, 25. *See* ATTORNEY.
counsel, 27. *See* COUNSEL.
executors and administrators, 29. *See* EXECUTOR.
trustees, 32. *See* TRUSTEE.
committee of lunatic, 32. *See* LUNATIC.
public officer, 32. *See* PUBLIC OFFICER.

PARTIES TO A REFERENCE—*continued.*
persons empowered to refer by statute, 33.
trustees of bankrupts, 33. *See* ASSIGNEE.
trustees of savings banks, 34. *See* SAVINGS BANK.
friendly societies, 34. *See* FRIENDLY SOCIETY.
benefit building societies, 36. *See* BENEFIT BUILDING SOCIETIES.
promoters of public undertakings, 38.
parties interested in lands taken, &c., 38. *See* LANDS CLAUSES CONSOLIDATION ACT.
railway companies, 38. *See* RAILWAYS CLAUSES CONSOLIDATION ACT.
joint stock companies, 38. *See* COMPANIES CLAUSES CONSOLIDATION ACT.
the Crown, 39.
of a cause must be those on the record, 71.
examination of, as witnesses, 189. *See* ARBITRATOR.
examination of, one found to be a felon, whether award set aside, 674.
excluding from meetings, 174.
attending reference privileged from arrest, 181.
award must decide as to all, 269.
effect of, on. *See* AWARD.
deceased, liability of executor of. *See* EXECUTOR.
dying before sum awarded paid, 536.
deceiving opponent or arbitrator, award set aside, 672.

PARTITION,
powers of commissioners of, 443.
awarding right of way over allotment, 443.
directing lots to be fenced off, 443.
awarding two separated lots to one party, 443.
arbitrator making, must award a conveyance, 267, 443.

PARTNERS,
reference by, not bind co-partners, 20.
power to sue not give power to refer, 20.
bound for others, 20.
when all must execute, or none bound, 20, 136.
reference of all matters between all or any, 55.
arbitration clause not revocable, 153.
effect of reference of disputes between, 128.
how to award on the joint debts and credits of a firm, 421.
awarding to pay and receive in moieties, 421.
when unnecessary to specify amounts, 422.
awarding all debts and credits to one, 422.
appointing a receiver, 422.
awarding on the partnership stock, 253, 423.
omitting to provide for deficiency of assets, 423.
awarding dissolution of partnership, 421.
settling terms of dissolution of partnership, 424.
awarding right to sue in partner's name, 424.
restraining one party from trading in particular town, 424.
accounting in equity for item omitted in award, 518.
stranger cannot enforce award between, 569.

PARTY,
interested added, 22.
by subsequent consent, 22.
by acquiescence or laches, 23.

PAVING EXPENSES, reference under Public Health Act, 130.

PAYMENT,
how arbitrator should award as to, 415.
arbitrator should direct, 415.
no attachment on award without, 415.
may fix time and place of, 415.
awarding promissory note or money bond to be given, 415.
by instalments, 416.
on a Sunday, 416.
penalty for non-payment at time specified, 416.
when fixing time of, improper, 416.
when arbitrator to ascertain purchase price, 416.
when awarding damages on a verdict, 360, 416.
ordering payment of rent not yet due, bad, 416.
setting off cross claims, 417.
extent of power as to directing, 417.
award to pay plaintiff or his attorney, good, 296.
in case of benefit building society, 418.
party dying, how to award executor to make, 418.
reference by executor, proper mode of directing, 418.
awarding executor to pay, 30, 418.
testator indebted, 419.
executor to pay out of assets quando, 31, 419.
to pay out of assets, 31, 419.
payment to executor, 537.
directing assignees to repay sum paid by mistake, 419.
directing, to be made to wife, and not husband and wife, 419.
plea of, awarding on, 348.
of money awarded, how to be made, 533.
out of sum in court of law, 650.
out of money in court of equity, 579.
whether, precludes motion to set aside, 688.

PEER, no attachment on award against, 590.

PENALTY,
arbitrator may impose, in award, 416.
offer of, no discharge from performance of award, 566.

PEREMPTORY,
undertaking, waiver of, by reference, 85.
notice of appointment for a meeting, 198.

PERFORMANCE,
what a sufficient, of the award, 530.
party has a reasonable time for, 530.
may be at several times, 530.
party bound to take notice of award being made, 530.
stranger stakeholder not bound to take notice, 531.
party must obey award substantially, 531.
award to pay money to wife, 531.
to keep drain cleansed, 531.
party must comply as far as lawful and possible, 531.
such performance answer to attachment, 531.
award to remove weirs, stranger interested, 532.
to reinstate premises pulled down, 532.
to dig for coal, 532.
party to pay must tender money, 533.
must seek out party entitled, 533.
must get costs taxed, if requisite, 533.

PERFORMANCE—*continued.*
award to enjoy house paying rent, 533.
to make a lease rendering rent, 533.
award, all suits to cease, 533.
when proceeding in a suit a breach, 533.
court no power to order award to be delivered up on payment, 534.
of an award directing the execution of a deed, 534.
when request to execute deed necessary, 534.
who to prepare and tender conveyance, 534.
ordinary rule between vendor and purchaser, 535.
deed tendered should agree with award, 536.
demanding execution by agent, 536.
no power of attorney to agent requisite, 536.
award to execute release on payment, 536.
death of party, payment to executor, 536.
award of release to time of award, 537.
delivering release to stranger for party's use, 537.
award to execute indemnity, 537.
that plaintiff shall stand acquitted of a suit, 537.
to acquit of a debt, 537.
quod staret quietus of rent, 538.
of award, evidence of submission, 553.
pleading, 550. *See* PLEA.
of award enforcing, in equity, 562. *See* EQUITY.

PERFORMANCE, SPECIFIC. *See* SPECIFIC PERFORMANCE.

PERIOD. *See* TIME.

PERIODICAL,
claims, reference of, 135.
limits for awarding, 140.

PERJURY,
indictment for, not referable, 13.
witness on reference liable for, 183, 674.
not on reference under old County Courts Act, 184.
of witness, when award set aside for, 674. *See* WITNESS.
award, no evidence of, 555.

PERPETUITY,
award of, bad, 567.

PERSON of party not subject to arbitrator, 410.

PERSONAL CHATTELS,
disputes concerning, referable, 3.
awarding as to, 411.

PERSONAL ESTATE subject to award, 411.

PERSONAL INTERESTS of arbitrator, 492. *See* ARBITRATOR, 859.

PERSONAL REPRESENTATIVE. *See* EXECUTOR.

PERSONAL SERVICE of award, &c., when necessary, 599. *See* ATTACHMENT, 863.

PERSONAL WRONGS referable, 3.

PETITION to enforce award in a charity suit, 580. *See* EQUITY.

PETITIONING CREDITOR,
sum awarded good debt of, 526.
so penalty in arbitration bond, 527.

PLACE AND TIME,
of payment, award need not specify, 287.
award to pay at, attachment on, 598.

PLEA,
of arbitration pending, not good, 45.
of agreement not to sue, when good in equity, 70.
of judgment recovered allowed to executor pending reference, 83.
awarding on each, 345. *See* CAUSE.
finding on inconsistent, 301. *See* AWARD.
Effect of an award as a defence, 546.
award must be pleaded, 546.
when plea of award without averment of performance good, 547.
when new duty created in satisfaction of old claim, 547.
award a bar when accord and satisfaction a bar, 547.
sometimes available for a stranger, 547.
payment according to void award, accord and satisfaction, 548.
award as to part of a thing demanded, 548.
award on parol submission no plea to action on a bond, 548.
of award to further maintenance of action, 548.
replication, power of distress by award, departure from avowry of common law power, 548.
of award, averments in, 544. *See* PLEADING.
of an award in bar to a bill in equity, 570. *See* EQUITY.
in bar of a bill to set aside award, 701.
How to answer in pleading an award pleaded, 549.
traversing the submission, 549.
pleading no award made, 549.
plea of no award, 549.
not every objection to award open on plea of no award, 549.
not refusing to hear party, 550.
misconduct or mistake of arbitrator, whether pleadable, 550.
of arbitrator colluding with party, 550.
of mistake of arbitrator, 550.
pleading performance of award, 550.
must show how performed, 550.
other pleadings to defeat award, 550.
of Statute of Limitations, good, 550.
of revocation by will of party, 551.
by marriage of female party, 551.
not by bankruptcy or insolvency, 551.
of foreign attachment, 551.
of excess, 551.
of waiver of award bad, to action on bond, 551.
parol accord and satisfaction, 552.
not made within reasonable time, bad, 552.
replication claim not covered by award pleaded, 552.
demurrer to pleading stating bad award, 552.

PLEADING,
how to state an award in, 543.
averments in a pleading stating an award, 543.
in debt on the arbitration bond, 545.
plaintiff must have assigned breaches, 545.
breach assigned not traversable, 545.
want of assignment ground of general demurrer, 545.
when part performance pleaded, 546.
when plea admitting award excuses non-performance, 546.

POOR RATE,
validity of, not referable before notice of appeal, 9.
referable on appeal, 9. *See* QUARTER SESSIONS.
levy of, stayed, contrary to good faith, 10.

POSSIBLE,
award must be, 300. *See* AWARD, 870.
award must be performed as far as, 531.

POSTEA in cause referred, how entered, 634.

POWER,
of arbitrator. *See* ARBITRATOR.
of umpire. *See* UMPIRE.
of court. *See* COURT.

POWER OF ATTORNEY,
agent demanding money awarded must have, 597.
demanding execution of a deed need not, 536, 597.

PRACTICE,
arbitrator not bound by rule of, 120.
conducting reference, 175.
making submission rule of court, 581. *See* SUBMISSION.
moving to enforce award in equity, 574. *See* EQUITY.
points of, in action on award, 542. *See* ACTION.
entering verdict on award, 634. *See* EXECUTION.
moving for attachment, 595, 602. *See* ATTACHMENT.
obtaining rule to pay amount awarded, 623. *See* EXECUTION.
execution under Arbitration Act, 1889..630.
moving to set aside award, 676. *See* SETTING ASIDE.
in equity, 703. *See* EQUITY.
on reference back, 479.
on motion to vary report of referee, 368, 370.

PRÆMISSIS, DE. *See* DE PRÆMISSIS.

PRECAUTIONS, award to take all proper, not specific enough, 438.

PRECEDENT CONDITION. *See* CONDITION PRECEDENT.

PREMISES, awarding of and concerning. *See* AWARD, 867.

PRESUMPTION OF COURT in favour of award, 270. *See* AWARD.

PRICE
of purchase. *See* PURCHASE PRICE.
award to take goods on reduction of, 127.

PRINCIPAL, when bound by reference by agent, 23. *See* AGENT.

PRINCIPLES
on which arbitrator to decide, 118.
not to be prescribed by court, 83, 203.

PRISON,
committal to, for not performing award, 587, 615.
in equity, 578.

PRIVATE ACT OF PARLIAMENT, submission by, 105.

PRIVATE WAY under inclosure, award unrestricted, 442.

PRIVILEGE
from arrest while attending reference, 181.
from attachment, 590.

PROCEEDINGS,
stay of, reference of action, 84.
of suit, 95.
in action contrary to submission, 46.
in the reference, 172. *See* ARBITRATOR, 852.
to enforce submission, 106. *See* SUBMISSION, 949.
contrary to agreement not to sue, set aside, 68.
to enforce award at law. *See* ACTION; ATTACHMENT; EXECUTION.
in equity. *See* EQUITY.
to set aside award at law. *See* SETTING ASIDE.
in equity. *See* EQUITY.

PRODUCTION
of documents, how enforced, 177, 190.
on county court reference, 181.

PROLONGED EXAMINATION
of documents, ground for referring, 88.
what is, 92.

PROMISSORY NOTE,
reference as to liability on, 4.
award liability to remain as before, bad, 264.
award of, good, 415.

PROMOTERS OF PUBLIC UNDERTAKINGS, reference by, 38.
See LANDS CLAUSES CONSOLIDATION ACT.

PROOF. *See* EVIDENCE.

PROTEST, attending reference after, 196.

PUBLIC HEALTH ACT. *See* STATUTES, 825.
submission under, 103.
appointment of arbitrator and umpire, 103, 230, 240.
costs of arbitration, 103, 471.
arbitrator's power over, under, 471.
taxation of, in Chancery, 579.
by master, 292.
proceedings as to lands taken under Lands Clauses Act, 471.
appointment of umpire by Local Government Board, 103, 231.
of 1848, abandoning submission, 103.
reference as to proportion of expenses, 130.
amount of compensation, 456.

PUBLIC HEALTH ACT—*continued.*
arbitration, though liability denied, 456.
duration of arbitrator's authority, 240.
commencement of umpire's authority, 241.
duration of umpire's authority, 241.
effect of award on frontagers not parties to the reference, 516.
award not enforced by rule to pay, 622.

PUBLIC JUSTICE, breach of, cannot be waived by a party, 687.

PUBLIC OFFICER
of company, reference by, 32.
no attachment against, 32, 591.

PUBLIC RIGHTS referable by statute, 5.

PUBLICATION
of award, what is a, 249. *See* AWARD, 866.
to the parties, what is, 250, 655.

PURCHASE PRICE,
duty of arbitrator appointed to fix, 416.
equity not fix, reference failing, 710.

QUAKER, affirmation of, attachment granted on, 606.

QUARTER SESSIONS,
indictment at, referable after conviction, 13.
submission by order of, 97.
reference of appeal at, may be by attorneys, 27.
matters of appeal generally referable, 9.
poor rate not referable unless on appeal at, 9.
taxing costs out of sessions, 97.
appeals under Land Drainage Act and Highway Act referred, 98.
appointment of umpire by, 231.
costs of reference at, order silent as to, 380.
award entered as judgment of sessions, 9, 649.
when award abortive, re-hearing appeal, 710.

QUARTER SESSIONS PROCEDURE ACT. *See* STATUTES, 822.

QUESTION arising in a cause, what is, 89.

RAILWAY COMPANIES ARBITRATION ACT,
reference under, 102.
pending arbitration may be pleaded, 46.
ousts jurisdiction of Chancery, if arbitration duly insisted on, 65.
one company may not revoke without consent of other, 161.
power of arbitrator under, 176, 183, 191.
appointment of umpire under, 102, 219.
limit of time to award, 141.
appointment of new arbitrator, 222.
when by Board of Trade, 222.
costs of arbitration in discretion of arbitrator, 380.
award not set aside for irregularity, 249.
enforcing award under, 631.
submission made rule of court, 102.

RAILWAY COMPANIES, telegraphs, purchase from, by postmaster-general, by arbitration, 226.

RAILWAYS CLAUSES CONSOLIDATION ACT. *See* STATUTES.
what matters referable,
compensation for lands taken, used, or injured by railways, 7.
injuries to mines by railways, 7.
disputes as to sufficiency of carriages and engines, 7.
matters authorized or directed to be referred, 38, 102.
how submission made, 102.
compensation for lands taken, &c., to be under the Lands Clauses Act, 7, 102. *See* LANDS CLAUSES CONSOLIDATION ACT.
appointment of arbitrator by railway under hand of secretary or two directors, 102.
submission not revocable without consent, 161.
nor by death of party, 170.
umpire to be appointed by arbitrators before they enter on reference, 219, 229.
appointment to be in writing, 234.
new umpire on death or incapacity, 225.
on their refusal or neglect, Board of Trade to appoint, 226.
Commissioners of Railways replaced by Board of Trade, 228.
practice in making submission rule of court, 585.
costs of arbitration in discretion of arbitrators, 102, 379.
declaration by arbitrators and umpire before entering on reference, 176.
to be annexed to award, 249.
wilfully acting contrary to, a misdemeanor, 498.
arbitrators and umpire may administer oath, 183.
may examine on oath parties and witnesses, 183, 190.
may call for documents, 191.
award not void for want of form, 249.
railway company bound to make communications between severed lands, 467.
to provide drains and watering-places for cattle, &c., 467.
enforcing award by distress infinite, 631.

RAILWAYS, COMMISSIONERS OF. *See* RAILWAYS CLAUSES CONSOLIDATION ACT.
power under Regulation of Railways Act, 1873 .. 102.

READY to be delivered, award is, when made, 251.

REAL ACTIONS referable at Nisi Prius, 74.

REAL PROPERTY. *See* LAND.

REASONABLE TIME allowed to perform award, 530.

REASSIGNING lands pursuant to award, 534.

RECEIVER,
appointed in the order staying action for winding up partnership, 49.
award appointing, 422.
set aside, 672.
liability of arbitrator for appointing, 499.

RECITAL
in submission, whether limiting reference, 129.
in award, effect of, 257. *See* AWARD, 867.
no evidence of appointment of third arbitrator, 554.
error in, no ground of setting aside, 668.

RECOGNIZANCE,
submission by, 96.
condition of, not alterable by rule of court, 541.
scire facias on, to enforce award, 567.

RECORD,
submission by, 96. *See* RECOGNIZANCE.
parties on, necessary to refer the cause, 71.
power of arbitrator to amend, 203.
award cannot be made matter of, at law, 575.
when rule to set aside award to be drawn up on reading, 682.

RECTOR referring right to tithes during his incumbency, 21.

RE-EXAMINING witnesses, setting aside umpirage for not, 666.

REFEREE,
under Judicature Acts, 93.
official, how appointed, 93.
taking accounts in administration action, 368.
business, distribution of among, 93.
by clerk to senior official, 93.
transfer by Lord Chancellor, 94.
under Arbitration Act, 1889.. 94.
fees of, in London and Middlesex, 94.
outside London and Middlesex, 94.
stamps for, 94.
special, must be agreed on, 88.
remuneration of, 495.
rules of court apply to, 369.
summons to refer to, 88.
sittings of, 178.
to proceed de die in diem, 177.
rule only directory, 177.
has same authority as judge, 177.
enforcing attendance of witnesses, 177.
can order discovery and production of documents, 177, 181.
made to answer interrogatories, 369.
give explanation, 369.
could not order documents to be produced, 181.
cannot commit, 178.
may state special case, 178, 206, 207, 318, 370.
how to find in an action, 369.
may direct judgment to be entered, 371.
motion for judgment where not directed by, 371.
to set aside judgment directed by, 372.
court may act on evidence taken before, 318.
may remit matter to, 318.
report of, how enforced or varied, 368. *See* REPORT.
award of, on compulsory reference, appeal from, 371.
on same grounds as verdict set aside for, 371.

REFERENCE,
to arbitration. *See* SUBMISSION.
on the usual terms, what is a, 76.
proceedings in, 172. *See* ARBITRATOR, 852.
costs of, what are, 374.
on what scale to be taxed, 640.
need not be taxed before action, 540.
compulsory, of matters of account, &c., under Arbitration Act, 87.
award on, appeal from, 371.
under Highway and Land Drainage Act, 98.
to the master. *See* MASTER.
failing, proceeding in the cause referred, 706.
enforcing contract in equity, 706. *See* EQUITY.
back, 479. *See* REFERRING BACK.
of indictment, verdict of guilty should be taken, 75.

REFERRING BACK,
award to arbitrator, 479.
power and duty of arbitrator, 479. *See* ARBITRATOR.
clause empowering court to refer back award, 479.
under the Arbitration Act, 1889.. 480.
under rules of Supreme Court, 480.
under the Common Law Procedure Act, 480.
on compulsory references or by consent, 480.
award under the Lands Clauses Act, 480.
under Public Health Act, 1875.. 480.
on what motions award may be sent back, 481.
for what causes award will be sent back, 482.
discovery of new evidence, 482.
to explain letter, 483.
to certify for costs, 408.
award good on face not for mistake in law, 483.
unless admitted by arbitrator, 484.
to find on specific items, 484.
limit of time for application, 485.
under Arbitration Act, 1889.. 485.
though time for setting award aside expired, 486.
rule absolute in first instance conditionally, 486.
whether court can refer back more than once, 487.
clause to refer to same or different arbitrator, 487.
effect of clause to refer back in Chancery, 488.
after new award fresh taxation of costs necessary, 644.
costs of abortive award after reference back, 644.

REFORM a deed, power of arbitrator to, 119.

REFUSAL,
of arbitrator to act, effect of, 165. *See* ARBITRATOR.
failing to attend meeting not a, 218, 222.
to make an award, 101, 442.
supplying vacancy on, 66.
under Lands, Railways, and Companies Clauses Acts, 101, 166, 221.
to proceed in the reference any further, 203.
to reopen case, 189.
to wait for witnesses, 189.
to deliver award until fee paid, 251.
of party to attend meeting, 198.

REGULATION OF RAILWAYS ACT,
effect of, 102. *See* STATUTES, 815.
disputes to be referred to railway commissioners, 102.
in what cases, 103.

REHEARING case, setting aside award for umpire not, 666.

REINSTATE premises, award to, 532.

REJECTING evidence, no ground for setting aside award, 200.

RELEASE,
award all suits to cease, operates as, 298.
pursuant to award, no plea for stranger in equity, 574.
award to execute, on payment, 536.
of right to lands, 410.
forthwith, 428.

RELEASES, MUTUAL,
arbitrator may award to be given, 427.
of bonds, &c., by which debts referred are due, 427.
not of matters beyond cause, cause only referred, 427.
not of arbitration bond, 427.
not beyond submission, 427.
as to time of matters accruing, 427.
need not specify form of, 428.
award of, effect of, 269.
decides all matters referred, 269.
construction of, 427.
to a day before submission, 273.
to a day later than submission, 427.
to time of award, 537.
to use of stranger, 297.
as to matters beyond submission, void pro tanto, 425.

REMITTING AWARD, 479. *See* REFERRING BACK.

REMOVAL of arbitrator for misconduct, 116.

REMUNERATION,
of arbitrator, 492. *See* ARBITRATOR, 859.
under Arbitration Act, 1889 . . 495.

RENT,
not due, awarding payment of, 135.
when non-payment breach of award, 533.
not awarding as to, 266.
awarding sum for arrears of, 297.

RENT-CHARGE,
for tithes, submission to determine, 105.
awarding as to, 442.

REPAIRS, awarding liability to, 434.

REPLEVIN,
sureties, discharge of, by reference, 85.
effect of award as to double costs of, 402.

REPLICATION in action on arbitration bond, 546. *See* PLEADING.

REPORT,
reference for, 367.
under Judicature Acts, 367.
on taking accounts to contain items, 368.
in administration action, 368.
under Arbitration Act equivalent to verdict, 370.
for enforcing not for setting aside, 370.
or for appeal, 370.
motion to adopt, vary, or remit, 368.
time for, where consideration further adjourned, 368.
where not, 368.
on reference for trial, appeal from, 371.
in Chancery Division, 371.
on compulsory reference, 371.
of valuer, 208.

REPUGNANT,
award must not be, 301. *See* AWARD, 870.
setting aside, 301, 671.

REPUTATION, award no evidence of, 556. *See* EVIDENCE.

REQUEST,
to perform award when necessary, 534. *See* PERFORMANCE.
in award equivalent to order, 256.

RESERVATION,
of authority avoids award, 281. *See* AWARD, 868.
setting aside award for, 669.

RESERVED LIBERTY to apply to the court, effect of, in equity, 710.

RESERVOIR, depreciation of, compensation for, 466.

RESTRAIN arbitrator from awarding, court no power to, 155.

RESTRAINT of trade, awarding, 424.

RETRAXIT, award of, valid, 448.

RETURN DAY of jury process, no limit to arbitrator's power, 138.

REVOCATION,
of the arbitrator's authority, 152.
by common law at the will of a party, 152.
submission revocable at common law until award made, 152.
of arbitrator appointed to act alone, 153.
effect of, by one only of many parties, 152.
arbitration clause not revocable, 153.
whether, of submission under seal need be under seal, 153.
of order of Nisi Prius need not be under seal, 154.
notice of, to arbitrator necessary, 154.
not so when by marriage or death, 154.
breach of submission, 106, 154.
ground of attachment when submission a rule of court, 106, 154.
prevented submission being made rule of court, 154.

REVOCATION—*continued.*
by common law at the will of a party—continued.
motion for costs for affected delay for, 107.
only under special clause in submission, 107.
refused if good cause shown for, 107.
judge's order made rule of court after, 107.
action lies for, 154.
justification may be pleaded, 155.
misconduct of arbitrator or party, 155.
bankruptcy of opponent, 155.
marriage of female party by consent, 155.
court not restrain arbitrator from awarding after, 155.
when submission made rule without consent clause, 157.
by leave of the court, 155.
attempted, arbitrator may proceed ex parte, 156.
stat. 3 & 4 Will. IV. c. 42, s. 39.. 156.
to what submission it applied, 157.
not to submissions by order of equity, 157.
nor to indictment, 157.
submission irrevocable without leave by Arbitration Act, 156.
former right to revoke, 156.
when submission did not state that it might be made rule of court, 157.
no right if it embodied Common Law Procedure Act, 157.
until arbitrator complete authority, 157.
court no power after award made, 157.
not grant ex parte application, 157.
when leave to revoke will be granted, 158.
matter also pending in Chancery, 158.
arbitration clause will not be revoked, 158.
arbitrator admitting evidence objected to, 158.
examining witness ex parte, 159.
judgment recovered pending reference, 159.
party becoming bankrupt, 159.
arbitrator mistaking the law, 159.
umpire appointed by lot, 160.
arbitrator refusing to act, 160.
arbitrator about to decide wrongly, 160, 206.
leave refused when arbitrator will correct his error, 160, 206.
court has discretion, 160.
of submission by order of county court, 161.
not of submission under the Lands, Railways, and Companies Clauses Acts, 161.
nor of arbitrator appointed by Local Government Board, 161.
in equity at the will of a party, 161.
submission sometimes subsisting after, 162.
made rule not revocable in Ireland, 162.
bankruptcy, no revocation, 162.
bankruptcy not a, 162.
arbitrator as stakeholder, 163.
award against bankrupt enforced, 163.
insolvency, 163.
by marriage of a female party, 163.
marriage a, as to all parties, 163.
no notice to arbitrator requisite, 163.
action for, against husband and wife, 164.
plea, marriage by consent of plaintiff, 155.

REVOCATION—*continued.*
by the refusal to act or death of the arbitrator, 164.
change of character of arbitrator not a, 164.
arbitrator refusing to proceed, 164.
by disagreement of arbitrators, 164.
death of arbitrator a, 164.
or refusal to act of one of several arbitrators, 165.
Arbitration Act, 1889, appointing new, 165.
of arbitrator, under Lands and Railways Clauses Acts, not a, 165.
under the Companies Clauses Act not a, 166.
Railway Companies Arbitration Act, 166.
by the death of a party, 166.
death generally a revocation, 166.
Arbitration Act, 1889.. 166.
foreign laws, whether death a, 166.
death of one of several parties on same side, 167.
action not abating by death, 167.
though verdict taken, death a, 167.
no notice to arbitrator necessary, 154.
death no revocation when arbitrator to state a special case, 167.
not by Scotch law, 168.
death of one of several parties with separate interests, 168.
death of infant as to guardian a, 168.
no relief in equity on, 168.
clause to prevent death being a, 169.
effect of the clause, 169.
executors bound by award, 169.
none in action for tort, 169.
enforcing award against survivors, 170.
death not a, under the Lands, Railways, and Companies Clauses Acts, 100, 170.
plea of, 551. *See* PLEA.
may be shown as cause against motion for attachment, 610.

RIFLE RANGE, loss of, compensation for, 466. *See* LANDS CLAUSES CONSOLIDATION ACT.

RIGHT OF WAY,
awarding, 438.
under inclosure award, 441.

RIOT, indictment for, not referable, 12.

RULE NISI abolished for applications as to awards, 676.

RULE OF COURT,
submission by, 72. *See* CAUSE.
a reference in writing, containing agreement to make it, 58.
cannot alter recognizance, 96, 542.
embodying submission not a rule to pay, 619.
no evidence to prove agreement of reference, 553.
evidence of judge's order of reference, 553.
for attachment, 607. *See* ATTACHMENT.
to pay, 634.
not rule nisi, 676.

RULE TO PAY sum awarded, 618. *See* EXECUTION.

RULES AND ORDERS,
Rule K. B. M. T. (36 Geo. III.), time setting aside award, 685.
Reg. Con. H. T. 1853, r. 169, grounds for setting aside award, 682.
under the Judicature Acts, Rules of 1875,
Order XXX. rr. 1, 3, 4, paying money into court, 644.
Rules of 1883. *See* Appendix of Statutes, 799.
Order XVI. r. 11, joinder of parties, 23.
Order XXV. r. 1, demurrers abolished, 552.
r. 2, party raising points of law in pleading, 552.
Order XXXIV. r. 2, decision of point of law by special case, 552.
Order XXXVI. r. 7, power to refer cause, matter or issue, 88.
r. 39, entering judgment after trial, 645.
rr. 45, 46, 47, distribution of business among official referees, 93.
r. 47a, transfer of business, 94.
r. 47b, Lord Chancellor's directions, 94.
r. 48, place of trial and view, 177.
r. 49, witnesses, 177, 179.
r. 50, power to conduct reference and to order discovery, 177.
to direct judgment, 365, 371, 645.
r. 51, referee no power to commit, 178.
r. 52, referee stating case, 207, 318.
court reviewing his decision, and judgment entered thereon, 318, 370, 371.
remitting, 480.
setting aside judgment, 695.
r. 52a, rules to apply to official referee, 178, 365.
r. 53, notice of report, 368.
r. 54, adoption or variation of report when consideration adjourned, 368, 480, 487.
r. 55, when not adjourned, 368, 480, 487.
r. 55a, 800.
r. 55b, costs when whole cause referred to official referee, 371, 378, 400.
r. 55c, rules to apply to arbitrator, 178, 365, 369, 378, 480, 695.
sittings de die in diem, 177.
Order XXXVIII. r. 2, affidavits, how intituled, 602, 677.
r. 12, alterations in, 678.
r. 15, stamp on, 677.
Order XL. r. 1, motion for judgment, 645.
r. 2, motion where no judgment directed, 366, 371, 645.
r. 6, setting aside judgment as wrongly entered on findings, 372, 695.
r. 6a, application of rules to officer of court, referee or arbitrator, 366, 371, 372, 695.
r. 7, motion for judgment after issues tried, 369.
Order XLII. r. 16, execution, 650.
r. 31a, enforcing award before expiration of time for setting aside, 627.
r. 32, examination of judgment debtors before official referee, 94.
Order XLIV. r. 1, writ of attachment, 608, 615.
Order LII. r. 2, motion on notice not rule nisi for applications, 676.
to set aside award, 676, 704.
to remit award, 486.

RULES AND ORDERS—*continued.*
Rules of 1883—*continued.*
Order LII. r. 2, for attachment, 608.
to enforce award, 624.
r. 3, notice of motion, 677.
r. 4, grounds of motion to be stated and affidavits served, 486, 608, 624, 682, 704.
r. 5, length of notice of motion, 677.
Order LIV. r. 12a, powers of master under Arbitration Act, 1889.. 88, 497.
Order LVII., interpleader, 499.
Order LIX. r. 3, appeal from award on compulsory reference, 371, 664, 692.
remitting matters on, 488.
Order LXIII. r. 16, sittings of referees, 178.
Order LXIV. r. 7, court enlarging time, 657, 661.
r. 14, time for setting aside award, 477, 654, 660, 663.
dates from publication to parties, 655.
r. 14a, enlargement one month, 802.
Order LXV. r. 2, costs of issues to follow event, 343, 380.
r. 12, county court costs, 379.
r. 15, taxing costs of award before time for setting aside expired, 640.
Order LXX. r. 1, irregularity, 677.
r. 3, objections to irregularity to be stated, 696.
Orders of 1884 and 1887, reference fees, 94.

SALE, CONTRACT OF, enforcing, reference as to terms of failing, 710.

SALVAGE of goods burnt, award as to, 411.

SAVINGS BANK,
disputes concerning, to be settled by arbitration, 34.
to whom to be referred, 35.

SCALE,
of taxation of costs, 640. *See* EXECUTION.
lower scale not applicable to costs of reference, 641.

SCIENCE, matter of, duty of arbitrator in awarding as to, 439.

SCIENTIFIC INVESTIGATION, question requiring, compulsory reference, 88.

SCIRE FACIAS,
to revive rule to pay money not requisite, 630.
on submission by recognizance, 567.

SCOTCH LAW,
reference by counsel, 29.
submission must name arbitrator, 41.

SCOTCH REFERENCE, colourable decreet arbitral, 517.

SCOTLAND, Arbitration Act, 1889, does not apply to, 41.

SEAL,
award to be under, when submission so provides, 248.
under, no deed, 254, 517.

SECOND,
reference, when court can compel, 708.
when court can refer back. *See* REFERRING BACK.
motion to set aside award, when allowed, 693.

SECURITY,
award to give, must specify nature of, 294.
of, with sureties, void as to sureties, 334.

SEPARATE ESTATE, in equity, wife may refer concerning, as feme sole, 16.

SEPARATION,
terms of, referable, 10.
on failure of arbitration, when court will settle, 712.
of good from bad part of award, 325. *See* AWARD.
bad part of award alone set aside, 689.

SERVICE,
of documents for an attachment, 599. *See* ATTACHMENT.
for rule to pay, 623.
of award before enforcing in equity, 576.

SESSIONS. *See* QUARTER SESSIONS.

SET-OFF,
plea of awarding on, 348.
matters in, reference of, 134.
awarding balance of, to defendant, 267, 670.
good answer to rule to pay money awarded, 626.
and to attachment, 612.

SETTING ASIDE,
forms relating to. *See* Appendix, 788.
submission in a cause, 77.
for fraud, mistake, or bad faith, 77.
agreement to refer, when unnecessary, 79.
proceedings contrary to agreement not to sue, 68.
SETTING ASIDE AN AWARD ON MOTION, 652.
jurisdiction of the courts to set aside an award on motion, 652.
only when submission can be made or is equivalent to a rule, 652.
in other cases, bill in equity only remedy for misconduct of arbitrator, 653.
power under statute Will. III., 653.
power under Arbitration Act, 1889 . . 653.
motion had to be in court of which submission a rule, 653.
not before judge at chambers, 653.
not on county court reference, 654.
award made in cause in Court of C. P. of Lancaster, 654.
may be set aside by judge at chambers, 654.
within what period the motion to set aside an award must be made, 654.
time for moving to set aside, 654.
before last day of term after award made, under Will. III., 654.
Rules of 1875 did not alter the time, 654.
time under Arbitration Act, 1889, and rules of court, 654.
before last day of next sittings after award, 654.

SETTING ASIDE—*continued.*
SETTING ASIDE AN AWARD ON MOTION—*continued.*
within what period the motion to set aside, &c.—*continued.*
same limit whatever be the ground of motion, 655.
attachment may be resisted for apparent defects at any time, 655.
time runs from publication of award to parties, 655.
publication to the parties notice of award made, 655.
though to be had only on payment of excessive fee, 656.
whether court could give further time for moving, 657.
drawing up rule nunc pro tunc, 658.
application within time, to compel production of submission, 659.
notice of motion sufficient complaint, 659.
parties cannot extend the time by consent, 660.
when award in a cause at common law, 660.
limit varied, 660.
motion to enter verdict, time same as on motion to set aside, 660.
when further time allowed on awards at common law, 661.
when good cause shown for delay, 661.
no time to get counsel's opinion, 661.
party withholding order of reference, 661.
modifying rule applying for further time, 662.
counsel failing to move in time, 662.
first rule discharged on technical grounds, 662.
excuse for delay must be stated in affidavit, 662.
what not good reason for delay, 662.
party misled by opponent, 662.
bad health, 662.
arbitrator withholding award till excessive fee paid, 663.
assignee recently appointed, 663.
fiat in bankruptcy issued, 663.
when award under the Lands Clauses Act, 663.
time for applying, 663.
for what causes an award may be set aside on motion, 664.
when the conduct of the arbitrator corrupt or irregular, 664.
all equitable grounds available, 664.
corruption, or partiality, or secret interest of arbitrator, 664.
sitting with umpire makes umpire's award bad, 242.
legal misconduct, 665.
refusing time to get counsel, 665.
to swear the witnesses, 665.
not hearing the case, 665.
examining witnesses, party absent, 665.
proceeding ex parte improperly, 665.
refusing to consider a matter in difference, 665.
to hear evidence on reference back, 666.
one of several arbitrators using counsel's opinion on a case falsely stated, 666.
two of three arbitrators acting without third, 666.
umpire appointed by lot, 666.
refusing to rehear case, 666.
hearsay evidence of admissions of misconduct, 310.

SETTING ASIDE—*continued.*
SETTING ASIDE AN AWARD ON MOTION—*continued.*
for what causes an award may be set aside on motion—*contd.*
when the award a mistaken decision in law or fact, 667.
not set aside for erroneous judgment of arbitrator, 667. *See* MISTAKE.
not set aside for erroneous judgment of arbitrator, either on facts or law, 667.
mistake admitted by arbitrator, 676.
when the award is a nullity, 668.
not set aside except when capable of enforcement, 668.
award made after time expired, or revocation, 668.
not for want of stamp on award, 668.
nor for want of recitals or misrecitals, 668.
when the award is not final, 668.
two awards, each deciding part, 668.
award omitting some matters, 669.
reserving or delegating decision, 669.
not deciding cause, 669.
or the issues in it, 669.
error in favour of party moving, 669.
deciding cause by unauthorized entry of verdict or judgment, 669.
omitting to assess damages, 670.
not finding balance for defendant on general reference, 670.
directing unwarranted entry of judgment, 670.
omitting to award on costs, 670.
party not injured, 670.
not deciding cause separately from other matters, 670.
award not providing for deficiency of assets, 671.
when the award is uncertain, 671.
in the decision, 671.
not specifying amounts, or persons, 671.
not precise in its directions, 671.
inconsistent and repugnant, 671.
when the arbitrator has exceeded his authority, 671.
as to subject-matters referred, 671.
as to costs, 389, 671.
as to giving directions, 672.
as to future payments, 420, 672.
as to dividing partnership effects, 422, 672.
by appointing a receiver, 672.
by ordering trespass or waste, 672.
excess in favour of party moving, 672.
when party or witness in fault, or new matter discovered, 672.
party deceiving opponent or arbitrator, 672.
whether, when new matter discovered, no fraud, 673.
new evidence, 673.
surprise, 673.
party examined discovered to be a felon, 674.
witness having given contradictory evidence before, 674.
parties married women or infants, 674.
party insolvent, 674.

SETTING ASIDE—*continued.*
SETTING ASIDE AN AWARD ON MOTION—*continued.*
for what causes an award may be set aside on motion—*contd.*
witness perjured, 674.
making incorrect statement, 675.
when the award has been improperly procured, 675.
"corruption or undue means" only grounds by statute of Will. III., 675.
proceeding contrary to justice is "undue means," 675.
error in law on face of award, 676.
mistake admitted by arbitrator, 667, 676.
"improperly procured" under Arbitration Act, 676.
moving to set aside an award, 676.
making the motion to set aside an award, 676.
on notice of motion, 677.
stating grounds, 677.
affidavits to be served with notice, 677.
how to be entitled, 677.
what sufficient, verifying award, 677.
immaterial alterations in, 678.
party or personal representative may move, 678.
when bankrupt or insolvent, 678.
when assignee, 679.
clause not to sue does not prohibit motion, 679.
award raising point of law, 679.
moving to set aside certificate, 679.
motion not usually on last day of term, 679.
on appeal against official referee, 679.
not on counsel's statement alone, 680.
on party's own affidavit, 680.
barrister arbitrator not to make affidavit, 680.
court not use his notes, 680.
no affidavits allowed after motion, 680.
affidavits must be filed, 681.
no second motion to set aside award, 681
except first failing for defect of jurat or title of affidavit, 681.
stating grounds of motion, 682.
grounds of motion must be set out in notice of motion, 682.
whether award or certificate made, 682.
party limited to ground stated, 683.
how objections must be stated, 683.
whether general statement helped by specific affidavit, 684.
particular words limit general statement, 684.
notice of motion, Chancery Division, must specify grounds, 685.
statement void as too general does not prevent use of other objections, 685.
showing cause against the rule to set aside an award, 685.
practice on opposing motion, 685.
whether cause can be shown on last day of term, 685.
turning motion into special case, 685.
what may be shown for cause against the motion, 686.
motion made too late, 686.
affidavits defective, 686.
grounds false in fact, 686.

SETTING ASIDE—*continued.*
SETTING ASIDE AN AWARD ON MOTION—*continued.*
showing cause against the rule to set aside an award—*contd.*
award bad or doubtful in law, 686.
error in favour of party moving, 686.
irregularity waived, 686.
not when public justice interested, 686.
time enlarged by consent, 687.
matter omitted never notified to arbitrator, 687.
no dispute about matter left unascertained, 687.
affidavits to support award bad on its face, 687.
party accepting money under award, 688.
party having paid money awarded, 688.
allowing opponent to act on award, 688.
decision on motion to set aside an award, 688.
result of the motion to set aside an award, 688.
court favours awards, 688.
not set aside unless clearly void, 689.
allowing fresh affidavits after argument, 689.
award set aside in part only, 689.
when bad part of award separable, 689.
new trial, when award in a cause set aside, 690.
costs of motion to set aside an award, 690.
discretionary with court to discharge rule with costs, 690.
costs usually granted, 690.
rule silent, costs of motion costs in the cause, 376.
SETTING ASIDE THE JUDGMENT ENTERED UP PURSUANT TO AN AWARD, 693.
judgment and award may both be set aside, 693.
judgment set aside if arbitrator no power to award judgment, 693.
though award not set aside, 693.
judgment entered after reference on a writ of trial, 693.
judgment set aside, though limit for setting aside award passed, 693.
though motion to set aside award discharged, 694.
for defects in award apparent on face, 694.
party's conduct may preclude objection, 695.
bankruptcy before award no ground, 695.
irregularity in entering judgment, 695.
setting aside judgment directed by referee as wrong on findings, 695.
on other grounds, motion for, in Chancery Division, to Court of Appeal, 695.
Queen's Bench Division entering judgment for other party, 695.
when motion to be made, 695.
within reasonable time after entry of irregular judgment, 695.
consent cures irregularity in entry as to costs, 695.
grounds of motion to be stated, 696.
setting aside an award in equity, 697. *See* EQUITY.
setting aside the attachment to enforce award, 614. *See* ATTACHMENT.

SEVERANCE, damage from, what is, 466. *See* LANDS CLAUSES CONSOLIDATION ACT.

SEWER, damage to, compensation for, 464. *See* LANDS CLAUSES CONSOLIDATION ACT.

SEWERS, PRESENTMENT BEFORE COMMISSIONERS OF, referable, 13.

SEWERS ACT, reference as to amount of compensation, 456.

SHALL OR MAY, construed imperative, 430.

SHARES,
distributive, award to pay, 293.
in ship, award to pay in proportion to, 293.

SHERIFF,
no power to refer cause on writ of trial, 75.
or to give arbitrator power to alter verdict of jury, 75.
verdict taken on reference by, irregular, not null, 707.
must be set aside before new trial, 708.
award may be good though verdict cannot be entered, 693.

SHORTHAND WRITER,
excluded by arbitrator, 174.
notes of, 640.
type writer, reproductions of, not to be charged as copies, 640.
costs of, not generally allowed, 640.

SHOWING CAUSE,
against motion for attachment, 609. *See* ATTACHMENT, 864.
whether at chambers against rule to pay sum awarded, 625.
against rule to set aside award, 685. *See* SETTING ASIDE, 941.

SILENCE,
effect of, in award, as to a matter in difference, 274. *See* AWARD, 868.
guiding rule, as to, 277.
as to costs, 384.

SITTINGS,
of courts under Judicature Acts, 178, note.
of official referee, 178.

SMALL DEBTS may be referred, 8.

SOLE TRADER in London, feme covert may refer, 16.

SOLICITOR. *See* ATTORNEY.
service on, of notice of motion for attachment, 608.
uncertificated party not entitled to costs, 474.

SPECIAL CASE,
arbitrator may state, at any stage, by Arbitration Act, 1889..318.
may be compelled to state, 318.
under Common Law Procedure Act not compulsory, 318.
referee under rules of court may state, 318.
also arbitrator, 318.
error did not lie to review judgment, 206.
appeal lies from judgment on, 320.
when interlocutory, 319.
costs of, 636.
under Lands Clauses Acts, 319, 320.
Local Government Board adjudging between local authorities no power to state, 319.
under Benefit Building Societies Act, compellable, 319.

SPECIAL JURY,
costs of, limited reference as to, 384.
how arbitrator should certify for, 406.

SPECIAL REFEREE, 318. *See* REFEREE.
court no power to refer to, unless agreed upon, 88.

SPECIFIC PERFORMANCE,
not of agreement to refer, 64.
of award, when enforced in equity, 563. *See* EQUITY.
when made beyond time, 152.
of contract, dependent on abortive reference, 710. *See* EQUITY.
awarding, 436.

SPEEDY EXECUTION, awarding, 389.

STAKEHOLDER,
arbitrator as, liability of, 163. *See* ARBITRATOR, 859.
requires notice of award being made, 532.

STAMP,
requisite on submission by agreement, 54.
by bond, 54.
many parties with common interest, 54, 253.
where matter of reference not under £5 value, 54.
not requisite on submission or award as to bankrupt's estates, 253.
nor between masters and workmen, 252.
not requisite on appointment of umpire by arbitrators, 240.
requisite on award, 252.
informal award must have, 253.
inclosure award not require ad valorem stamp, 253.
award under seal no deed, 254.
appraisement no award, 254.
party agreeing to be bound by decision of another, 255.
verdict of miners' jury, 255.
no animus arbitrandi, 255.
opinion of counsel, whether award, 255.
"matter annexed" to award, 255.
on award may be imposed at any time, 255.
master may refuse to draw up rule for attachment on unstamped award, 255.
not requisite on certificate of arbitrator, 255.
want of, no ground of setting aside award, 255, 668.
on documents to be noticed by arbitrator, 202.
penalties for insufficient, to be required, 202.

STATEMENT,
in writing of matters in difference, arbitrator requiring, 205.
of grounds of decision in award, 316. *See* AWARD.
of case in award, 318. *See* ARBITRATOR; AWARD.
by arbitrator as to grounds of award after award made, 310. *See* ARBITRATOR.

STATUTE, award under, may operate as a conveyance, 523. *See* INCLOSURE ACT.

STATUTE OF FRAUDS,
written award on parol submission, parol contract under, 53.
sometimes void as to lands, 567.
award on submission by bond as to price of lands valid under, 56.

STATUTE OF LIMITATIONS,
plea of, in action on award, 551.
agreement to refer not promise to pay under, 54.

STATUTE OF VICTORIA,
enforcing award under, at law, 618. *See* EXECUTION.
in equity, 579.

STATUTE OF WILLIAM III., 9 & 10 Will. III., c. 15,
object and effect of the statute, 58.
agreement of reference made a rule of court, 58.
costs of award taxed, 58.
award improperly procured set aside, 58.
award enforced summarily, 58.
by attachment, 587.
by bill in equity, though submission rule of a court of law, 563.
practice making agreement a rule, 581. *See* SUBMISSION.
making award under, order of equity, 576.
award might be set aside on motion, if procured by corruption or undue means, 58, 675.
what amounts to "corruption or undue means," 675.
setting aside award at law, 652. *See* SETTING ASIDE.
limit of time for setting aside, 654.
equity could not, when submission rule of court of law, 698. *See* EQUITY.
when rule of Chancery, only on motion, 698.
no appeal to House of Lords against decision of equity, 704.
parol submission, not within the statute, 59.
nor, semble, reference of cause and all matters, 59.
not indictment, 59.
clause that submission might be made rule of court, 59.

STAY OF PROCEEDINGS, reference of a cause, when, 84.

STAYING PROCEEDINGS,
contrary to reference, at common law, 46.
under Arbitration Act, 1889..46.
Common Law Procedure Act, 1854..47.
court has discretion as to, 47.
in what cases granted, 47.
action charging fraud, 48.
not when submission properly revoked, 49.
counter-claim, 49.
reference to foreign court, 50.
not where one only of several disputes referable, 50.
bankruptcy, 50.
not where party's conduct disentitles, 51.
in equity, 48.
at law by a court of equity, 91.

STET PROCESSUS,
award of, 338.
bad when costs abide event, 338.

STRANGER
to the record may be added as party on reference of a cause, 22, 71.
may be added afterwards, 22.

STRANGER—*continued.*
consent to refer enforced against him, 71.
added as third party without consent by official referee, 23.
may become party by acquiescence in award, 22, 569.
by laches, 23, 569.
arbitrator refusing to allow attendance of, 174.
STRANGER TO THE SUBMISSION, EFFECT OF AWARD AS TO, 443.
directing a payment to be made to, 443.
direction to pay money to, generally void, 443.
rest of award often good, though direction void, 444.
when bad part separable, 444.
direction valid when for party's benefit, 444.
to pay party's servant, 444.
to pay stranger for party's use, 444.
to discharge a joint debt to a stranger, 444.
payment to executor of, 445.
whether benefit need appear on face of award, 445.
not expressly authorised to receive money, 445.
directing payment to plaintiff or his solicitor, 445.
to arbitrator for party's benefit, 445.
directing a stranger to do an act, 446.
direction generally void, 446.
awarding party to execute bond with sureties, 446.
one arbitrator to be surety, 446.
wife not a party to join in conveyance, 446.
to deliver up deed or house in possession of another, 447.
directing stranger to pay costs, 447.
arbitrator to apply funds as awarded, 447.
direction valid when stranger bound to obey, 447.
awarding party to procure discharge of a bond, 447.
direction to cancel note on condition stranger not demand costs, 447.
when stranger merely ministerial, 448.
awarding presentment by tenants of manor good, 448.
but not so, to procure lord of manor to grant, 448.
reserving to stranger to settle deeds, 285.
arbitrators agreeing to be bound by opinion of, 217.
directing act to be done by the court, 448.
award to levy a fine, 448.
of a discontinuance, nonsuit, retraxit, 448.
directions affecting the property of a stranger,
award as to property of, generally void, 449.
directing payment at house of, 449.
out of funds of, void, 449.
directing act to be done on land of, 449.
direction bad, unless made conditional on consent had, 450.
directing tenant to commit waste, void, 450.
to remove property partly belonging to a stranger, 451.
directing award to be obeyed, as far as party may lawfully, 532.
award should show direction as to stranger justified, 451.
not obeying award, party bound for, liable, 448.
cannot avail himself of the award by bill in equity, 569.
plead the award as a defence to a suit, 574.
attachment not lie for, for sum awarded to, 589.
nor rule to pay, 628.
effect of award in evidence as to, 556. *See* EVIDENCE.
altering award, 529.

STREAM,
regulating use of a, by award, 435.
to repair bank of, 450.

SUBJECT MATTERS OF REFERENCE,
civil interests of the parties, 3.
civil rights of a private character, 3.
all matters concerning personal chattels or personal wrongs, 3.
debts certain, 3.
matters concerning real property, 4.
questions of law, 4.
actions, judgments, and suits, 4.
not matters illegal, 5.
illegal items in account, 5.
future use of property, 5.
differences, 5.
matters referred under the Arbitration Act, 1889 . . 5.
cause or question of fact therein, 6.
where prolonged examination necessary, 6.
or if matters of account, 6.
matters referred under other statutes, 6.
inclosing commons, commuting tithes, 6. *See* INCLOSURE ACT.
compensation for lands taken for or injured by undertakings of a public nature, 6. *See* LANDS CLAUSES CONSOLIDATION ACT.
for lands taken, used, or injuriously affected, 6.
in constructing railways, 6. *See* RAILWAYS CLAUSES CONSOLIDATION ACT.
for markets and fairs, harbours, docks, and piers, 7.
for waterworks, improvements in towns, cemeteries, 7.
for injuries, by drainage, to mines, 7.
under Public Health Act, 1875 . . 7.
Housing of the Working Classes Act, 1890 . . 7.
disputes between railway companies, 7.
compensation for injuries to mines by railways, 7.
whether mines are dangerous, 8.
damage by abandoned railway, 8.
adjustments, &c., under Local Government Act, 1888 . . 8.
disputes between masters and workmen, 8. *See* MASTERS AND WORKMEN.
compensation to tenants of allotments for crops, 8.
joint stock companies' affairs, 8. *See* COMPANIES CLAUSES CONSOLIDATION ACT.
county court actions, 8.
civil proceedings at Quarter Sessions, 9. *See* QUARTER SESSIONS.
suits in Divorce Court, 10. *See* ECCLESIASTICAL COURT.
matters of a criminal nature, 11.
felonies not referable, 11.
nor proceedings to strike attorney off the rolls, 11.
what misdemeanors, 11. *See* MISDEMEANOR.
after indictment, 11. *See* INDICTMENT.
after conviction, 13.
presentment before commissioners of sewers referable, 13.
what referred by particular phrases, 123. *See* SUBMISSION.

SUBMISSION,
for Forms of, *see* Appendix, 717.
general qualities of a submission, 40.
no particular form of words necessary, 41.
what is a reference to arbitration, 41.
must show intention of parties to be bound by award, 41.
not a mere valuation, 42.
unless judicial inquiry intended, 43.
must be executed by all the parties, 43, 136.
arbitrator cannot be appointed by will, 43.
appointment of arbitrator to be complete must be notified, 43.
when advisable to take warrant of attorney to enforce award, 43.
when dispute as to possession of lands, 44.
conveying lands to arbitrator on trust to abide award, 44.
different kinds of,
by parol, 52. *See* PAROL.
by writing not under seal, 53. *See* AGREEMENT.
by bond, 54. *See* BOND.
by deed, 56. *See* DEED.
disadvantages of submissions which cannot be made rules of court, 56.
court no jurisdiction at common law, 56.
submission revocable, 56.
no setting aside award at law, 57.
no summary means of enforcement, 57.
only by action and suit, 57.
doubtful if sect. 11 of Arbitration Act, 1889, applies, 57.
arbitration clause in agreements, to refer all disputes, 60. *See* AGREEMENT.
in a cause at common law, 71. *See* CAUSE.
on the "usual terms," what is, 76.
enforcing by attachment, 86.
award on, how enforced, 87.
whether a stay of proceedings, 84.
a discharge of bail, 85.
compulsory and other references of action under Arbitration Act, 1889..87. *See* ARBITRATION ACT, 1889.
judicial and statutable submissions, not made in a cause at law, 95.
by order in equity, 95. *See* EQUITY.
by record in the Court of Exchequer, 96.
by order of a county court, 97.
by order of quarter sessions, 8, 97.
under the Lands Clauses Act, 98. *See* LANDS CLAUSES CONSOLIDATION ACT.
Railways Clauses Act, 102. *See* RAILWAYS CLAUSES CONSOLIDATION ACT.
Railway Companies Arbitration Act, 1859..102.
Regulation of Railways Act, 1873..102.
Companies Clauses Act, 103. *See* COMPANIES CLAUSES CONSOLIDATION ACT.
Public Health Act, 1875..103.
Local Government Act, 1888..104. *See* LOCAL GOVERNMENT ACT.
by private Act of Parliament, 105.
Lunacy Act, 1890..104.
Tramways Act, 105.
Housing of the Working Classes Act, 1890..105.

SUBMISSION—*continued.*
over what matters the submission gives the arbitrator jurisdiction, 123.
effect of particular terms to refer particular matters, 123.
all matters in difference, 123.
demand in auter droit, 124.
demand admitted, 124.
within former submission, 124.
not claim abandoned, 124.
all suits, controversies, and demands, 124.
all debts, trespasses, and injuries, 124.
all demands due and owing, 124.
all actions and complaints, 124.
matters in difference between the parties in the cause, 125.
in the cause between the parties, 125.
cause and all questions, in Scotland, 125.
cause, or all matters in the cause, 125.
whether issue at law referred, 126.
whether demurrer, 126.
not right to judgment non obstante veredicto, 126.
when cause and all matters referred, 127.
costs of reference, 127.
usual terms as to costs, 77.
wool in process of woolling, &c., 127.
dispute as to quality of goods, 127.
money laid out on request, 128.
all disputes, 128.
disputes on contract with brokers, 128.
dispute arising out of contract, 128.
disputes between partners, 128.
mining lease, construction thereof, 128.
to assess damages, 129.
effect of recital in, 129.
as to settled account, 129.
as to suit in Chancery, 130.
paving expenses under Public Health Act, 130.
damage from railway works, 130.
subject-matter whether joint or several, 131.
all suits "between them two," 131.
between A. and B. on one part, and C. on the other, 131.
adverse rights of defendants in equity, 131.
all matters "between the parties or any of them," 132.
up to what date matters in difference may arise, 132.
no claim in cause arising after writ, 132.
by special provisions, claim after writ, 132.
matters relating to annuity in the cause, 133.
indictment, clause for compensation, 133.
all matters in difference, means up to time of reference, 133.
re-executing at a later day, 134.
parties may submit future claims, 134.
money not due till after reference, 134.
mesne profits, 134.
periodical award of damages, 135.
money not due at date of award, 135.
effect of the submission,
no bar to action for matters referred, 45.
arbitration pending no plea, on equitable ground, 45.
except under Railway Companies Arbitration Act, 46.
agreement to refer when accord and satisfaction, 45.

SUBMISSION—*continued.*
effect of the submission—*continued.*
action by assignees after reference by insolvent, 46.
proceedings stayed in action brought after, 46, 84. *See* STAYING PROCEEDINGS.
in a cause. *See* CAUSE.
in a suit. *See* EQUITY.
alteration and amendment of, 79, 82. *See* ALTERATION.
setting aside, 77. *See* SETTING ASIDE.
preventing award, a breach of, 106.
a forfeiture of arbitration bond, 106.
ground of action, 106.
punishable by attachment, 106.
revocation, a breach of, 106, 154. *See* REVOCATION.
effect of particular clauses in the submission,
recitals in, 129.
clause, how award to be made, 247. *See* AWARD.
preventing death revoking, 169. *See* REVOCATION.
limiting time for award, 138. *See* ARBITRATOR.
giving power of enlargement, 143. *See* ENLARGEMENT.
giving power over costs, 377. *See* COSTS.
costs to abide event, 389. *See* COSTS; CAUSE.
power to certify for costs, 404. *See* COSTS.
giving costs for affected delay, 107.
wilfully preventing award ground of motion, 107.
revocation, unless justified, ground, 107.
party may justify, 107.
court cannot give costs without clause, 108.
no power when award made, 108.
consent clause, to make submission rule of court, 58. *See* STATUTE OF WILLIAM III.
power to order what to be done, 430. *See* ARBITRATOR.
power to examine parties, 189. *See* ARBITRATOR.
to administer oath, 182, 190. *See* ARBITRATOR.
to call in a valuer, 209. *See* ARBITRATOR.
to proceed ex parte, 197. *See* ARBITRATOR.
to state a case in award, 318. *See* AWARD.
to amend the record, 202. *See* ARBITRATOR.
parties to abide by award, 106. *See* ACTION; EQUITY.
not to proceed at law or equity, 68. *See* AGREEMENT.
to refer back, 479. *See* ARBITRATOR; REFERRING BACK.
referring to joint arbitrators, 214. *See* ARBITRATOR.
for appointment of umpire, 223. *See* UMPIRE.
to award entry of verdict, 350. *See* CAUSE.
of judgment, 362. *See* CAUSE.
to sign judgment for amount awarded, 645.
liquidated damages for refusing to refer, 63. *See* AGREEMENT.
making the submission a rule of court, 581.
making the submission a rule of a court of law, 581.
summary enforcement of award, 581.
submissions to have effect as if made rules, 581.
may be made rule at any time, 582.
submissions in actions, 582.
practice making submissions rule, 582.
dating rule, 583.
making submissions rules under statutes, 583.
necessary to make, before motion to set aside award, 703.
making the submission a rule under the Lands Clauses Act, 584. *See* LANDS CLAUSES CONSOLIDATION ACT.

SUIT,
in equity, award on, 366. *See* EQUITY.
to cease, award of, 533.
proceeding in, reference failing, 707. *See* EQUITY.

SUMMONS
to refer, 72.
time of applying, 88, 93.
for enlargement, 150.
for order to pay sum awarded, 641.
for attachment, 606.

SUNDAY,
award of payment on, 416.
no arrest on, under attachment for non-performance, 614.

SUPREME COURT OF JUDICATURE ACT, 1890 (52 & 53 Vict. c. 44).
court power over costs of all proceedings, 319.
award not equivalent to a verdict of jury for appeal purposes, 370.

SURETIES
in replevin, discharge of, by reference, 85.
by enlarging time, 149.
award ordering party to procure, bad, 280, 446.

SURPLUSAGE,
award of verdict, when, 355.
judgment, when, 362, 693.

SURPRISE, setting aside award for, 673.

SURRENDER,
copyhold, award to, performance of, 534.
award of, 448.

SURVEYORS and their successors, award of herbage to, 441.

SURVIVOR,
of two co-parties, when death no revocation as to, 167.
enforcing award against opponent, 170.

TAKING UP award compulsory under Lands Clauses Act, 475.

TAXATION OF COSTS, 635.
delegating to the master, 283. *See* COSTS.
by master, under Lands Clauses Act, court no power to review, 474.
of the cause and reference, 635. *See* EXECUTION.
party to pay should procure, 385, 533.
not necessary before commencement of action, 540.
of quarter sessions reference, 97.

TELEGRAPHS of railway companies, purchases by arbitration, 226.

TENDER
of money awarded should be made, 533.
for execution of deed awarded, 534.

TERMINATION of arbitrator's authority, 137. *See* ARBITRATOR, 851.

TERMS,
abolition of, 654.
old law terms, 655.

TESTATOR, award respecting estate of, 418. *See* EXECUTOR.

TESTIMONY by arbitrator, 503. *See* ARBITRATOR.

THIRD ARBITRATOR. *See* ARBITRATOR.

TIME,
computation of, in submission, "months," 139.
for making award, when none specified in submission, 136.
a year by Scotch law, 138.
arbitrator cannot limit, 138.
three months, under Arbitration Act, 1889, unless contrary intention appears, 138. *See* ARBITRATOR; UMPIRE.
under Inclosure Act directory only, 141.
twenty-one days under Lands Clauses Act, 140.
thirty days under Railway Companies Arbitration Act, 141.
twenty-one days under Public Health Act, 1875 .. 240.
may be enlarged to two months, 240.
to appoint umpire, 228. *See* UMPIRE.
third arbitrator, 219.
party to reference asking arbitrator for further time, 188.
elapsed, compelling defendant to refer again, 708.
for doing act directed, award need not fix, 286.
award to pay at specified, attachment on, 598.
for setting aside award, 654. *See* SETTING ASIDE.
judgment, 372, 695.
for motion to refer back, 480.
for application to vary report of official referee, 368, 371.

TITHES,
dispute as to composition for, awarding on, 414.
submission by statute as to commutation of, 6, 105.
award extinguishing right to, 523.
apportioning rent-charge, 442.
awarding undivided moieties of, 434.

TITLE
of affidavits. *See* AFFIDAVIT.
to property, award may decide, 521.
cannot give, 521.

TOLERATION ACT, indictment under, not referable, 12.

TORT, action for, reference of, determined by death of plaintiff, 169.

TOSSING UP for choice of umpire, bad, 231.

TOWN AGENT of solicitor binds client by reference, 26.

TRADE, restraint of, awarding, 424.

TRAMWAYS ACT, 1870, what a "dispute" under, 105.

TRANSFER property, award cannot, 520. *See* AWARD.

TREASURER of building society may be sued by member for retaining money, 38.

TRESPASS,
award ordering party to commit, 415, 449, 498.
set aside, 672.
liability of arbitrator ordering, 498.
award in, when good plea for a stranger, 548.

TRIAL,
by referee, 177.
appeal from referee's refusal to postpone, 181.

TRUSTEE,
reference by, personal liability, 32.
liability to attachment on award, 590.
of savings bank, reference by, 34. *See* SAVINGS BANK.
of friendly society, 35. *See* FRIENDLY SOCIETY.
of wife, and husband, reference between, 17.
of infant, death of infant revokes reference as to, 168.

UMPIRAGE, arbitrator's fees may be costs of, 245. *See* UMPIRE.

UMPIRE,
by whom to be appointed, 214, 223.
mode of appointing, 214.
office of, 223.
power of arbitrators to appoint under Arbitration Act, 1889.. 66, 214, 223.
of court, on death, incapacity, or refusal of umpire, parties or arbitrators failing to agree, 223.
under Common Law Procedure Act, 1854.. 215, 224, 226.
appointing, to decide between arbitrators, bad, 224.
when limited to points on which arbitrators differ, 225.
appointment to act in futuro, 229.
appointment under the Lands Clauses Act, 101, 225.
by arbitrators, 225. For Forms, *see* Appendix, 746.
by Board of Trade, 225.
when one arbitrator acts ex parte not required, 225.
need not be made rule of court on motion to set aside award, 585.
under the Railways and Companies Clauses Acts, 225.
under Railway Companies Arbitration Act, 1859.. 226.
under the Act for purchase of railway telegraphs, 226.
at what period the arbitrators should appoint, 228.
at time prescribed by submission, 228.
when appointment condition precedent to acting, 228.
when no time prescribed, 228.
better course to appoint before hearing case, 229.
under Arbitration Act, 229.
when appointment to be made under the Lands, Railways, and Companies Clauses Acts, 229.
appointment under Lands Clauses Act to be within first three months, 230.
under Public Health Act, 1875.. 230.
by quarter sessions, 231.

UMPIRE—*continued.*
how the arbitrators are to choose, 231.
appointment must be by choice, not chance, 231.
not by lot, 231.
award set aside for, 667.
unless choice out of persons first agreed on as fit, 231.
consent of parties renders appointment by lot valid, 232.
if with full knowledge of facts, 232.
attorney's clerks not competent to consent, 233.
appointing fresh umpire if first refuse, 233.
umpire's appointment is unaffected by disapproval of parties, 234.
no special form of appointment, 234.
appointment in writing under the Lands, Railways, and Companies Clauses Acts, 234.
by commissioners of railways, how executed, 234.
commencement and duration of authority of, 234.
commencement when no time limited for the arbitrators, 234.
under Arbitration Act, 1889.. 234.
commencement from end of arbitrators' time, 234.
or notice of disagreement, 235.
umpire appointed by the court same powers, 235.
when time limited for the arbitrators' award, 235.
on disagreement of arbitrators, 235.
subject to defeasance on their agreeing again, 235.
when named in submission with same time as arbitrators, 235.
when arbitrators to appoint, and one period limited, 236.
what a disagreement of the arbitrators, 236.
empowered to enlarge time before disagreement, 237.
no power when arbitrators award on part, 237.
unless specially given, 230.
duration of authority, 238.
for time limited in submission, 238.
one month under schedule to Arbitration Act, 1889.. 238.
court or judge can enlarge time, 238.
under the Lands Clauses Act, three months, 238.
commencement of authority under the Lands Clauses Act, 239.
three months computed from duty devolving on him, 240.
or from appointment under section, 28, 240.
under Public Health Act, 1875.. 240.
commencement of umpire's authority, 241.
time may be enlarged to two months, 240.
limit twenty-one days, unless enlarged, 241.
under Railway Companies Arbitration Act, 241.
power of, where arbitrators' award clearly bad, 242.
power and duty of, 242.
same as of arbitrators, 242.
must re-hear case, 242.
usage of merchants, 242.
sitting with arbitrators, 242.
one of whom interested, 242.
agreement award to be made on arbitrators' notes, 243.
party waiving objection to, not re-hearing, 243.
not tendering evidence, 243.
under the Lands Clauses Act, 244.
award partly by arbitrators and partly umpire, bad, 244.
umpire may charge arbitrators' fees as costs of umpirage, 245.

UMPIRE—*continued.*
power and duty of—*continued.*
umpirage in which arbitrators join, good, 244.
setting aside, 666. *See* SETTING ASIDE.
not set aside for false recital, 258.

UNCERTAIN,
award must not be, 286. *See* AWARD, 869.
alternative in award, 280. *See* AWARD, 868.
directions in award, bad, 438.
setting aside award, when, 671.

UNDUE MEANS of procuring award, what amounts to, 675.

UNINTELLIGIBLE, award must not be, 300. *See* AWARD, 870.

UNREASONABLE AWARD,
enforcing, 302, 567.
attachment on, refused, 592.

UNTIL a certain day, enlarging time, effect, 139.

USUAL TERMS, reference on the, what is a, 76.

VACATION,
signing judgment in, 646.
moving in, to enforce award in equity, 577.

VALIDITY
of award doubtful, no attachment, 593.
no rule to pay, 621.

VALUATION,
to be made on a specified day, 139.
by inspection only, 187.
of samples, 187.
when an arbitration, 224.
when not, 42.
for stamp purposes, 254.

VALUER,
whether ministerial officer, 284.
arbitrator calling in, 208, 209.
often not arbitrator, 42, 113, 224.
to settle damages, cannot direct verdict, 129.
in habit of acting for a company, 113.

VERDICT,
taken subject to reference, effect of, 73.
of guilty, should be taken on reference of indictment, 75.
enforcing second reference under pain of execution on, 708.
court could not order entry of, for defendant, 708.
power of arbitrator to award, 351. *See* CAUSE.
clause to say what to be done, not give power, 437.
unauthorized award of, not a direction to pay, 592.
setting aside award for, 669.
not when separable and surplusage, 326.

VERDICT—*continued.*
general award of, a finding on all pleas, 347.
award on compulsory reference enforceable as, 370.
entering, pursuant to award, 632. *See* EXECUTION.
awarded, not to be limited by statement of arbitrator, 314.
or amended by his notes, 635.
when to move to enter on point raised in award, 635.
moving to set aside, 679.
taken on reference fails when award set aside, 707.
cost following, though plaintiff's claim reduced, 403.
of miners' jury, no award, 254.

VIBRATION, compensation for, 461. *See* LANDS CLAUSES CONSOLIDATION ACT.

VICTORIA, STATUTE OF,
enforcing award under at law, 618. *See* EXECUTION.
in equity, 579.

VIEW,
of premises, discretionary in arbitrator, 187.
when empowered to decide on, without evidence, 187.

VOID AWARD, when set aside, 668.

VOLUNTARY STATEMENTS by arbitrator, 509. *See* ARBITRATOR.

VOUCHERS, to verify, when arbitrator may order party, 413.

WAIVER
of irregularity, 195. *See* ARBITRATOR.
showing as cause against rule to set aside award, 686.
of improper appointment of umpire, 196.
of umpire not hearing evidence, 243.
of award, plea of, 552. *See* PLEA.
of right to costs awarded, 404.

WARRANT OF ATTORNEY, taking, to enforce award, 44.

WASTE,
award to commit, bad, 450.
set aside, 672.

WEIRS, award to remove, performance of, 532.

WIFE,
power of, to bind herself by referring, 16.
husband, civiliter mortuus, 16.
transported—alien enemy, 16.
when lunatic, 32.
sole trader in London, 16.
as to separate estate in equity, 16.
not as to real estate, not to separate use, 16.
under Married Women's Property Act, 17.
reference between, and her husband, 17. *See* HUSBAND AND WIFE.
trustees of, and her husband, reference between, 17.
reference with, by party knowing her coverture, binding, 17, 299.
award not set aside, 674.
award of payment to, good, 419.
enforced by attachment, 531.

WIFE—*continued.*
when award to convey her lands enforced in equity, 568.
feme sole, party, by becoming, revokes submission, 163.
award against, when sole, whether attachment lies on after marriage, 591.

WILL, arbitrator cannot be appointed by, 43.

WILLIAM III., STATUTE OF. *See* STATUTE OF WILLIAM III.

WINDING-UP partnership, whether included in arbitration clause, 51.

WINE, demand of, not same as demand of wine-warrant, 599.

WITHDRAWING JUROR on reference, whether cause terminated, 74, 724.

WITHIN a certain time, includes last day, 139.

WITNESS,
enforcing attendance of, on the reference, 178.
when attendance compulsory, 178.
voluntary, 178.
provision by 3 & 4 Will. IV. c. 42, s. 40..178.
old practice obtaining order for attendance of, 179.
rule absolute in first instance, 179.
serving the rule or order, 179.
disobedience a contempt of court, 179.
under Arbitration Act, 1889, subpœna, 179.
power of court to compel attendance of witness within United Kingdom, 179.
Habeas Corpus, 179.
under Rules of Court, 177.
parties bound by submission to produce documents, 180.
criminal prisoners, stat. 16 & 17 Vict. c. 30..180.
persons in Ireland or Scotland, stat. 17 & 18 Vict. c. 34..180.
not compellable to attend on reference of cause and all matters, 180.
enforcing attendance before referee, under Arbitration Act, 179.
attending the arbitrator, privileged from arrest, 181.
parties, attorneys, and witnesses privileged, 181.
eundo, morando, et redeundo, 181.
how far privileged during adjournments, 182.
arbitrator no power to discharge witness arrested, 182.
examination of, on oath, 182. *See* ARBITRATOR.
of sick witness at his own house, 175.
of parties as, 190.
not sworn, award when set aside, 665.
in private, award set aside, 665.
indictable for perjury, 183.
on county court reference, formerly not, 184.
perjury of, setting aside award for, 674.
not for mere incorrect statement of, 675.
arbitrator refusing to hear, award set aside, 185.
rejecting wrongly as incompetent, award not set aside, 200.
umpire refusing to re-hear, award set aside, 243.
costs of, costs of reference, 374.
rejected by arbitrator, costs of, not allowed, 638.

WOMAN, MARRIED. *See* WIFE.

WOOL, IN PROCESS OF WOOLLING, damage to, referred, 127.

WORKMEN AND MASTERS. *See* MASTERS AND WORKMEN.

WRIT OF ERROR, clause prohibiting, barred arrest of judgment, 70.

WRIT OF INQUIRY, when not necessary in action on award, 543.

WRIT OF TRIAL, reference by sheriff on, 75. *See* SHERIFF.

WRONG, his own, party cannot plead, in equity, 718.

THE END.

LONDON: PRINTED BY C. F. ROWORTH, GREAT NEW STREET, E.C.

3 6105 063 220 532



